ANTI-DISCRIMINATION PT.1

EQUALPAY, EQUAL TREATMENT AND PROHIBITION OF DISCRIMINATION

1. **SOURCES OF LAW** --> The need to enact a common frame for sex equality is justified by:

❖ Fighting social dumping and reducing competitive disadvantages.
❖ Since the 1990s, antidiscrimination law is viewed as contributing to economic growth.
❖ Equality law has therefore a market rather than social origin.

The need to enact a common frame for sex equality and in particularly for equal pay is justified by the concern that the absence of a shared obligation to ensure equal pay some MS could gain a competitive advantage through reliance on cheap female labour. Since 1990s, antidiscrimination law is viewed as contributing to economic growth. Equality law has therefore a market rather than social origin.

a) **Article 21 of the EU Charter of Fundamental Rights**; --> The article 21 of the EU charter of fundamental rights providing the principle of non-discrimination.
b) **Article 19 and Article 157 TFEU**; --> These principles have been applied by 2 different waves of EU directives.

- 2000/43/EC and 2000/78/EC --> Enlargement of possible grounds of discrimination to race, religion, disability, ethnical origin and so on
- 2002/73/EC --> Modification to directive 76/207/EC and definition of sexual and moral harassment
- 2006/54/EC--> Recast Directive

c) First Wave of Directives: Council Directive 75/117/EEC of 10 February 1975 and Council Directive 76/207/EEC (Equal Pay for men and women) (See the Movie "We Want Sex Equality"). --> The 1st wave basically implements the principle of non-discrimination of the ground of sex.
d) Second Wave of Directives (so-called "Second Generation"). --> The 2nd wave of EU directives enlarges broaden the possible grounds of discrimination from sex to race, ethnical origin, disability, age and so on.

2. GROUNDS OF DISCRIMINATION

a) <u>SEX</u>: Equal Treatment between men and women. Sex as social construct.

P v. S --> Dismissal of an employee following her decision to undergo a process of gender reassignment is contrary to the prohibition of discrimination on the ground of sex.

Does the "comparator" still play a relevant and dominant role? (See Barbera) Prohibition of discrimination protects human dignity.

SEX --> is a protective ground of discrimination from the outset of the EU. Sex and his provisional discrimination are usually understood as equal treatment between men and women. However, it has soon become clear that sex can be a social construct. In the recast directive, now it is stated that the scope of the prohibition of discrimination, based on the fact that a person is of one or another sex. In view of its purpose and the nature of the rights which is seek to lifeguard, it also applies to discrimination arising from the gender reassignment of a person.

In the famous judgement of European Court of Justice, **P vs S** the dismissal of an employee following her decision to undergo a process of gender reassignment is found to be contrary to the prohibition of discrimination on the ground of sex. This decision is followed by other judgements of EC of J --> All of them oriented to understand the sex more as a social construct then as biological factor.

P vs S and the following case--> to understand whether discrimination must be based on a comparison. Usually in order to understand whether a person has been or has been not discriminated we have to make a comparison between the treatment applied for this person with certain characteristics and the treatment that has been applied to another person, without such protective character.

So, Discrimination is usually based on a comparison. However, it has become clearer that the comparator is not always essential, in some case we can realize that has been a discrimination even though there are not possible comparators to be taken into account. This is because the prohibition of antidiscrimination is becoming more oriented to protection of human dignity.

b) RACE AND ETHNIC ORIGIN: This definition is really difficult. The Eu has underlined the Rejection of theories about the existence of separate human races. Ethnic origin more than race.

*The **House of Lords*** held that Sikhs are a 'racial group' for the purposes of the Race Relations Act, must be considered as a group that follow the following points. (theRRA). More precisely for a group to fall within the scope of the RRA, the following conditions must be met:

I) a long-shared history.
II) a unique cultural tradition, including family and social customs and manners, often but not necessarily – associated with religious observances.
III) either a common geographical origin, or descent from a small number of common ancestors.
IV) a common language, not necessarily peculiar to the group.
V) a common literature peculiar to the group.
VI) a common religion different from that of neighbouring groups or from the general community surrounding it.
VII) being a minority or being an oppressed or a dominant group within a larger community.

According to the House of Lords, '"ethnic origins" in the context of that provision meant a group which was a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms was a common racial stock, in that it was that combination which gave them an historically determined social identity in their own eyes and in those outside the group'.
As to the EU definition of ethnicity we have to take into consideration ***2 important judgements***:
Race and Ethnic Origin-> 1st Judgement **CHEZ** --> "the concept of ethnicity, which has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds, applies to the Roma community"
Jyske Finans, §§ 19-20 (2nd judgement) **-->** "Ethnic origin cannot be determined on the basis of a single criterion but, on the contrary, is based on a whole number of factors, some objective and others subjective. Moreover, it is not disputed that a country of birth cannot, in general and absolute terms, act as a substitute for all the criteria set out in paragraph 17 above.
As a consequence, a person's country of birth cannot, in itself, justify a general presumption that that person is a member of a given ethnic group such as to

establish the existence of a direct or inextricable link between those two concepts".

c)RELIGION -->Achbita and Bougnaui

d)DISABILITY --> Chacon Navas, Kaltoft and Coleman for discrimination by association

e) AGE --> General principle of Community Law (Mangold and Kucukdeveci**).**

General principles of law are referred to in legal literature as being Community over – legality. In this respect the Court requires compliance by both the Community institutions – in the setting-up of secondary acts, having a superior authority and the Member States – in respect of all acts falling within the scope of Community law in their execution.
The general principles of law are unwritten rules that community judge (Court of Justice) applies and thus are incorporated into Community law, they are the product of interpretive methods used in its jurisprudence.
Can be distinguished four categories of principles which the Court applies faced both in identifying and determining the compatibility with Community law:
1. General principles of law common to all legal systems, national and international;
2. The general principles of public international law;
3. General principles common to the legal systems of the Member States;
4. The principles of community (European Union) law.

It is important to note that discrimination on the ground of age suffers of several exception (see **Article 6, Directive 2000/78**). -->the Directive also permits states to introduce specific exemptions under ***Article 6(***2) (admission or entitlement to retirement or invalidity benefits) and Article 3(4) (armed forces). In both cases, the member state must actively specify that they are taking advantage of the exception. Member States have again in general chosen to take advantage of both exceptions, often again without any close analysis of their scope.

Such differences of treatment may include, among others:

i. the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and

remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

ii. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

iii. the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement."

