

TRANSFORMING THE EU WORKPLACE
Systemic and meaningful remedies to end employment discrimination

© Cover picture by Freepik - Icons by Flaticon and the Noun Project

▶▶

UHASSELT

KNOWLEDGE IN ACTION

Funded by
the European Union

Prof. dr. Petra Foubert
Dr. Sara Vancleef

FWO Pendl-project G078520N

1

FWO-PROJECT ON THE ENFORCEMENT OF NON-DISCRIMINATION LAW (G078520N)

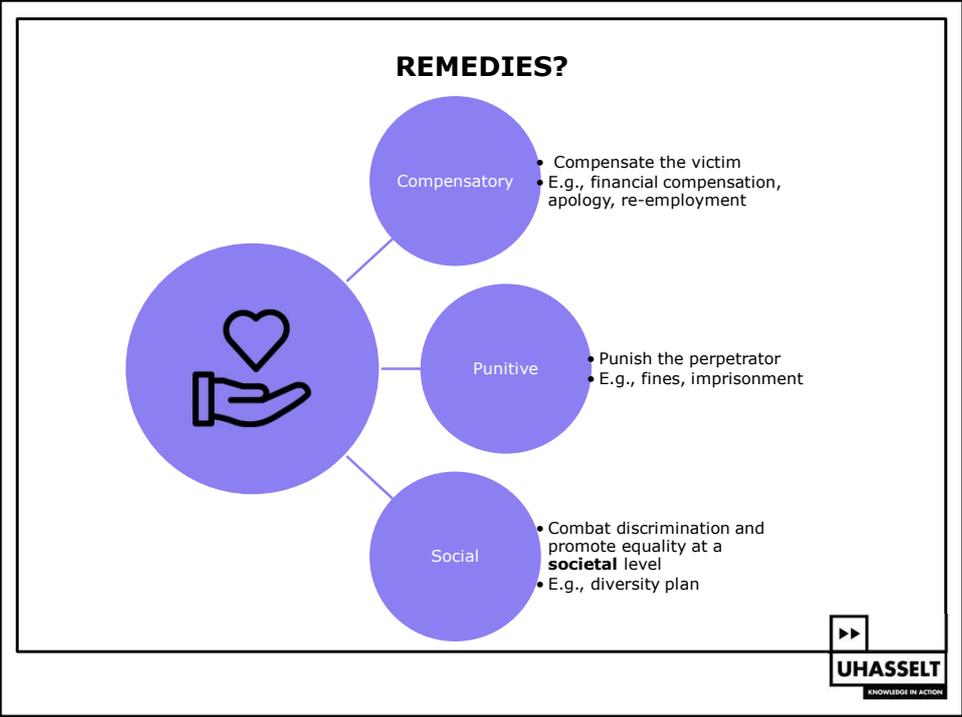
	Alleged victim	Alleged discriminator
<i>Common evidence and tort law</i>		
↓		
Burden of proof	Presumption of discrimination	No discrimination
Means of evidence	No evidence	If it exists: in its possession
Remedies	Symbolic, soft, not creative	Not effective and deterrent
↑		
<i>Non-discrimination law</i>		

