

AN EQUINET REPORT

**POSITIVE ACTION MEASURES.
THE EXPERIENCE OF EQUALITY
BODIES**

Positive Action Measures. The Experience of Equality Bodies

Positive Action Measures is published by Equinet, the European Network of Equality Bodies.

Equinet brings together 42 organisations from 32 European countries which are empowered to counteract discrimination as national equality bodies across the range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation. Equinet works to enable national equality bodies to achieve and exercise their full potential by sustaining and developing a network and a platform at European level.

Equinet members: Commissioner for the Protection from Discrimination, **Albania** | Ombud for Equal Treatment, **Austria** | Interfederal Centre for Equal Opportunities, **Belgium** | Institute for Equality between Women and Men, **Belgium** | Commission for Protection against Discrimination, **Bulgaria** | Office of the Ombudsman, **Croatia** | Ombudsperson for Gender Equality, **Croatia** | Office of the Ombudsman, **Cyprus** | Public Defender of Rights – Ombudsman, **Czech Republic** | Board of Equal Treatment, **Denmark** | Danish Institute for Human Rights, **Denmark** | Gender Equality and Equal Treatment Commissioner, **Estonia** | Ombudsman for Equality, **Finland** | Ombudsman for Minorities, **Finland** | Commission for Protection against Discrimination, **Former Yugoslav Republic of Macedonia (FYROM)** | Defender of Rights, **France** | Federal Anti-Discrimination Agency, **Germany** | Office of the Ombudsman, **Greece** | Equal Treatment Authority, **Hungary** | Office of the Commissioner for Fundamental Rights, **Hungary** | Irish Human Rights and Equality Commission, **Ireland** | National Office Against Racial Discrimination, **Italy** | National Equality Councillor, **Italy** | Office of the Ombudsman, **Latvia** | Office of the Equal Opportunities Ombudsperson, **Lithuania** | Centre for Equal Treatment, **Luxembourg** | National Commission for the Promotion of Equality, **Malta** | National Commission for Persons with Disability, **Malta** | Netherlands Institute for Human Rights, **Netherlands** | Equality and Anti-Discrimination Ombud, **Norway** | Human Rights Defender, **Poland** | Commission for Equality in Labour and Employment, **Portugal** | High Commission for Migration, **Portugal** | Commission for Citizenship and Gender Equality, **Portugal** | National Council for Combating Discrimination, **Romania** | Commissioner for the Protection of Equality, **Serbia** | National Centre for Human Rights, **Slovakia** | Advocate for the Principle of Equality, **Slovenia** | Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin, **Spain** | Discrimination Ombudsman, **Sweden** | Equality and Human Rights Commission, **UK – Great Britain** | Equality Commission for Northern Ireland, **UK – Northern Ireland**

Equinet Secretariat | Rue Royale 138 | 1000 Brussels | Belgium

info@equineteurope.org | www.equineteurope.org

ISBN 978-92-95067-81-3

© Equinet 2014

Reproduction is permitted provided the source is acknowledged.

This publication is supported by the European Union Programme for Employment and Social Solidarity - PROGRESS (2007-2013).

This programme is implemented by the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment, social affairs and equal opportunities area, and thereby contribute to the achievement of the Europe 2020 Strategy goals in these fields.

The seven-year Programme targets all stakeholders who can help shape the development of appropriate and effective employment and social legislation and policies, across the EU-28, EFTA-EEA and EU candidate and pre-candidate countries.

For more information see: <http://ec.europa.eu/progress>

This publication was prepared by Equinet's Equality Law in Practice Working Group. The views expressed in it belong to the authors and neither Equinet nor the European Commission are liable for any use that may be made of the information contained therein. This information does not necessarily reflect the position or opinion of the European Commission.



Co-funded by the PROGRESS
Programme of the European Union

Table of Contents

Preface	Page 3
List of Contributors	Page 4
Executive Summary	Page 5
The Affirmative Action Experience in the United States	Page 8
Chapter One: Legal Framework and Conditions for Positive Action	
1.1 Background	Page 13
1.2 Legal Framework	Page 14
1.3 Case Law	Page 19
1.4 Conditions for use of positive action/special measures	Page 23
Chapter Two: Distinguishing Features of Positive Action	Page 27
Chapter Three: Examples of Positive Action Measures	
3.1 Access to the Labour Market/Employment	Page 29
3.2 Access to Goods and Services	Page 38
3.3 Elections	Page 40
3.4 Other	Page 41
Chapter Four: Monitoring and Evaluation	
4.1 Under-representation	Page 42
4.2 Monitoring	Page 44
Chapter Five: Promoting Positive Action – The Role of Equality Bodies	
5.1 Implementation	Page 47
5.2 Ways Forward	Page 47
Chapter Six: The Northern Ireland Experience of Positive Action Measures in the Areas of Religious and/or Political Discrimination	
6.1 Background	Page 50
6.2 Affirmative Action/Positive Action	Page 51
6.3 Things to Do before taking Outreach Positive Action	Page 51
6.4 Understanding Lawful Positive Action	Page 52
6.5 Impact of Positive Action Measures in Northern Ireland	Page 53
Conclusions	Page 55

Preface

Equinet's Working Group on Equality Law in Practice consists of legal experts working at National Equality Bodies and focuses on how European and national equality legislation is implemented and interpreted in practice at national level. This method permits a comparison of the different national legal solutions and enables the Working Group to identify patterns in the way the Directives are implemented and applied in national laws; to identify potential gaps in protection or provisions in the EU Directives requiring further clarification; and to identify potential and existing legislative gaps in national legal systems. This work is intended to further the goal of achieving enhanced and harmonized protection from discrimination across all the EU Member States and beyond.