The Directive therefore lists examples of legitimate objectives that may justify direct discrimination on the grounds of age, and of the types of differential treatment that can be carried out to achieve these objectives within the limits of proportionality. Both the specified legitimate aims and the examples of differential treatment should be seen as broad guidelines, not as specific categories of automatic exemptions.85 Even age distinctions which fall within the scope of these examples need to satisfy the objective justification test. See also the interesting case *Commission vs. Hungary* that has adopted national legislative provisions relating to the age-limit for compulsory retirement of judges, prosecutors and notaries. This law was deemed to be in contrast with Dir. 2000/78 because of lack of "proportionality". Thai aim was legitimate (turn-over) but the means are neither adequate nor proportionate to achieve a more balanced age structure.

e) **SEXUAL ORIENTATION**: is understood as Gender identity, including not only gender reassignment situation but a broad variety of transgender person not identifying themselves with the sex of birth. → it is focus on the personal sense of body and other expression of gender. The judgement of the Court of Justice deal with the sex orientation are problematic.

And usually take as example of the difficult distinction between direct and indirect discrimination.

One of the most interesting judgement is *Maruko*→ The claimant seeks to obtain widow's benefits from his same sex partner's pension scheme after his death. In Germany, this payment was only afforded to spouse and not to civil partners. One of the main problem is: Is this direct or indirect discrimination? → The answer provided by the ECJ is that this legal provision might constitute a direct discrimination on the ground of sexual orientation. That because for individual having a certain sex

orientation, it is not possible to enter into a marriage but only into a civil partnership. In this respect, it was clear that individuals with a certain sex orientation would be precluded to access and obtain widows benefits from the partner's death. → Benefits reserved only for married couple and not to civil partnerships.

Art. 157 TFEU

1. Each Member State shall ensure that the principle of equal pay for male and female workers for **equal work or work of equal value** is applied.
2. For the purpose of this article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Different meanings of equality→ Formal equality ('treat likes alike'); equality of opportunities; equality of results. **The comparator must be real.**

Case law – *Defrenne vs. Sabena* → One of the most important judgement is the Defrenne Vs. Sabena → which states that this legal provision is provided with direct horizontal effect. This means → a private individual/citizen can invoke the direct application of this legal provision from national quarts.

3. CONCEPT OF EQUAL TREATMENT; DIRECT AND INDIRECT DISCRIMINATION.

The definitions are provided by the →**Article 2, Directive 2002/73/EC, and Article 2 of the Recast Directive.**

►(A) '**Direct discrimination'**: *where one person is treated less favorably on grounds of sex than another is, has been or would be treated in a comparable situation*. → The comparator is regarded as fundamental in order to understand whether there has been a direct discrimination, we have to take into account a comparable situation and then try to understand whether one person has been treated less favorably than another. The need for a comparator is becoming less important in certain situation such as the prohibition of discrimination on the ground of sexual orientation, maternity or pregnancy but it is important to remember that is still an important element of the concept of discrimination.

(B) '**Indirect discrimination'**: it exists where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;→ The concept is very complicated→ there is an apparently neutral provision, so while in the direct discrimination the less favorable treatment applied to one person with a certain protective character is intrinsically discriminatory, here we are dealing with a provision criterion of practice that apparently are neutral. However, in practice their application has the result of putting person with certain character at a disadvantage compared with the other. Here's the possibility for the employer to justify the indirect discrimination with a double test: first of all it is necessary to demonstrate that the indirect discrimination pursue a legitimate aim, second is necessary to demonstrate the means of achieving that aim are appropriate and necessary.

(C) '**Harassment'**: where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The Material Scope of the directive: Principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Particularly in relation to:

a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
(c) employment and working conditions, including dismissals, as well as pay as provided for in Directive 75/117/EEC;
(d) membership of, and involvement in, an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits provided for by such organizations.

DIRECT DISCRIMINATION:

- The origin can be found in the American doctrine of **DISPARATE TREATMENT** which was turned to fight intentional discrimination.
- Basically, there is direct discrimination whenever a less favorable treatment is applied to one person ***because*** **of** a protected characteristic. (because of her/his sex etc)

The **element of 'intention'** is not relevant that the perpetrator of the discrimination has the intention to discriminate. The concept of discrimination is an objective one. The definition of discrimination places a test of comparison at the oath of establishing discrimination. It starts to play a less important role in the EU. In the UK, for instance, the House of Lords develops the 'but for test'. As long as it can be said that but for his/her sex the claimant would have been treated more favorably, discrimination can be established without reference to the motivation of the perpetrator.

- There must be **a direct causal link** between the prohibited ground of discrimination (sex) and the less favorable treatment. **Intention to discriminate is not relevant (but for test).**
- **Relevance of the comparator?** The comparator can be also hypothetical. Once it has been proved that a 'differential treatment' has been applied *because of* a protected characteristic, a discrimination is established, and the question of comparator becomes a formality. Problems may emerge if the treatment is not alleged to be 'less favorable'.

Example of direct discrimination → CASE 1: *An application for the job of nuclear physicist is rejected because the applicant is a woman and the application form is returned to the applicant stamped 'women need not to*

apply'. However, it is demonstrated that the job was then assigned to a man who, unlike the woman, possessed a PhD in physics.

Is there a direct discrimination? Is there the need for a comparator driven approach?

Direct discrimination can be justified only in exceptional cases→ Basically the defense is constituted by GOR (Genuine Occupational Requirements). The defendant can justify a direct discrimination only on grounds of GOR. → You need to demonstrate that the protective characteristic is an essential feature of the job to be performed. (if you need to perform Shakespeare, Otello, you need as actor starring at Otello one person who is afro American this could be regarded as a genuine occupational requirement).

See: Case C-229/08, *Colin Wolf v. Stadt Frankfurt am Main*, judgement of the European Court of Justice (Grand Chamber) of 12 January 2010.

Mr. Wolf (31 years old) applied for an intermediate career post in the fire service in Frankfurt, Germany. The City of Frankfurt refused to consider his application because he was older than the age limit of 30 year. According to a German national provision only persons under 31 years of age can be recruited to intermediate career posts in the fire service. The ECJ stated that the activities that come with the job, such as fighting fires, rescuing persons and protecting the environment, are characterized by their physical nature. The possession of particularly high physical capacities may therefore be regarded as a GOR. Crucial in this judgement is the demonstration of a link between the need to possess high physical capacities and the age of a person.

"39→ It is thus apparent that the concern to ensure the operational capacity and proper functioning of the professional fire service constitutes a legitimate objective within the meaning of Article 4(1) of the Directive.

40 → As regards, second, the genuine and determining occupational requirement for the activities of the fire service or for carrying them out, it follows from the uncontradicted information provided by the German Government that persons in the intermediate career of the fire service perform tasks of professional firefighters on the ground.