▶▶

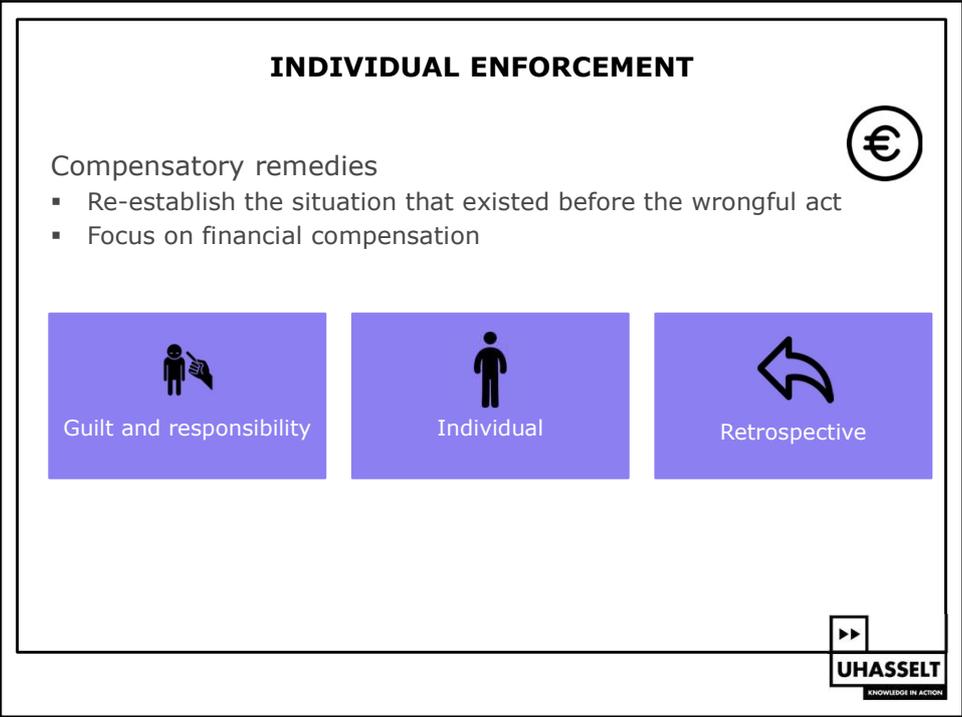
UHASSELT

KNOWLEDGE IN ACTION

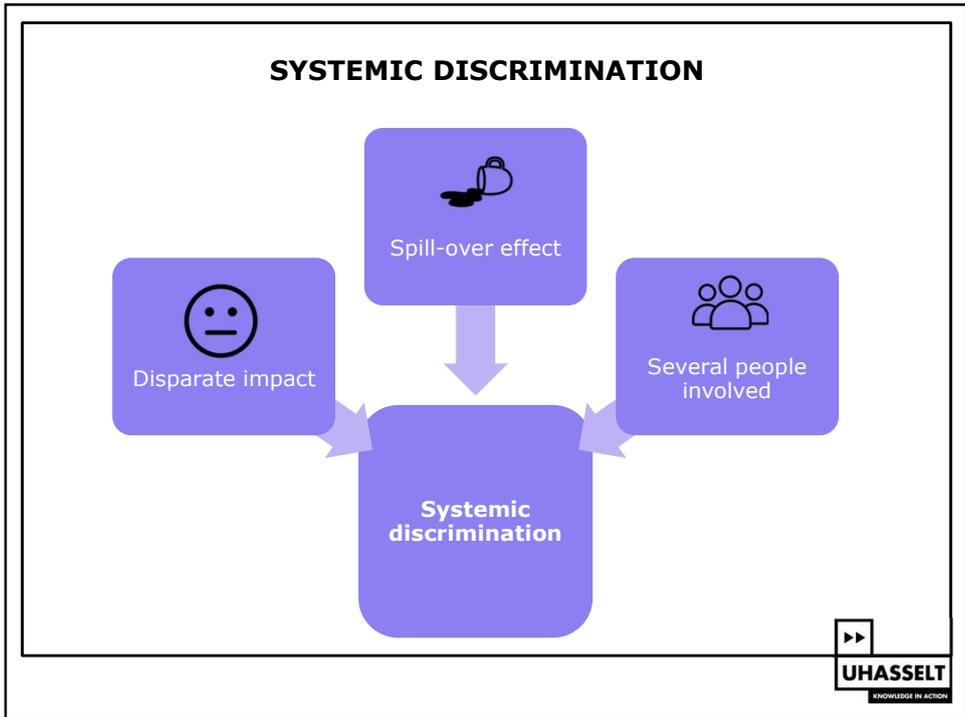
2



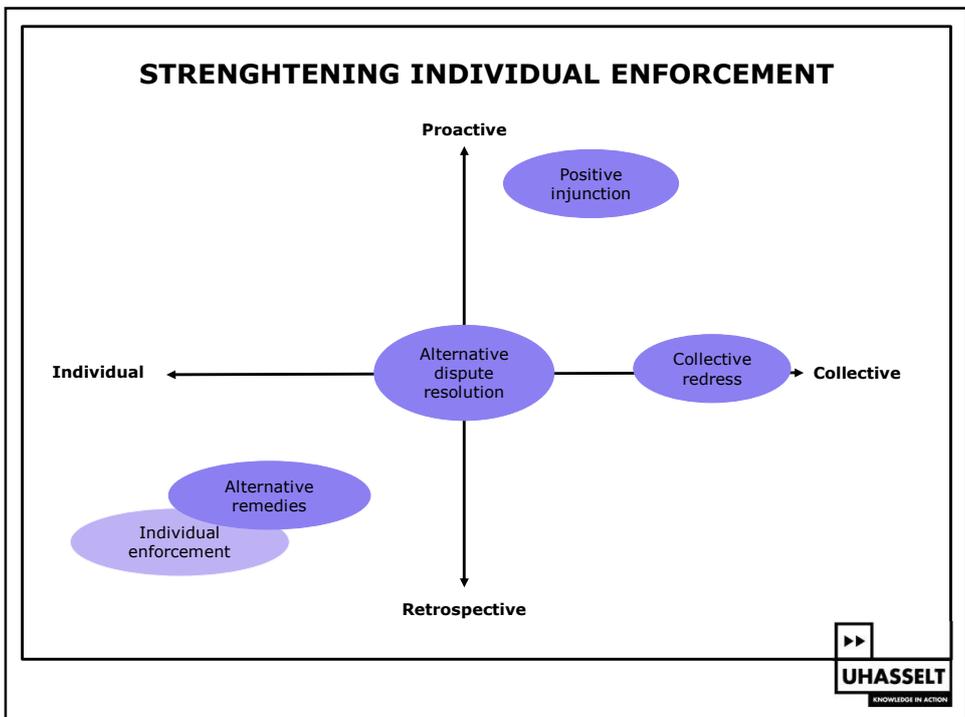
3



4



5



6

INDIVIDUAL ENFORCEMENT: ALTERNATIVE REMEDIES

- Compensation other than monetary payment
 - (Re-)employment, publication, rectification, apology



- May be better tailored to the **needs** of parties



- Remains **individual** and **retrospective**



7

INDIVIDUAL ENFORCEMENT: ALTERNATIVE DISPUTE RESOLUTION

- Out-of-court settlement
 - Facilitative or determinative



- Cheaper, quicker, informal, confidential, more flexible
- Room for **creative solutions**