Positive action and positive obligations are identified as crucial tools at European level in order to ensure full equality in practice. Therefore, based on the 2014 Work Plan of Equinet, the Working Group conducted an analysis of positive action measures on the basis of the EU Equal Treatment Directives.

Equinet also organised a one-and-a-half day capacity-building training on positive action measures aimed at enabling equality bodies' staff to better judge the legality and effectiveness of positive action measures and to provide more informed recommendations to decision-makers. The training built on the work done by the Working Group and it analysed the legal questions relating to the application of positive action measures on the basis of EU Equal Treatment Directives.

This Working Group report discusses the complex legal issues relating to the application of positive action. It takes into account concrete cases, good practice examples and examples of problematic provisions provided by members of the Working Group, as well as the conclusions of the Equinet training on positive action measures. It is hoped that the report will contribute to a better understanding of the legal nature of positive action as well as of its boundaries as specified by European and national legislation and case law.

It is to be noted that the conclusions are based on the work of staff members of 24 National Equality Bodies. The Working Group does not necessarily endorse all examples of positive action measures cited as compliant with the Directives as they have not been tested in the courts, but they are illustrative of how the provisions are being used. In addition, the conclusions are those of the Working Group and do not necessarily represent the views of the wider Equinet network.

On behalf of all Equinet members, we would like to thank everyone who devoted their time, energy and expertise to contributing to this report.

Jayne Hardwick

Working Group Moderator

Tamás Kádár

Senior Policy Officer, Equinet

List of Contributors

Executive Summary, Conclusions

Jayne HARDWICK (*Working Group Moderator*)

United Kingdom

Equality and Human Rights Commission

The Affirmative Action Experience in the United States

Peggy MASTROIANNI

United States of America

Legal Counsel of the United States Equal Employment Opportunity Commission (EEOC)

Chapter 1: Framework and Conditions for Positive Action

Margrethe SØBSTAD

Norway

Equality and Anti-Discrimination Ombud

Chapter 2: Distinguishing Features of Positive Action

Petr POLÁK

Czech Republic

Office of the Public Defender of Rights

Chapter 3: Examples of Positive Action Measures

Barbara BOS

The Netherlands

Netherlands Institute for Human Rights

Monika ČAVLOVIĆ

Croatia

Office of the Ombudsman

Chapter 4: Monitoring and Evaluation

Caroline WIESLANDER BLÜCHER

Sweden

Office of the Equality Ombudsman

Chapter 5: Promoting Positive Action: The Role of Equality Bodies

Maja BOVA

Italy

National Office against Racial Discrimination

Chapter 6: The Northern Ireland Experience of Positive Action Measures in the areas of Religious and/or Political Discrimination

Mary KITSON and Aidan FITZPATRICK

United Kingdom

Equality Commission for Northern Ireland

Executive Summary

This Report summarises 24 country reports¹ from Equality Bodies on the implementation of positive action measures across Europe. It sets out a plethora of innovative ways Member States and enterprises are seeking to prevent or compensate for disadvantages experienced by men, women, persons with disabilities, older and younger people and people from ethnic or national minorities. The range of measures illustrate a creative use of the broad permissive provisions in the Equality Directives which enable steps to be taken to enhance equality of opportunity for all.

The report is introduced by the transcript of a presentation by Peggy Mastroianni, Legal Counsel of the United States Equal Employment Opportunity Commission (EEOC) on “The Affirmative Action Experience in the United States”. The speech opened the Equinet training on positive action measures held in Belgrade on 16-17 October 2014. It gives a historical overview of affirmative action measures in the United States, the rationale of such measures and the current landscape of affirmative action in the United States.

Chapter 1 of the report sets out the legal framework for positive action measures in the EU Equal Treatment Directives, the relevant provisions in International and European Treaties and Conventions and the obligations on States to take positive action in certain circumstances. Case law before the Court of Justice of the European Union has so far focussed on gender equality measures and the Working Group’s analysis suggests that the CJEU intends to use a uniform concept of positive action for all discrimination grounds. The chapter concludes with principles and conditions for the legality of positive action established in CJEU case law thus far, noting that positive action measures are seen by the Court as an exception to the non-discrimination principle and thus should be construed restrictively and need to undergo a proportionality test including the criteria of legitimacy, effectiveness and necessity.

Chapter 2 briefly distinguishes positive action from other provisions in the EU Equal Treatment Directives such as indirect discrimination, reasonable accommodation for disabled people and special treatment of pregnant and nursing mothers.