In contrast to the management duties of persons in the higher careers of the fire service, the activities of persons in the intermediate career are characterized by their physical nature. Those persons take part in fighting fires, rescuing persons, environment protection tasks, helping animals and dealing with dangerous animals, as well as supporting tasks such as the

maintenance and control of protective equipment and vehicles. It follows that the possession of especially high physical capacities may be regarded as a genuine and determining occupational requirement within the meaning of Article 4(1) of the Directive for carrying on the occupation of a person in the intermediate career of the fire service".

ASMA BOUGNAOUI – CASE 188/15 → Ms Bougnaoui is fired for wearing an Islamic headscarf in the workplace in breach of the employer's request to wear "neutral dresses" when she meets costumers. Ms Bougnaoui claims the dismissal to be **discriminatory**.

The employer objects it is not his/her desire but the **clients' desire** not to meet employees wearing islamic headscarfs.

The question referred by the French Judge to the ECJ is: 'Must Article 4(1) of Directive 2000/78 be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?'

However, the ECJ made clear that 'genuine and determining occupational requirement' refers only to a requirement that **is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer**. → The willing of the customer, not to be in contact with employees wearing Islamic headscarf in no way can be regarded as a genuine requirement that could justify a direct discrimination. Genuine and determining occupational requirement need to refer to objective nature of the occupational activity.

Consequently, the answer to the question put by the referring court is that Article 4(1) of Directive 2000/78 must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision".

DIFFICUL CASES →
- Can the fact of «**being of Japanese origin**» be regarded as an essential requirement (GOR) to work in a Japanese Restaurant?
- Can the fact of «**having the hair visible**» and «not wearing headscarf» be regarded GOR to work as hostess in a fair?
- Can a lesbian teacher be fired from a private catholic school **on the ground of her sexual orientation**?

ANTIDISCRIMINATION 2

INDIRECT DISCRIMINATION: Addresses rules practices that apply in the same way to all persons but create disadvantage for a *group of people* → that are in possession of protective characteristics.

- The employer applies equally the same rule to men and women. However, **the impact of doing so is disparate or, rather, the rule puts one sex at disadvantage.**
- Origin in the American doctrine of disparate impact developed to limit the employer's ability to circumvent discrimination laws.

Origin in the american case *Grigs vs. Duke Power Co.* The employer has segregated its workforce, restricting African Americans to low-paid labor departments. Then, after the Civil Rights Act, it was introduced an apparently neutral requirement for applicants seeking jobs in better-paid departments either to pass an aptitude test or to receive a high-school degree. The requirement had a disproportionate impact on Afro-Americans.

PARTICULAR DISADVANTAGE→ At the beginning «**disparate impact**» was based on a numerical analysis, as a primary method of identifying indirect discrimination. A potential indirect discrimination was deemed to exist if it affected a far greater number of women than men. But later on, it was understood that an approach founded only on statistical comparison would not be appropriate.

And «**Particular disadvantage**» was then incorporated into gender equality discrimination, in order to underline the shift from numerical to qualitative analysis. Statistical data remain an evidence of this disadvantage, for instance the demonstration that an employer's practice negatively affect more women than men, but statistical data are not anymore required.

- The wording '*a particular disadvantage*' represents an innovation in the definition of indirect discrimination. More precisely, it reflects a shift from a **quantitative or numerical approach** to **a qualitative approach**.
- **Intention to discriminate is not relevant.**
- **The disparate impact can be also potential and not actual.**
- Justification defense remains the constituent element of indirect discrimination. The **proportionality/necessity test** developed by the European Court of Justice requires to show that the criterion, provision, or practice is turned to a legitimate aim and that it is proportionate/necessary to achieve that aim.
- Difference between indirect discrimination and the so-called 'negative concept of equality'. **Proportionality vs. reasonableness**.

INDIRECT DISCRIMINATION – JUSTIFICATION DEFENCE: Indirect discrimination can be broadly justified. The justification defense, which could be provided by the employer, is based on a two steps assessment.

- **Two steps assessment→** First, it is necessary to show that a 'neutral provision, criterion or practice' **has a disparate impact on a disfavored and protected group** (disparate impact or disparate effect). Specific causal link or statistical evidence? Difference between American and EU approach.

- Second, it is necessary to show that the provision, criterion or practice **is not capable of justification by reference to legitimate object and that means used to achieve that object are appropriate and necessary** (justification defense). Business necessity and, notably, cost-savings is not usually regarded as a justification (see *Dekker*).

Examples of Legitimate Aims→ Protection of the commercial image of the company (e.g. neutrality)? Turn-over? States enjoy a broader margin of discretion in determining the goals of its policy. → usually the states are allowed to introduce discrimination on the ground of age in order to pursue aims such as encouraging the turnover incentive the entry of youth in the labor market, changing the structure of the labor market into a more flexible labor market.

The second step is the **Proportionality Test**→ This is the part in which usually the ECJ finds more elements. The main question is whether the means chosen by the employer or by the State in order to achieve a certain aim are proportionate, adequate and reasonable. This judgement entails a margin of discretion of the ECJ→ usually lays down the criteria and then refers the question to the national judge, who will have finally to answer to the question where means used had been proportionate, adequate and reasonable in the light of the aim. → Also, adequacy, reasonableness.

THE CONCEPT OF HARASSMENT AND SEXUAL HARASSMENT

Harassment*:** "*where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of* ***a female or of a male employee*, and of creating an intimidating, hostile, degrading, humiliating or offensive environment*". → what matters is that the conduct is perceived as unwanted by the victim of the harassment. It must be related to the *sex* or to other protective characteristics such as race, origin, religion etc. It must have the effect of violating the human dignity, that is at the core of the definition, and of creating an intimidating and humiliating environment.

The definition depends on the adoption of the directive 2002/73. Harassment on other ground was, however, already recognize as discrimination in directive 2000/43 and 2000/68.

Sexual Harassment: "*where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a female or of a male employee, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment*". It is *different from harassment* in so far as the conduct that must have a s*exual nature*.

See the Coleman case.

DIFFERENCE BETWEEN HARASSMENT AND DISCRIMINATION

- In harassment, comparators ***are not an essential element*** of the definition, while they are essential element of the definition of discrimination.

- In Harassment the focus is on ***individual human dignity***, while in discrimination the focus is on the protection of **disfavorable groups** (people with certain characteristics);
- **General crisis of comparator** as essential element of discrimination in a flexible, mobile, knowledge-based economy.