- Power imbalance between employer and employee
 - **Confidential**



8

INDIVIDUAL ENFORCEMENT: COLLECTIVE REDRESS

- Enforcement of equality rights by a group
 - Enforcement by groups or NGOs
 - Group action, representative action or *actio popularis*



- Easier to identify **systemic** issues
- **Group-based** remedies



- Is it **provided** by law?
- **Not** so much **used** in the EU...



9

INDIVIDUAL ENFORCEMENT: POSITIVE INJUNCTION

- Court order to take positive measures
 - Vs. court order to stop discrimination (negative injunction)



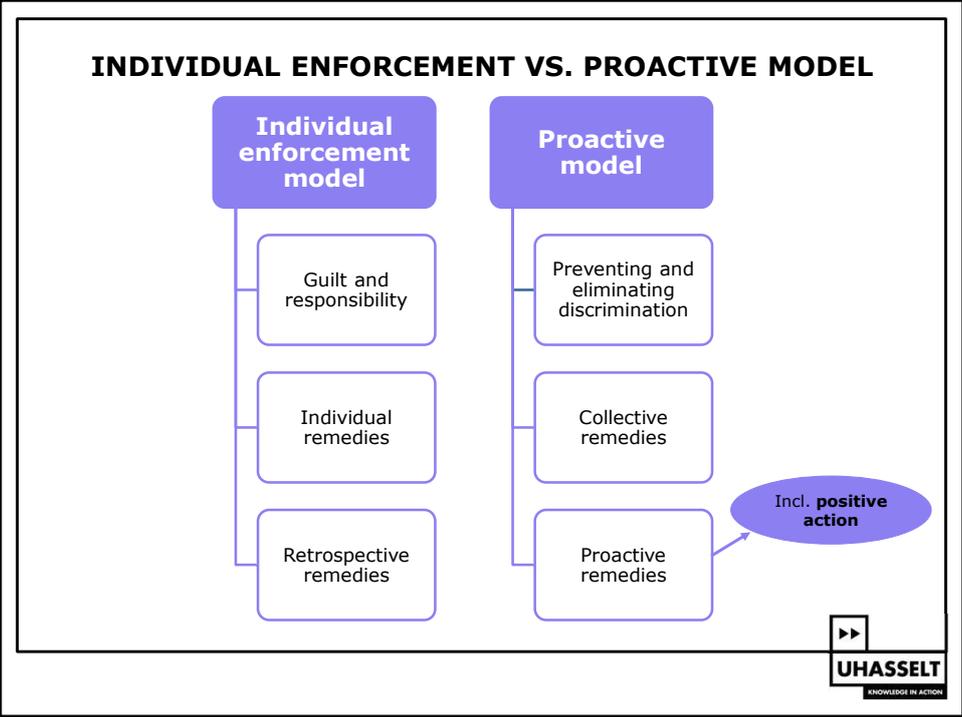
- **Structural** and **organisational** measures
- **Proactive** (and group-based) remedies