Chapter 3 sets out examples of positive action measures taken across the EU. Positive action measures to tackle under representation of women in employment are the most widespread and well developed with most action falling within this category. Not only are the private and education sectors taking specific action to enhance employment opportunities for women via grants and training, but in certain states (Sweden, Serbia, Poland, Portugal and France) various obligations are placed on private and public sectors to meet employment targets, publish equality data and adopt action plans to address under representation and achieve equal pay.

¹ Austria, Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Sweden, United Kingdom

Although falling outside of the scope of the Equality Directives, it is interesting to note that several member states (Poland, Slovenia, Portugal, Serbia Italy, France and the UK) have various quotas in place to increase the numbers of women in elections.

The second most prevalent type of positive action measures are those targeted at persons with disabilities, including: employment quotas or subsidies for employment; transport and parking facilities to provide access to goods and services. In order to tackle disadvantages linked to age, several countries (Serbia, Slovenia, the Netherlands and Latvia) have introduced various subsidies to encourage the recruitment of younger and older workers. Older people also benefit from the measures taken to reduce the cost of transport to compensate for their reduced earning capacity.

Measures to enhance access to employment for people from ethnic minorities are taken in a number of member states (Norway, Germany) to ensure that bias does not affect the shortlisting process. In Germany depersonalised application forms were evaluated as being effective in ensuring that candidates were assessed on their qualifications rather than their gender or ethnic origin. A number of states have implemented positive action measures for Roma people (Slovenia, Italy, Croatia, Latvia, Slovakia, Serbia, Romania and Hungary) focussed on training, education, housing and subsidies for companies who hire employees with a Roma background. Further, in Italy resources were provided for lawyers, jurists, police services, Roma associations and media professionals to foster networking opportunities and working methods in order to tackle discrimination and provide support to victims.

The collection of data is critical to understanding when positive action is needed and justified. Some challenges faced in analysing and collecting data are considered in Chapter 4. Significantly, most equality bodies report that hard data related to gender is generally available and uncontroversial and this is likely to be a contributory factor to the prevalence of positive action measures targeted at women. However, the same cannot be said for other protected groups. The Working Group's discussions suggest the need for providing adequate resources to equality bodies and other monitoring bodies and the need for mandatory, systematic and cyclic monitoring, publishing of and follow up on results.

Despite the range of examples of positive action measures which are covered in Chapter 3, positive action is generally not well understood or systematically implemented. Chapter 5 offers some ways forward to improve the acceptance and take up of positive action, including actions that can be taken by equality bodies, such as promoting positive action and informing all relevant stakeholders; conducting research in the area; formulating specific recommendations to Member States for the use of positive action, including in their public procurement contracts; monitoring the implementation of existing measures; and gathering and communicating good practices. Placing obligations on public authorities to promote equality in the discharge of their duties and in procurement, including the use of positive action, is also considered in this chapter.

Chapter 6 is a case study of the use of positive action measures addressing religious and political discrimination in Northern Ireland. A duty was introduced on employers in 1989 to actively practice equality, which entailed monitoring, workforce and employment practice reviews and affirmative action. This chapter also explains how to ensure that positive action is lawful, distinguishes such action from the reasonable adjustment duty and explains the factors which have made positive action a success story in Northern Ireland, offering lessons learned to other countries.

The Affirmative Action Experience in the United States

Presentation by Peggy Mastroianni, EEOC Legal Counsel

Equinet Training on Positive Discrimination Measures

16 October 2014, Belgrade, Serbia

Today I'll be talking about Affirmative Action in the U.S. (a/k/a "Positive Action," "Positive Discrimination," or "Fair Discrimination").² I'll cover:

- the reasons why we have affirmative action in the U.S.,
- our history with affirmative action, and
- the current affirmative action landscape in the U.S.

But first let me introduce myself. I am the Legal Counsel at the Equal Employment Opportunity Commission (EEOC), the agency that enforces the federal employment discrimination laws in the U.S. The EEOC, with 53 offices all over the country, takes in over 90,000 complaints (charges) of employment discrimination a year. We investigate, mediate, conciliate, and, in some cases, file lawsuits based on these complaints. We also issue policy and technical assistance documents explaining the federal employment discrimination laws. Last year we recovered more than 411 million dollars in relief for victims of discrimination.

Let's begin our discussion of affirmative action with a few general points:

First, the U.S. permits much *less* preferential hiring than some countries, including Serbia.

Second, affirmative action in the U.S. *supplements* strong anti-discrimination laws – both federal and state. In other words, affirmative action is not the only tool in our EEO toolbox.

Third, there is a difference between what U.S. law permits in the way of affirmative action, and what employers actually *do*.