UNWANTED CONDUCT→ the Focus is on **subjective perception** of the victim

But also, on:

- Victim's reaction to be appreciated by taking into consideration **inequality of bargaining power.**
- **Duration and reiteration** of the harassment particularly in cases of "neutral" conducts
- '**Contextual discrimination**'.

LEGAL EVENT→ The event is the violation of the human dignity. It is necessary to take into account the *reasonable person standard* and not every conduct could be regarded as objectively violating human dignity.

➔ The subjective perception of the victim is what matters but within a reasonable person standard.

Creation of an intimidating, hostile, degrading, humiliating or offensive environment → Scarcely applied by judges.

DUTY OF REASONABLE ACCOMMODATION IN CASE OF DISABILITY

This directive provides an especially important duty, the duty of reasonable accommodation to be applied in the case of disable people. This is a special provision containing the directive which is applied specifically to disability.

Article 5, Directive 2000/78 →states that "reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned".

First, the focus is on the duty of the employer to enable a person with disability to work in a condition of equality with others. This has to be applied in different stage of career.

The limit→ is that the measure cannot impose to the employer a disproportionate economic burden, that shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State. → the burden on the employer has to be appreciate by taking into account financial support provided by the member states. This duty, nowadays, has a broaden application → in Samira Achbita case, this duty seems to have been applied also in case of discrimination on the ground of religion, but this is still an ongoing debate.

Consequence in case of breach (violation) of this duty → in Italy there are a huge number of judgements that consider the dismissal of a disable worker in breach of the employer duty of provide a reasonable accommodation → the consequence is to consider the dismissal as a discriminatory dismissal. So, the violation of this duty leads to the classification of the employer's act in term of direct discrimination.

As to the EUCJ case law we can consider the case of ***Ring and Skouboe Werge*** → *which contains recognition that If the employer fails to provide the r acc and the worker is therefore compelled to remain or seek leave, then it will be contrary to the directive for the employer to dismiss a worker due to this absence.* → ***prohibition of the dismissal of the employee in seek leave.***

BURDEN OF PROOF→ According to the EU directive, the victim of discrimination has access to a more favorable burden of proof.

It is extremely complicated to prove the existence of discrimination→ for this reason, the EU directive allow the victim of discrimination to have access only to legal Presumption. Mainly for the victim, it is only necessary to allege in court facts which it may be presumed that there has been direct or indirect discrimination. While it shall be for the respondent to prove that has been no breach of the principle of equal treatment. → so, the reversal burden of proof.

(Article 19, Dir. 2006/54/EC – Proof of Discrimination and dir. 97/80/EC-Burden of proof Directive) "*Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent*

authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment".

- *Does this work in practice?*
- In some Member States, Legal Presumptions are introduced also to prove the existence of non-economic loss caused by discrimination.

BURDEN OF PROOF → ***Access to relevant information***

The ECJ has also introduced another more favorable regime for the victims of discrimination. → **access to relevant information**. The **victim** has a sort of right to have access to relevant information in possession of the employer from which a discrimination could be inferred to exist. **The defendant**, the employer **could refuse to give that information** but this refusal can be in this way one of the factor to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination.

The European Court of Justice, in Meister, has recently addressed the following question: whether a worker, who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected, can claim a right to have access to information at the disposal of the employer and what are the consequences of the refusal of disclosure. The Court holds that, according to Article 8(1), Dir. 2000/43/EC, a worker 'is not entitled to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process. Nevertheless, it cannot be ruled out that a ***defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination****. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it'*

BURDEN OF PROOF→ **situation testing** → as a means to prove the existence of discrimination, particularly in case of job application.

In several Member States the 'situation testing', used in order to prove the existence of discrimination, is more and more accepted in Court particularly in cases of job applications. Basically, '***situation testing'*** consists in sending out

job applications of candidates with identical qualification but names that do not reveal a certain ethnic or racial origin. Where evidence is collected that applicants belonging to a minority racial or ethnic group are systematically treated less favorably, this evidence is accepted in Courts as a proof of discrimination (direct discrimination).

BURDEN OF PROOF→ **Statistical evidence** → also remains a very important means to prove the existence of discrimination, even though the EU has shifted from a numerical to a qualitative approach.

There is a difference between the USA and the EU approach as to statistical evidence. In order to show that an employer's practice has a detrimental effect on a protected group, **the claimant can allege statistical evidence in the EU; in the USA, on the contrary, he/she is required to prove with specificity a causal link** (specific practice requirement). According to some scholar, this is due to the American **'race blindness approach'** (compared to the EU '**sex consciousness'**). The American approach is turned to avoid the risk that a detrimental effect is caused by several innocent causes.

SANCTIONS → In case of discrimination sanctions, according to the EU directive (to all anti-discriminatory directives), must be **effective**, **proportionate,** and **dissuasive**. – there is no preference for specific remedies such as reinstatement rather than general economic compensation. This means that → member States are free to choose what sanction introduce in case of discrimination.

- → Reinstatement
- → Economic compensation

ARJONA CAMACHO JUDGEMENT→ The member states are free to choose from those 2 sanctions but what matters is that the sanction must be dissuasive in addition to effective and proportionate. In this way, in case of a discriminatory dismissal, the ECJ → has ruled that the nature of the sanction must be interpreted **be interpreted as meaning that it enables the national court to award the victim reasonable punitive damages that are truly additional**, that is to say, an additional amount which, although going beyond the full reparation of the actual loss and damage suffered by the victim, serves

as an example to others. → this is to say that <u>punitive damages are now admitted in case of discriminatory dismissals</u> unlike the different national legal tradition of several member states where usually punitive damages are not admitted.

Question→ *'May Article 18 of Directive 2006/54, which refers to the dissuasive (in addition to real, effective and proportionate) nature of the compensation to be awarded to a victim of discrimination on grounds of sex**, be interpreted as meaning that it enables the national court to award the victim reasonable punitive damages that are truly additional**, that is to say, an additional amount which, although going beyond the full reparation of the actual loss and damage suffered by the victim, serves as an example to others (in addition to the person responsible for the damage), provided that the amount in question is not disproportionate, that also being the case even when the concept of punitive damages does not form part of the legal tradition of that national court?'*

Answer →referred is that Article 18 of Directive 2006/54 must be interpreted as meaning that, in order for the loss and damage sustained as a result of discrimination on grounds of sex to be the subject of genuine and effective compensation or reparation in a way which is dissuasive and proportionate, that article requires **Member States which choose the financial form of compensation to introduce in their national legal systems, in accordance with detailed arrangements which they determine, measures providing for payment to the person injured of compensation which covers in full the loss and damage sustained**".