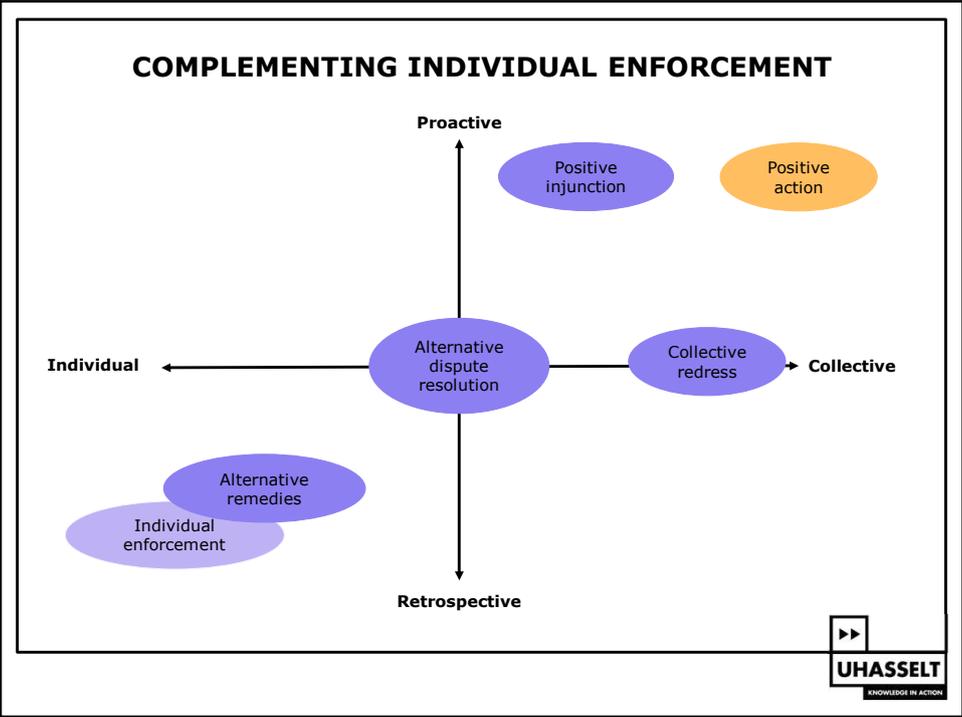
- **Judiciary's** role and expertise
 - Difficult to **enforce**
 - Remedy **past harms**?