Let's turn now to some of the **reasons** that have been articulated in the U.S. to justify race-based affirmative action:

Affirmative action has been justified as a way to make amends for our history of racial oppression (starting with slavery, and continuing with "Jim Crow" segregation laws and

² Throughout this talk, I am using ideas from Professor Randall Kennedy's great book on affirmative action entitled For Discrimination: Race, Affirmative Action, and the Law (2013).

the “New Jim Crow” in which the criminal justice system was used as a means of racial oppression). Affirmative action is seen **as a form of reparation** for the black victims of this history. As Justice Thurgood Marshall wrote in 1978, “At every point from birth to death the impact of the past is reflected in the still disfavoured position of the Negro.”³ As we will see, although the reparation rationale is a powerful justification for affirmative action, the Supreme Court has largely rejected it.

- Affirmative action has also been justified **as a means of countering hidden bias**. The idea is that numerical goals should be substituted for the traditional schemes of proof that do not always work to disclose hidden bias.
- Another reason advanced for affirmative action is that it can **forestall social disruption**.
- And finally, the rationale that prevails in the U.S. today – **the diversity rationale**. The idea is that affirmative action is a means of enriching previously all-white institutions.

Let’s move on to the **U.S. history** with affirmative action, and you will see all these rationales at play.

Fifty years ago, **in 1964**, after the murder of President Kennedy, President Lyndon Johnson and Congress worked together to enact the Civil Rights Act of 1964. There was a strong national sentiment at the time in favour of making amends for our history of racial oppression. Accordingly, the new anti-discrimination law was accompanied by ad hoc, decentralized affirmative action such as special recruitment efforts, race-based scholarships, and set asides for minority businesses.

The breakthrough to federal affirmative action occurred **in the 1970’s** under President Richard Nixon. It was in part influenced by social unrest, particularly the Black Power movement. The Office of Federal Contract Compliance Programs (OFCCP) was created, and the affirmative action focus was on the lily-white construction industry. Goals were set for each building trade based on the qualified minority external labour force. However, organized labour opposed this effort, and it failed. *But*, there was now a precedent for goals, and the OFCCP’s affirmative action efforts expanded from the construction trades to all federal contractors.

During this period, the notion of quotas took root informally and formally. Various types of implicit quotas were developed for the Cabinet, the Supreme Court, awards, grants, boards of corporations, student admissions, and employee selections.

The Supreme Court said in these early days that:

³ Regents of University of California v. Bakke, 438 U.S. 265 (1978) (Marshall, J., concurring in the judgment in part and dissenting).

- Institutions of higher education can take race into account in student admissions for purposes of diversity; however, rigid quotas were not permissible. Regents of University of California v. Bakke, 438 U.S. 265 (1978).
- Employers can voluntarily prefer black workers for training in craft jobs to compensate for past discrimination. United Steelworkers of America, AFL CIO CLC v. Weber, 443 U.S. 193 (1979)

With the **1980's**, and the election of President Ronald Reagan, hostility to affirmative action on the Supreme Court grew – and that trend has continued. An increasingly conservative Supreme Court issued opinions saying that:

- All government race classifications were subject to *strict scrutiny*. Wygant v. Jackson Bd. of Educ. 476 U.S. 267 (1986) (protection of minority teachers against lay-offs); City of Richmond v. J.A. Croson Co. 488 U.S. 469 (1989) (set asides for minority contractors). In other words, government preferences *for* black and Hispanic persons became subject to the same constitutional test as discrimination *against* them; all were subject to strict scrutiny. As Justice Clarence Thomas saw the issue, benign prejudice was as bad as malicious prejudice. Under the strict scrutiny standard, conclusory allegations of past discrimination were not sufficient, and a preference had to be narrowly tailored and could not unduly burden white people. The sentiment in favour of reparations no longer prevailed.
- The one area where the Supreme Court found that a preference for black and Hispanic persons was permissible under the strict scrutiny standard was in admission to universities – as long as the preference was narrowly tailored and not permanent. The rationale used to meet the strict scrutiny standard in the university context was **diversity**.

What is the **current affirmative action landscape** in the U.S.?

One commentator, Professor Randall Kennedy of Harvard Law School, has compared affirmative action in the U.S. to an **injured bear**. It is too strong to die, but too hurt to attain full vitality.⁴ What are the limits on race and ethnic preferences now? To summarize:

- Affirmative action is only permitted: (1) to redress specific, proven discrimination, or to redress a manifest imbalance in a traditionally segregated job category, *or*, (2) in higher education, to advance diversity;
- Affirmative action cannot result in an absolute bar to the selection of non-minorities; and
- Affirmative action must be a temporary measure.

⁴ Kennedy, R., For Discrimination: Race, Affirmative Action, and the Law (2013)

Why the hostility to preferences? There is in the U.S. a legal ideal of “colourblindness.” There is also an ideal of selection based on merit (not caste, not lineage) that has created unease with quotas. We are an immigrant society in the U.S. Generations believe they made it on their own – and many did.

However, critics of the “merits” argument question whether achievement is *only* the result of individual effort and talent.

- They argue that individual achievement is the result of individual effort and talent **plus** luck and social support (family, schools, parks, libraries, etc.).
- They also point out that today’s descendants of slaves and victims of segregation lost out on the inherited wealth, the access to connections, and the access to education that the majority has, and that that loss justifies affirmative action.