- **Financial compensation is always possible** (even in case of discriminatory dismissal).
- **Punitive damages are not mandatory**.
- Principle of **compensation in full of loss and damages**.

→ Basically, if the member states opt for a form of economic compensation, according to Arjona Camacho, this form of compensation is bound by the principle of compensation in full of loss and damages suffered by the victim of the discrimination. Punitive damages, additional to the full compensation, are always possible but not mandatory.

PREGNANCY, MATERNITY, PATERNITY → The protection of pregnancy is found in directive 1992/85, containing the prohibition of dismissal for pregnant women. It is used to protect not only the woman but also the child, the foetus → because the dismissal could pose the worker in a condition of stress and this might negatively affect the child.

The EU→ provides a right to adequate allowance in principle amounting to seek leave pay.

Directive 2010/18 (now →2019/1155) provides rights for females and males workers →amount of parental leave on the grounds of birth or adoption of a child, in order to take care of a child. → non transferrable basis. There was no right to remuneration during the leave period, but the agreement contains rules on employment rights about those topics.

***Dekker*:** Dismissal of the woman on the ground of her maternity is equal to discrimination on the ground of sex. Now confirmed by extensive case law. → this also has an influence on the Italian law, which for the first time provided an equation between discrimination on the ground of pregnancy, maternity and sex.

Webb: A woman's absence during pregnancy and maternity leave cannot be taken into account for computation of period justifying dismissal due to worker's absence. → the ECJ said that it cannot be taken into account for computation of period justifying dismissal due to the worker's absence.

Sabine Mayr: Mrs. Mayr is dismissed when attempting *in vitro* fertilization. Is prohibition of pregnant woman applicable? Article 10, Dire. 1992/85. No, because the ova had not been transferred yet into the woman's uterus. However, this can be regarded as a discrimination on ground of sex since the dismissal is essentially based on the fact that the woman has undergone such treatment. → the ECJ found that she could be protected under the prohibition of discrimination on the ground of sex → in fact the decision of the employer to dismiss the woman because off her choice to have a child, could be equated with a direct discrimination on the ground of sex, because only women can undergo such treatments therefore dismissing a female worker because of such decision is a direct discrimination on the ground of sex.

In Italy this has led to an important decision → Corte di Cassazione in 2016, decided to consider that case a direct discrimination on the ground of sex.

<u>QUESTIONS → THE FERYN CASE</u>

► The manager of a business undertaking (Feryn) makes an important statement in television. The company is going to hire new employees for door-to-door selling. However, he underlines that they are not going to hire employees of Marocain origin since citizens (Belgium citizens) are afraid of opening the door and this would have a negative impact on the business of the company. Therefore, he kindly invites Marocains not to apply for the job.

Is there a discrimination? On what ground? Direct or indirect? Justifiable or not justifiable? Who is the victim who might seek compensation?

DIFFICULT CASES

- JAPANESE

The waiter is in contact with clients→is part of the commercial image of the restaurant→it could be an essential requirement to be Japanese if the employer wants to give the idea of an original Japanese restaurant→ waiter coherent with the image.

The chef is not seen by the clients→possible that he is not Japanese →individual of a different nationality attends japan master chef/ spends many years in Japan and is a great Japanese chef→not really essential being Japanese to cook Japanese food

In this case what is meant by GOR?

- LESBIAN TEACHER

Teacher fired because she refused to give details about her private life →refuse to renew the fixed terms of the contract agreement (not a dismissal)→ after the refusal school decided not to renew the fixed contract agreement→ school said that students' parents were afraid that the teacher could have had a specific sexual orientation that was inconsistent with the

catholic culture→ they wanted their children to be educated by teachers sharing catholic culture → She taught as art teacher

Opinions of the parents(clients)→not relevant to understand whether is a objective requirement→ objective requirement is linked to objective nature of the job→SUBJECTIVE OPINION OF THE CLIENT HAS NO ROLE →this point is well addressed by ECJ in ***Asma Bougnaoui***

Code of conduct→if I agree to enter a contract with a clear code of conduct which prohibits to be heterosexual→

Link between productivity and visibility→ what matters for ECJ is the objective nature of the job→ so the answer is "job characteristics require a certain characteristic?"→LOOK AT OBJECTIVE NATURE OF THE JOB

- **JAPANESE**

Working as a waiter (considering scope of organization that is to offer a Japanese mood restaurant) → WORKING AS A WAITER OBJECTIVELY MAY REQUIRE BEING OF JAPANESE ORIGIN?

It's possible for employer to decide to give the idea of being in an original Japanese restaurant →IN THIS CASE WORKING AS A WAITER OBJECTIVELY REQUIRES BEING IN CONTACT OF THE PUBLIC/SPEAKING TO THE PUBLIC/EXPLAINING THE MENU

WORKING WITH THE JIHAB → WOULD BE PROHIBITED IF THE FAIR PORMOTES PRODUCTS FOR THE HAIR → HAVING THE HAIR VISIBLE WOULD BE FUNDAMENTAL REQUIREMENT FOR THE NATURE OF THE JOB

- LESBIAN

ITALIAN COURT→ says that is on the ground of sexual orientation →just teaching topic religion would be a subject requiring a teacher that shares catholic

COMMITMENT/VALUES→you can share art educational project even though you do not share all catholic values

FERYN CASE→ the manager of a business undertaking makes an important statement in television.The company is going to hire new employees for door-to-door selling. However, *he underlines that they are not going to hire employees of Moroccan origins since citizens (Belgium citizens) are afraid of opening the door and this would have a negative impact on the business of the company→He kindly invites Moroccan not to apply for the job→AS A RESULT NO MOROCCAIN APPLIES FOR THE JOB.*

Legal proceeding taken by the Court → direct (direct link between decision not to hire certain applicants and their race/ethnic origin) discrimination on the ground of ethnic origin→not justifiable because customers' wishes cannot be taken into consideration to determine a GOR (only the objective nature of the job can be considered, the fact of being of a determined ethnic origin does not deal with the objective nature of the job)→ he could have said that only people perfectly speaking Country languages would have been hired →it could have been possible → you need to know perfectly the language for selling products door-to-door.
If no Moroccan applies for the job→ *potentially every Belgium citizen that has Moroccan origin is a POTENTIAL (not an actual) victim.*

Who represents/organize the interest of the potential victims?→ organization representative bodies fighting discrimination.

Example: case of lesbian teacher brought by a private organization and workers trade unions in front of the court→interest to not have workers discriminated.