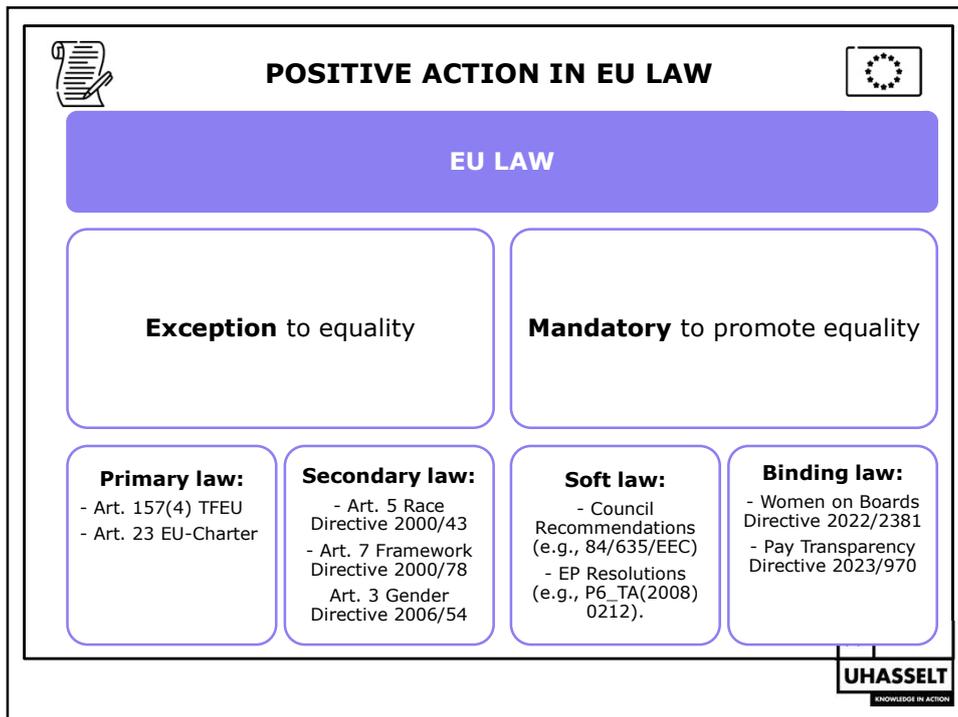
10



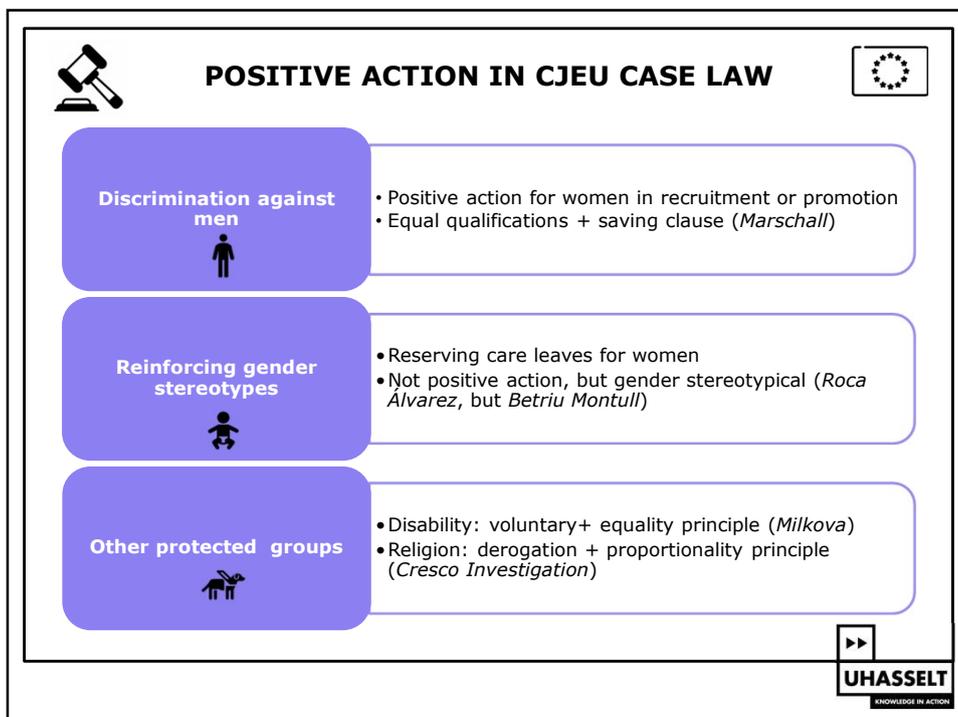
11



12



13



14

POSITIVE ACTION: INTERPRETATION

Restrictive interpretation

 Positive action is:

- Subject to a strict **proportionality** test
- A **derogation** from the equality principle
- **Optional**, not mandatory

 The **text** of the provisions determine that the **goal** of positive action is to ensure "full equality in practice"