Let me close with some examples of “hard” affirmative action and “soft” affirmative action.

We have quite a bit of “soft” affirmative action in the U.S.

- **Federal Contractors** – this is a good place for any country to begin. The theory: if you want to be a federal contractor, there is a quid pro quo. You must do *more* than other employers. What are some of the things that federal contractors are required to do in the U.S.?
 - Monitor their personnel practices, compare their workforce to the qualified labour supply, and change their practices where necessary;
 - Do affirmative recruitment outreach;
 - Have programs to develop employee skills;
 - Mentor supervisors; and
 - (for individuals with disabilities) meet an aspirational 7% goal.
- **Federal Government** – another good place for countries to begin (the state should lead by example)
 - Federal agencies required to determine the root causes of under-representation through barrier analysis – identify barriers and remove them.
 - Barrier analysis requires examining workforce statistics, EEO complaint trend information, exit interviews, internal audits or studies, external audits or studies, union information, special emphasis programs, and employee surveys.

And what about “hard” affirmative action? Is there any left?

YES.

- Hard affirmative action in Higher Education – Narrowly tailored programs using race or sex as one factor to make a selection are permissible. Grutter v. Bollinger, 539 U.S. 306 (2003)
- Hard affirmative action in court-approved EEOC resolutions – EEOC v. McCormick & Schmick (2014) (EEOC alleged segregation of black workers in less desirable shifts and jobs; relief included hiring goals for two years – percentage of black hires for desirable jobs must equal the percentage of black applicants for those jobs.)

Although there are very few hard affirmative action programs, the reality is that many institutions in the U.S. – for example, governments, universities, and large employers – take race into account, particularly in making selections for high-profile, public-trust or public-facing positions; they just don't formalize it.

Why the dichotomy between the legal standard and the reality? Because the U.S. is divided – with partisans on both sides of this issue.

Look at Supreme Court Justices Clarence Thomas (Bush appointee) and Supreme Court Justice Sonia Sotomayor (Obama appointee):

- Thomas, African-American, was raised by his grandparents in Pinpoint, Georgia, when his mother could not care for him.
- Sotomayor, Puerto Rican, was raised in the Bronx by a mother who was a health care worker and a father who withdrew into alcoholism.
- Both benefitted from Catholic educational institutions and from affirmative action programs
- Both graduated from Yale Law School
- While Justice Thomas rejects affirmative action, Sotomayor has no trouble accepting the positive role it played in her life.

And that is where affirmative action is in the United States today.

Chapter 1: Legal Framework and Conditions for Positive Action

1.1 Background

1.1.1 Definition

Positive action is defined in the EU Equal Treatment Directives⁵ as specific measures to prevent or compensate for disadvantages linked to specified personal characteristics, with a view to ensuring full equality in practice.

Under EU law, positive action has traditionally been seen as an exception to the principle of non-discrimination with the aim to achieve substantive equality through measures designed with the purpose to provide equal opportunities. Some authors claim that certain definitional elements of positive action in EU law (*‘With a view to ensuring full equality in practice’*) might even be understood as referring to equality of outcome or results, but this interpretation has so far not been accepted by the Court of Justice of the European Union⁶.

This chapter focuses on positive action under EU law based on the relevant directives and cases brought before the Court of Justice of the European Union, although it also takes account of relevant UN instruments.

1.1.2 Rationale

The various positive action provisions all reflect the understanding that the prohibition of discrimination alone is not sufficient in order to obtain substantive equality. Thus, the Equality Directives as well as Article 157(4) Treaty on the Functioning of the European Union ("TFEU") put the aim of its positive action provisions like this:

“With a view to ensuring full equality in practice....”

The measures allowed for under the EU Directives all aim at preventing or compensating for disadvantages linked to the discrimination grounds.

The Gender Recast Directive, read with Article 157(4) TFEU, has additional wording, going beyond “with a view to ensuring full equality in practice between men and women in working life”. This allows the adoption of measures which provide for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional services. This may point to a more proactive approach than just preventing or compensating for disadvantages. This question is further discussed in section 1.4.3 of this report. The Recast and Gender Goods and Services Directives also permit more

⁵ The Race Directive (2000/43), The General Framework Directive (2000/78), The Gender Goods and Services Directives (2004/113), The Gender Recast Directive (2006/54), and the Self-Employed Directive (2010/41)

⁶ See for example: Prof. Dr. Marc De Vos: *Beyond Formal Equality, Positive Action under Directives 2000/43/EC and 2000/78/EC*, Office for Official Publications of the European Communities, Luxembourg, 2007, p. 29.

favourable provisions concerning the protection of women as regards pregnancy and maternity.

The Recitals, which constitute guidance and are not binding, also say in relation to the Race Directive, General Framework Directive and Gender Recast Directive

"that positive action measures permit organisations of persons sharing one of the relevant characteristics where the main objective of the organisation is the promotion of the special needs of those persons."