It is fair to condemn Feryn without a victim? In what should the condemn consist? What will be the sanction for this discrimination with no victims?

Business organization can be condemned to paid damages if there have been damages
→***DAMAGE***→ SOME RIGHTS HAVE BEEN VIOLATED, but victims have been only potential→ VIOLATION OF A GENERAL INTEREST (no violation of real identifiable rights)→ the respect of anti-discrimination law is also a general

public interest, for the society as a whole (not only in the interest of victims)→ anticipate the protection to the point which there are no real victims.
Damages→ punitive damages will be quantified by the judge are turned to sanction a violation of the law which breaches the interest of the society→ *DAMAGES GIVEN TO THE ORGANIZATION THAT WILL RECEIVE THE ECONOMIC DAMAGES*
TO SUM UP→ National body for fighting discrimination brought a claim before the court → ECJ decided to anticipate the protection even to the point in which no real victims existed (because antidiscrimination is a fundamental value of community law/ fundamental for the functioning of the market /fundamental for the society, for this reason a victim it's not needed→ victim is society/the market as a whole)→ damages more punitive than compensating given that no real victims exist.

Directive 2000/78→Specific legal provision turned to underline the importance of bodies for promotion of equality of treatment (which Feryn case is linked to)→ collective action and COLLECTIVE DISCRIMINATION.

Art 9.2, Directive 2000/78→Member states shall ensure that associations, organizations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligation under this Directive

COLLECTIVE DISCRIMINATION→Discriminatory behavior act/practice undertaken by a business organization that affects an indefinite number of individuals.

COLLECTIVE DISCRIMINATION IN RECENT CASE IN ITALY→ **FIAT CASE**

The new Fiat establishment Nuova Panda re-hire several employees who have been previously made redundant (cassa integrazione) in the former establishment who had been shut down. However only a small percentage of employees in new establishment belongs to the CGIL (while in the former Fiat establishment 30% of workers was a CGIL member)

→ The action is brought before the Court by CGIL in support and protection of the workers who have been discriminated because of their "personal belief"→ **Art 1, Directive 2000/78**

- "Personal belief" in this case→ Union's affiliation, but it is not included in the Directive even if Art 15 of Italian Constitution contains it.

Fiat strategy→ not to re-hire employees that are CGIL affiliated → they are more conflictual:

- Former Fiat establishment→ 30% CGIL members
- New Fiat establishment "Nuova Panda"→ 2% CGIL members

Case brought before the Court of Appeal in Rome by several CGIL members employees who think that they had been discriminated and by CGIL as organization in support and protection of the discriminated workers

- Defense of Fiat→ union's affiliation (political) is not considered personal belief
- Court of Rome→ discrimination on the ground of personal belief, in order to have access to the directive 2000/78 that provide also the concept of collective discrimination, basically equated discrimination on the ground of union's affiliation to discrimination on the ground of personal belief

Discrimination → if compared to other violations (such as social dumping) *sanctions are higher and burdens of proof is easier*→Proof of discrimination in this case→statistical data→ *victim of discrimination does not need to prove that discrimination occurred* (which would be very difficult)
→ victim just needs to allege facts/circumstances from which it might be reasonably presumed that a discrimination occurred "it's likely that discrimination has occurred"→FROM 30% TO 2% OF CGIL AFFILIATED SEEMS TO BE A FACT FROM WHICH A DISCRIMINATION CAN BE PRESUMED TO HAVE OCCURRED

Reversal burden of proof → employer (Fiat) has to demonstrate that maybe there is the statistic but a discrimination did not occur in the reality, maybe because employees have been re-hired on the ground of other clear criteria that does not involve union's affiliation

Damages→Once a discrimination has been presumed to have occurred → Fiat is condemned to damages by the Court and also to other sanctions→ particularly the adoption of a plan for removing discrimination → it means the need to re-organize the activities in order to demonstrate the presence of CGIL members in the establishment is guaranteed → VERY STRONG SANCTION

Extremely low punitive damages (in Italy)→ CGIL only paid about 3000 euros→ in the USA union could have been rewarder hundreds k of $, but what is important is political value of this judgment.

CGIL, CISL and UIL always acted together→ in the Fiat case they split→ CISL and UIL agreed with the employer about the need for a number of reforms → then it was a "personal fight" between Fiat and CGIL FIOM→ 2 other unions are in Fiat but were more together with the employer about the reforms. CGIL carried out its best against Fiat in the trial, not really through strikes or protests → via extremely high number of legal proceedings.

PRINCIPLE OF NON-DISCRIMINATION ART 21 EUCFR and its legal value have been particularly explored in the context of age discrimination→ Principle of non-discrimination has played a relevant role in connection with prohibition of discrimination on the ground of age.

Prohibition of discrimination on the ground of age → suffers from a greater number of exceptions if compared to other protected characteristics→ because labor law is predominantly based on discrimination on the ground of age → for example duty of notice in case of dismissal varies according to the years of service / there are some employment contracts that can be concluded by employees with a certain age (job on call for employees younger than 25 years old) / salary varies according to the years of service / pension and retirement scheme that depends on the age of the employee

Art 6 Directive 2000/78→ Justification of differences of treatment on the grounds of age→ "*Notwithstanding article 2(2) , Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labor market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary*"

→ this article provides for broader justifications/exceptions→ Directive allows MS to introduce labor laws that provide discrimination on the ground of age, however this discrimination must pursue a legitimate aim including labor market policy objectives and proportionality test (dominant test used by ECJ)

How Art 21 have been used by ECJ→ legal value of principle of non-discrimination:

MANGOLD CASE C-144/04 → German law and fixed-term employment
German legislation about fixed term work, amended in 2002 and 2006, provides that a fixed-term contract shall not require objective justification if the worker has reached the age of 52→ fixed-term contract can be concluded freely without needing objective justification if the worker has reached the age of 52.
Reason→ a worker that reached 52 might have more difficulties in finding new occupation→ the limit on flexible contracts could be abolished in order to encourage employment and occupation for elder workers

Mr. Mangold, working for Mr. Helm (a lawyer) criticizes:

a) Compatibility of National legislation with Dir. 2000/78/EC →Equality of Treatment and prohibition of age discrimination).
b) Compatibility of National legislation with the "non-regression" clause → The case is brought before the German Court that refers the case to the ECJ

Directive→ before it is transposed into national law has only vertical effect→ binds the State but not private citizens→ a private can only expect the State to adopt the Directive.
On what ground a private citizen (Mangold) invokes the directive against another private citizen (Helm)→ Directive could be invoked only by a private citizen to the State before it is transposed.