Recent initiatives for greater equality in EU **law** and **society** 

Text, goal and present-day conditions

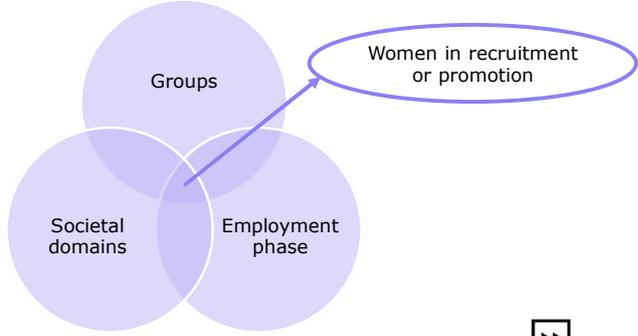



15

POSITIVE ACTION: UNDERSTANDING

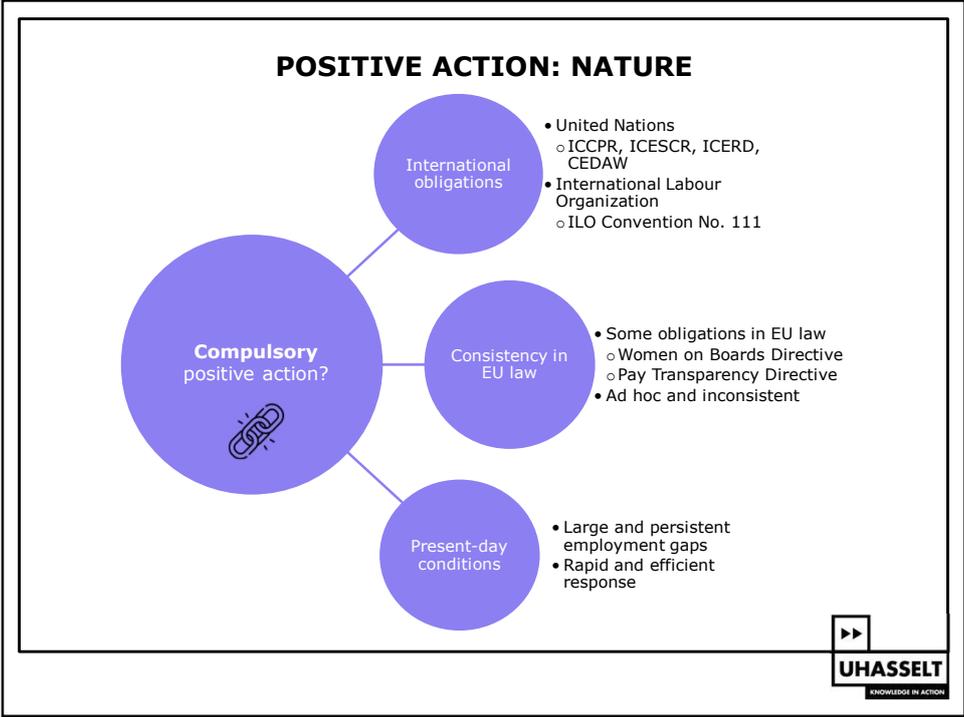
Prioritising an equally qualified candidate is allowed...
 ... unless there are reasons that tilt the balance in favour of the male candidate

Many positive action measures have not yet been assessed:

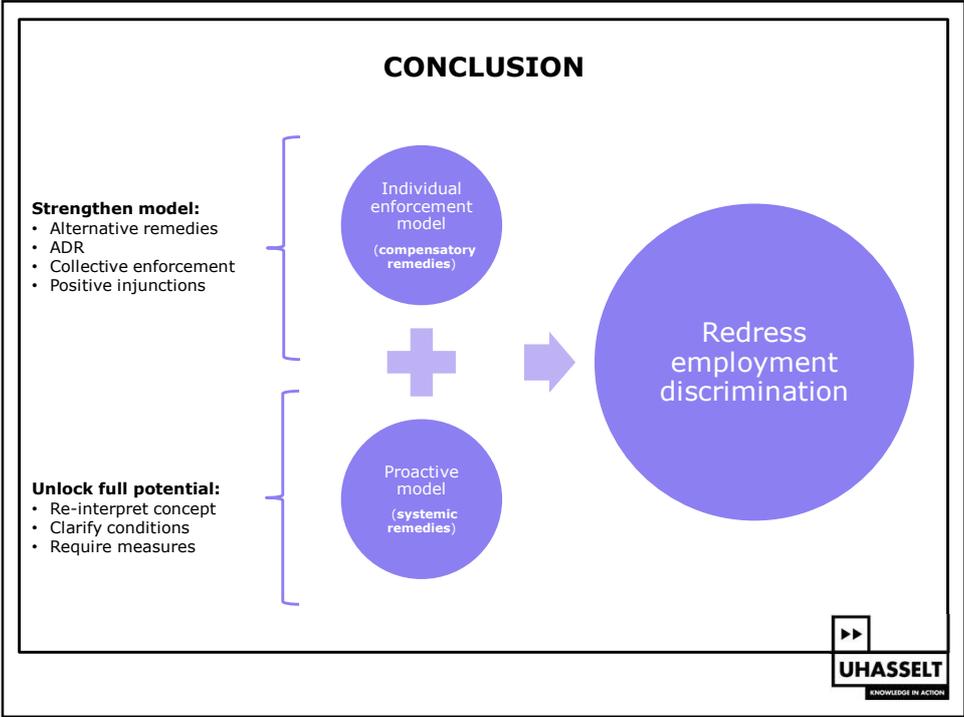





16



17



18