1.2 Legal framework

1.2.1 Gender

The UN Convention on the Elimination of all forms of Discrimination Against Women

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women, shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Charter of Fundamental Rights of the European Union

Article 23

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

The Treaty of the Functioning of the European Union

Article 157 paragraph 4 (ex. Article 141(4)):

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Directive 2006/54/EC The Recast Directive

Article 3 Positive action

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.

Recitals 21 and 22:

The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of one sex. Such measures permit organisations of persons of one sex where their main object is the promotion of the special needs of those persons and the promotion of equality between men and women.

In accordance with Article 141(4) of the Treaty, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Given the current situation and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.

Gender Goods and Services Directive 2004/113:

Article 6:

With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.

The former Directive 76/207/EEC The Equal Treatment Directive⁷:

Article 2 paragraph 4:

This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1).

The former Directive 2002/73/EC The Equal Treatment (Amendment) Directive⁸

Article 2 paragraph 8:

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.

⁷ Now consolidated and updated by the Recast Directive, but included for completeness as case law refers to this Directive

⁸ Idem

1.2.2 Race or ethnic origin

The UN Convention on the Elimination of All Forms of Racial Discrimination

Article 1 paragraph 4

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2 paragraph 2

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

The UN International Covenant on Civil and Political Rights

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This Article has been construed as to contain a certain obligation for State Parties to implement positive action measures in order to ensure inter alia that minorities can maintain their culture and language⁹.

The Treaty on the Functioning of the European Union

Article 19 (ex Article 13 Treaty Establishing the European Community)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

⁹ CCPR, General Comment 23 (Fiftieth session, 1994). Report of the Human Rights Committee, Vol. I, GAOR, Forty-ninth Session, Supplement No. 40 (A/49/40) s. 107-110

2. *By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.*

Directive 2000/43/EC The Race Directive

Article 5 Positive action

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

Recital 17:

The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.

1.2.3 Disability

The UN Convention on the Rights of Persons with Disabilities

Article 5 paragraph 4:

Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Charter of Fundamental Rights of the European Union

Article 26

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

Directive 2000/78/EC The General Framework Directive

Article 7 Positive action

1. *With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.*

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Recital 27:

In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community, the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities, affirmed the importance of giving specific attention inter alia to recruitment, retention, training and lifelong learning with regard to disabled persons.

1.2.4 Religion or belief, disability, age, sexual orientation

Directive 2000/78/EC The General Framework Directive

Article 7 Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Recital 26:

The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation, and such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons.

1.2.5 Language

The European Charter for Regional or Minority Languages

Article 7 (2)

The adoption of special measures in favour of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population or which take due account of their specific conditions is not considered to be an act of discrimination against the users of more widely-used languages.

1.3 Case law

The EU case law on positive action is limited to gender and is based on the former Directive 76/207/EEC. The question as to what can be inferred from this case law when it comes to positive action measures on other discrimination grounds will be discussed under section 1.4.2 of this report.

The Court of Justice of the European Union

Pre-Amsterdam Treaty case law:

C-312/86 «Commission v. France» (1988)

In France, collective agreements granting special rights for women were allowed. These rights included i.a. extended maternity leave, reduction in working hours for women 59 years of age or older, early retirement, extra holidays, sick leave for taking care of sick children etc.

The court stated that the exception provided for in Article 2(3) of Directive 76/207 on the implementation of the principle of equal treatment for men and women, which covers measures concerning the protection of women, particularly as regards pregnancy and maternity, may not apply to measures relating to the protection of women in capacities, such as those of older workers or parents, *which are not specific to them*. To authorize, in general, the maintenance of special rights for women in collective agreements, cannot be justified. Furthermore, this national legislation makes the parties of the collective agreements responsible for removing certain instances of inequality *without laying down any time-limit for compliance with that obligation*. This does not adequately implement the directive, the Court said.

C-450/93 «Kalanke» (1995)

The Court stated in its ruling (para. 22) that national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) Directive 76/207/EEC.

C-409/95 «Marschall» (1997)

In the Marschall case the provision giving priority to women in a sector of the public service was not absolute, unlike the provision in the Kalanke case.

Preconditions for the appliance of the priority provision were that there were fewer women than men at the level of the relevant post in a sector of the public service and that both female and male candidates for the post were equally qualified in terms of

their suitability, competence and professional performance. If those criteria were met the provision required that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour.

The Court stated that a precondition for the positive action measure in question was a proven gender imbalance due to "*the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures*". The Court ruled that this national rule was not precluded by Article 2(1) and (4) of Directive 76/207/EEC, provided that:

- in each individual case the rule 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 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, and
- such criteria are not such as to discriminate against the female candidates.

Post-Amsterdam Treaty case law:

C-158/97 «Badeck» (2000)

The Land of Hessen, Germany, had an Act on women's equality which allowed for measures to increase the representation of women in certain sectors of the public service which included priority in hiring, binding targets, training places, call to interview and representation in representative, administrative and supervisory bodies.