a) Compatibility of National legislation with Dir. 2000/78/EC Paragraph 75-76→ "*The principle on non-discrimination on grounds of age must thus be regarded as a general principle of Community law … Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member State for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organization of appropriate legal remedies, the burden of proof, protection against victimization, social dialogue, affirmative action and other specific measures to implement such a directive are concerned*"

→ ECJ says that Directive 2000/78 formally has vertical effect, however the directive is linked to Art 21 fundamental right (principle of non-discrimination, it's used the word "principle" but in fact it's a RIGHT)→ this particular connection allows to overcome the problem of the vertical effect → THE DIRECTIVE IMMEDIATELY ACQUIRES DIRECT HORIZONTAL EFFECT→ MANGOLD IS RIGHT IN INVOKING THE DIRECTIVE AGAIST ANOHER PRIVATE CITIZEN and transposition into national legislation is no more a condition → IT UNDERLINES THE RELEVANCE TO ART 21 AND ITS ROLE PLAYED IN CONGIUNTION WITH ANTI-DISCRIMINATION DIRECTIVE

KUKUKDEVECI→ ECJ goes even further

Paragraph 53→"*The need to ensure the full effectiveness of the principle of non-discrimination on the grounds of age, as given expression in directive 2000/78, means that the national court, faced with a national provision falling within the scope of EU law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision, without being either compelled to make or prevented from making a reference to the Court for a preliminary ruling before doing so*"

The need to ensure full effectiveness to the principle of non-discrimination on the ground of age, expressed in directive 2000/78 require national courts to decline the application of national provisions considered to be incompatible with that principle, thereby overcoming the limits of vertical effect of Directives provided with indirect horizontal effect.

In practice→ whenever before a national court is taken the question on the compatibility between a national law with anti-discriminatory directives → if national court thinks that the national law is incompatible with anti-discriminatory directives → solution is not (as it usually happened) referring the question to the Constitutional court of the nation or to the ECJ→ solution is that national court is authorized immediately to decline the application of the national law

If worker claims that employer is applying a national law that is in contrast with anti-discrimination directives → tribunal can refuse to apply the national law and tribunal does not need to refer the question to anybody.

Usually, in Italy, control of constitutionality of the national law is exercised by the constitutional court or also by ECJ→ this control is centralized and exercised by a specific organ (constitutional court)→ IN THIS CASE ECJ MAKES POSSIBLE THAT THE CONTROL ABOUT COMPATIBILITY BETWEEN NATIONAL LAW AND DIRECTIVE OF NON-DISCRIMINATION IS DECENTRALIZED → ALL JUDGES AT EVERY LEVEL OF JURISDICTION MIGHT DECIDE WHETHER A NATIONAL LAW IS CONSISTENT WITH EU ANTI-DISCRIMINATION LAW → IF IT'S NOT CONSISTENT, NATIONAL LAW IS NOT APPLIED → SHIFT FROM SYSTEM OF CENTRALIZED CONTROL TO A SYSTEM WITH DECENTRALIZED CONTROL→ it might create problems in terms of legal certainty for the business undertaking →In terms of legal effect Kukukdeveci approach seems to epitomize the idea of constitutionalizing→ certain legal instruments would be granted an elevated legal status based on their connection to the protection of fundamental rights

ABERCROMBIE CASE→ An Italian application of the principle held in Kucukdeveci is in Court of Appeal of Milan, 15 April 2014. The so-called **Abercrombie case** (on call employment contract which can be concluded with persons over 50 years of age and with persons under 24 years of age, on the understanding, in the latter case, that the contractual services must be performed before the age of 25 is reached)

→Abercrombie hired a number of young employees on the ground of "job on call" (contratto di lavoro intermittente) regulated by Biagi law→ non-standard form of employment specifically providing for persons who have reached the age of 50 and persons younger than 24 → *contract based on the age* (possible discrimination on the ground of age).

Abercrombie had a number of employees hired legally on the basis of on-call employment contract → when one of the employee reached the age of 25 celebrated together with the colleagues and then the day after he was said that he was over the limit of the on-call employment contract → employment relationship can no longer go on (not a dismissal but contract not renewed)

Employee complains that there has been a discrimination on the ground of age→ Abercrombie replied that it is not its fault and that it is not doing any discrimination →just using a legal contractual tool provided by Italian law

Tribunal and court of appeal of Milan (1st degree) in 2014→ kukukdeveci judgement is applied by court of Milan→ according to the Tribunal of Milan this on call employment contract is inconsistent with directive 2000/78→ therefor Kukukdeveci reasoning is applied and on-call employment contract should be disapplied because of its inconsistency with directive 2000/78→ then the case is brought to Corte di Cassazione (supreme court)

Corte di cassazione (supreme court)→ decentralization is very dangerous for uncertainty (every judge can disapply national law)→ INSTEAD OF CONFIRMING WHAT TRIBUNAL OF MILAN SAID, DECIDED TO REFER THE QUESTION TO THE ECJ (Supreme court was not bound to do that but decided

to do that because allowing every judge at every level of jurisdiction to disapply national law on the ground of its incompatibility with EU directive could have turned to be dangerous), in order to receive a question on the consistency of Italian on call employment contract with directive 2000/78

CONSEQUENCES FOR ABERCROMBIE→ **ECJ judgment**: "*Article 21 of the Charter of Fundamental Rights of the European Union and Article 2(1), Article 2(2)(a) and Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as not precluding a provision, such as that at issue in the main proceedings, which authorizes an employer to conclude an on-call contract with a worker of under 25 years of age, whatever the nature of the services to be provided, and to dismiss that worker as soon as he reaches the age of 25 years,* ***since that provision pursues a legitimate aim of employment and labor market policy and the means laid down for the attainment of that objective are appropriate and necessary***".