The Court reviewed the various provisions and stated the following: Article 2(1) and (4) of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions does not preclude a national rule which

- in sectors of the public service where women are under-represented, gives priority, where male and female candidates have equal qualifications, to female candidates where that proves necessary for ensuring compliance with the objectives of the women's advancement plan, if no reasons of greater legal weight are opposed, provided that that rule guarantees that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates,
- prescribes that the binding targets of the women's advancement plan for temporary posts in the academic service and for academic assistants must provide for a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline,
- in so far as its objective is to eliminate under-representation of women, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women, unless despite appropriate measures for drawing the attention of women to the training places available there are not enough applications from women,

- where male and female candidates have equal qualifications, guarantees that qualified women who satisfy all the conditions required or laid down are called to interview, in sectors in which they are under-represented,
- relating to the composition of employees' representative bodies and administrative and supervisory bodies, recommends that the legislative provisions adopted for its implementation take into account the objective that at least half the members of those bodies must be women.

C-407/98 «Abrahamsson» (2000)

Under Swedish law a university was required to give automatic priority to a sufficiently qualified applicant of the under-represented sex in preference to a candidate belonging to the opposite sex who would otherwise have been chosen, provided that the difference in their respective qualifications was not so great that application of the rule would be contrary to the requirement of objectivity in the making of appointments. The Court ruled that this national legislation was precluded by Article 141(4) TEC and Directive 76/207/EEC article 2(1) and (4).

Whether this legislation applied only to procedures for filling a predetermined number of posts or to posts created as part of a specific programme of a particular higher educational institution, was not relevant. The level of the post to be filled was not relevant either.

The Court stated furthermore that Article 2(1) and (4) of Directive 76/207 does not preclude a rule of national case-law under which a candidate belonging to the under-represented sex may be granted preference over a competitor of the opposite sex, provided that the candidates possess equivalent or substantially equivalent merits, where the candidatures are subjected to *an objective assessment which takes account of the specific personal situations of all the candidates*.

C-79/99 «Schnorbus» (2000)

The Court decided this case on the concept of indirect discrimination but it is also interesting in light of positive action since it illustrates that a positive action measure may constitute indirect discrimination, which has to undergo the test of legitimate aim and proportionality.

Land Hessen, Germany, gave, in accordance with national law, priority for admission to practical training for employment in the civil service to applicants who have completed compulsory military or civilian service. Women were excluded de facto from benefiting from the measure, since women are not required to do military or civilian service. Thus, the objective character of the national provisions giving such priority constituted prima facie indirect discrimination against women. However, the Court found that such provisions which, as in the case in point, take account of the delay experienced in the

progress of their education by applicants who have been required to do military or civilian service, are objective in nature and prompted solely by the desire to counterbalance the effects of that delay. Accordingly, they cannot be regarded as contrary to the principle of equal treatment for men and women.

C-366/99 «Griesmar» (2001)

The French civil and military retirement pension scheme only gave female civil servants service credit for children upon calculation of pension. The credit was unrelated to maternity leave or disadvantages caused by absence from service due to childbirth. The Court ruled that this constituted a standard monetary advantage which did not objectively address occupational difficulties that women encounter during their careers. Thus, this resulted in discrimination against male workers in a comparable situation with child rearing responsibilities and could not be justified as a positive action measure.

C-476/99 «Lommers» (2002)

Mr. Lommers was denied access to partially subsidized nursery places for his child. The Dutch Ministry of Agriculture had reserved a limited number of places for children of female employees, giving access to male officials only in cases of emergency.

The CJEU held that the plan aimed to achieve substantive equality by reserving spaces in subsidized nursery facilities. Therefore it was consistent with Community law, specifically with Article 2(4) of the Directive on Equal Treatment. The Court based its decision on the fact that women were significantly under-represented in the Ministry and there was proven insufficiency of proper, affordable care facilities, and the insufficiency of suitable nursery facilities was more likely to induce female employees to give up their jobs. The scheme was allowed only if the said exception in favour of male officials is construed as allowing those who take care of their children by themselves to have access to the nursery places scheme on the same conditions as female officials.

C-319/03 «Briheche» (2004)

The case concerned conditions of access to public-sector employment, more specifically French provisions exempting widows who have not remarried before the age limit for obtaining access to that employment. The Court ruled that this national provision was precluded by Article 3(1) and Article 2(4) of Council Directive 76/207/EEC, in that the provision excluded widowers who have not remarried who are in the same situation. The provision gave priority to widows automatically and unconditionally. The provision could not be allowed under Article 141(4) EC either because it was disproportionate to the aim pursued.

European Free Trade Association Court

E-1/02 University of Oslo (2003)

The University of Oslo had reserved a number of academic positions for women in order to increase the representation of women. The EFTA Court ruled that Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of Directive 76/207/EEC. The measures could only be allowed if they did not automatically and unconditionally give priority to women, if men and women are equally qualified and if the candidates are subject to an objective assessment that takes into account their specific personal situations. The fact that some of these positions were created specifically for the purpose of recruiting more women was not relevant. The fact that the positions were temporary in nature was not relevant either.