Standard full contract is applied to the employee→ ECJ HELD THAT THE ITALIAN ON CALL EMPLOYMENT CONTRACT IS ABSOLUTELY CONSISTENT WITH EU DIRECTIVE 2000/78→ *BECAUSE PROHIBITION TO DISCRIMINATION ON THE GROUND OF AGE SUFFERS FROM MANY EXCEPTIONS LISTED IN ART 6 OF THE DIRECTIVE → DISCRIMINATION ON THE GROUND OF AGE CAN BE JUSTIFIED IF IT PURSUES A LEGITIMATE AIM (IN THIS CASE ENCOURAGING EMPLOYMENT AND OCCUPATION OF THE YOUTH AND ELDER PEOPLE + THE USE TO ACHIEVE THIS AIM WERE APPROPRIATE AND PROPORTIONATE)*→Anyway it would be controversial if any judge could have the possibility to disapply a national judge

Italian Supreme Court it's like that has given a message to the judge of Tribunal of Milan→ formally after Mangold and Kukukdeveci national law that is deemed to be inconsistent with directive 2000/78 can be disapplied, but it's safer to refer it to the ECJ→ FROM THE POINT OF VIEW OF LEGAL CERTAINTY→ CAREFUL/ATTENTIVE APPROACH (even though Judge of Milan was right)

POSITIVE ACTIONS (POSITIVE DISCRIMINATIONS)→ have been considered by EU law from different points of view→*Positive Actions/Affirmative Actions, underlie the idea that substantial equality requires "unequal means" to be established.*

(Article 3, Directive 2006/54/EC)→ "*Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life".*

Positive actions are discriminatory measure introduced to reduce a previous discrimination

EXAMPLE: in a certain occupation with certain number of posts must be given to women (protected characteristic) because women have been subject to a previous discrimination in this sector
→to find a remedy to a previous discrimination by a positive action. Positive actions used to guarantee an equal access to goods and services or to guarantee an equal representation → same result to different groups or the same opportunities.

in EU and USA (where positive actions have been proposed first)→ they should provide equal opportunities rather than equal results, difference between the 2 cultural frameworks:
USA→ adopted to find a remedy on traditional discrimination on the grounds of race/ethnic origin.
Europe→ adopted in order to find a remedy on traditional discrimination on the grounds of sex.

Positive actions must be TEMPORARY→ used only until the previous discrimination is resolved → after it has been resolved, positive actions cannot be used anymore.

Several judgements of the ECJ dealing with the problem of discrimination and positive actions:

- Kalanke
- Marshall
- Badeck

THE KALANKE CASE (C-450/1993

Mr. Kalanke and Ms. Glissman apply for the same job (horticulture) and are both shortlisted. Mr. Kalanke is found to be better than Ms. Glissman who, however, has a "similar" qualification. The job is given to Ms. Glissman on the ground of normative provision that provides that In the case of an appointment (including establishment as a civil servant or judge) which is not made for training purposes, women who have the same qualifications as men applying

for the same post are to be given priority in sectors where they are under-represented.

- The ECJ held that Article 2(4) must be read restrictively. National rules such as those in the Bremen Law which guarantee women **absolute and unconditional priority** for appointment or promotion **go beyond promoting equal opportunities and are outside the ambit of the exception in Article 2(4).**

What does absolute and unconditional mean?

MARSHALL CASE (C-409/1995)

A norm states that *"Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual [male] candidate tilt the balance in his favor"*

→ legitimate positive action because there is a reason→ in that sector women were under-represented in compare to men. Women are to be given priority only in the event of equal suitability→ only if they have an equal qualification / they are found to be equally suitable for that job position.

Saving clause→idea that the commission deciding whom the job should be assigned to, has in many cases the possibility to tilt the balance in favor of the male candidates on the ground of specific reasons → in any case commission has the possibility to change→ *SAVING CLAUSE SHOULD BE INTRODUCED IN NATIONAL LAW CONTAINING A POSITIVE ACTION*

"Specific reasons"→The expression is vague as to guarantee flexibility.

Mr. Marshall and woman, equally qualified, are selected for the same job. The job is than given to the woman according to the law.

"*Unlike the rules at issue in Kalanke, a national rule which, as in the case in point in the main proceedings, contains a saving clause does not exceed those limits if, in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates*".
Has the Kalanke principle been "overruled"?

BADECK CASE (C-158/97) → problems addressed by ECJ are the problems of quota→*A national rule providing that a quota of 50% in a board of directors or even in Parliament must be reserved to women* (very much debated also in Italy)

Flexible results quotas→ Quota might be compatible with EU law if they satisfy certain requirements:

- it does not automatically and unconditionally give priority to women when women and men are equally qualified→ this is the result of Kalanke and Marshall.
- the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.
- No reasons of 'greater legal weight' are opposed→ this is the saving clause (maybe title of study)
- appropriate measures for drawing the attention of women to the training places available have been set down and there are enough applications from women.

Quotas are admitted in EU law but within certain strict limits laid down in Badeck, Kalanke and Marshall→ Badeck is in the most recent EU law perspective.

THE ABRAHAMSSON AND GRIESMAR CASE, most important conclusions**:**

- Positive actions must be interpreted strictly
- They are (by all means) derogation from the principle of equal treatment→ *THEY HAVE TO BE CONSIDERED STRICTLY AS AN EXCEPTION.*
- Positive actions entail giving priority when candidates are equally qualified not when there is a clear difference in qualification.
- There must be a «saving clause».
- Positive actions must be temporary (see the evolution in the USA).

Positive actions in the USA used also in the program of admission in university→ positive actions must be analyzed by the USA Supreme Court particularly in the cases involving admission policies to universities

Question raised by a number to the Supreme Court→*can a university reserve a certain number of posts to people of a certain ethnic origin?*

Supreme Court USA *considers that the problem of race integration has been to a large extent resolved →positive actions are less and less accepted as a means to resolve a problem of discrimination which is found to be not anymore so existent as it was in the past***.**

For example, Proposition 209 forbids institutions in California from considering race, ethnicity, or gender in public education, amongst other sectors.

However, see *Abigail Fisher vs. University of Texas* (Race conscious admission program turned to protect students body diversity as a central value of education)

Abigail Fisher→ female student that wanted to apply to the Texas University

- Texas University→ had a very particular admission program → 70% of the post were reserved to the top 10% students in Texas (automatically admitted)→ remaining post assigned based on consideration which involves race/ethnic origin.
- *Fisher* was not part of the top 10% and was not admitted to university because the post had to be assigned to people of a different race/ethnic origin → she protested and fired a lawsuit against the university of Texas saying that she was more qualified and she had more right to be

admitted in comparison to the other students that were admitted in her place on the ground of race/ethnic origin consideration

Decision delivered by the Supreme Court 71 with a large majority →race conscious admission program was to be considered constitutional consistent with the 14th amendment → because it served what the American call "a compelling interest"→ very fundamental public interest which is to guarantee the study body diversity → *IF YOU CHOOSE STUDENTS ONLY ON THE BASIS OF QUALIFICATION THEN THE STUDENTS BODY UNIVERSITY WILL BE MUCH MORE HOMOGENEOUS BECAUSE CAUCASIAN STUDENTS ARE MUCH MORE LIKELY TO BE QUALIFIED THAN HISPANIC/AFROAMERICAN STUDENTS*→ even by Judge Antonin Scalia that was one of the most conservative judge of the Supreme Court.