1.4 Conditions for use of positive action/special measures

1.4.1 Is positive action a duty?

Equality Directives

The EC Directives allow Member States to introduce positive action measures, but do not place an explicit duty on them to introduce such measures. The Race and General Framework Directives and the Gender Goods and Services Directive state that the principle of equal treatment “shall not prevent” positive action measures. The Recast Directive states that “Member States *may* maintain or adopt measures”.

United Nations Committee on the Elimination of Racial Discrimination (CERD)

There is a duty to take special measures as may be necessary to guarantee enjoyment of human rights.

Article 2 (2) of the CERD convention *requires* State Parties to take special and concrete measures as may be necessary to ensure the adequate development and protection of racial groups for the purposes of guaranteeing them full and equal enjoyment of human rights. Helpful guidance is provided by the CERD Committee General Recommendation No. 32 which explains that ‘special measures includes also measures that in some countries may be described as (...) “positive action”’ where they correspond with Art 1(4) and 2(2) CERD (as set out above).

The Recommendation also explains that:

- “Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.

- Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country....”
- “the requirement to limit the period for which the measures are taken implies the need, as in the design and initiation of the measures, for a continuing system of monitoring their application and results using, as appropriate, quantitative and qualitative methods of appraisal.”

United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and United Nations Committee on the Rights of Persons with Disabilities (CRPD)

The CEDAW Committee recommends the use of positive action measures¹⁰ but the Convention itself imposes no obligation to do so, simply recording that States Parties have agreed to ‘adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention’.

The EU is now a party to the CEDAW and in future decisions of the CJEU any development under the CEDAW in this regard will have to be taken into consideration by the court.

The CRPD has no direct obligation regarding the use of positive action measures.

1.4.2 Are there different conditions for use of positive action on different discrimination grounds?

As previously stated, the only positive action cases which have so far been determined by the Court of Justice of the European Union relate to gender and these decisions set out guidance on the use of positive action measures.

It is likely that the courts would apply the same principles when dealing with challenges to positive action measures which favour other protected groups for the following reasons: the positive action provisions in the Equality Directives are substantially identical¹¹ and therefore it is likely that the Court would read the corresponding provisions in the Race and General Framework Directives consistently with the gender positive action cases for reasons of consistency and legal certainty. Further, the preparatory documents of the Recast Directive show that the European Commission had a policy to apply uniform concepts of equality and positive action across the Equality Directives.¹² There is a slightly different provision relating to gender in Article 157(4)

¹⁰ See the Committee’s General Recommendations No. 5,8,23 and 25

¹¹ Note: apart from a slightly different provision related to gender, see paragraph 1.4.3

¹² See COM (2004) 279 final.

TFEU which provides that Member States may adopt measures providing for “specific advantages” in order for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers and this provision has been incorporated to the Recast Directive. See below for further details.

1.4.3 Does Article 157 TFEU and Article 3 of the 2006/54/EC Directive entail a different (and wider) approach to positive action compared to the CJEU case law based on Article 2(4) of the 76/207/EEC Directive?

Some jurists claim that the adoption of Article 2(8) of the 2002/73 Directive, which is now Article 3 of the Recast Directive entails a wider approach to positive action than under the 76/207 Directive in that it refers to Article 141(4) by stating that “Member States may maintain or adopt measures within the meaning of article 141(4) of the Treaty”.

The wording of Article 3 of the Recast Directive is different from the 76/207/EEC Directive in that the latter included the following: “in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1)” (access to employment, including promotion, and to vocational training and working conditions), whereas Article 141(4) TEC, now Article 157(4), instead provides for “*specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers*” and includes a reference to something more substantive than merely preventing discrimination by stating “*with a view to ensuring full equality in practice*”. However, the Commission has not expressed any direct change in the approach to positive action. There is no explicit reference to a wider approach to positive action upon the adoption of the 2000/43 and 2000/78 Directives either.

Although none of the cases before the CJEU have been based on any of these Directives, including the 2006/54 Directive, the Court has not in its rulings on Article 141(4) in the present case law given support to a different approach to positive action with reference to these Directives, even if it was asked to do so by the Advocates General in *Badeck* and *Briheche*. The Court has so far left unanswered whether Article 141(4) and consequently Article 3 of the Recast Directive could imply a different proportionality test (*Abrahamsson* para 55 and *Briheche* para 31). Nevertheless, the Working Group’s analysis seems to suggest that the CJEU intends to use a uniform concept of positive action, notwithstanding the small textual differences between the different Directives.

1.4.4 Conditions for use of positive action measures

Based on CJEU case law the point of departure is that positive action is an exception to the non-discrimination principle and thus should be construed restrictively.

Furthermore, positive action in favour of women must aim at achieving equal opportunities and not equal results or gender balance.

The positive action measure must then undergo a proportionality test including the three criteria of legitimacy, effectiveness and necessity. Thus, one can list the following conditions for legal positive action:

1. There must be a proven under-representation (inequality)
2. The imbalance must stem from unequal opportunities / disadvantages
3. The measure must be proportionate, that is it must be *legitimate, effective* and *necessary*. This implies:
 - 3.1 The imbalance must be proven
 - 3.2 The measure must aim at eliminating and correcting the causes of reduced opportunities (see *Commission v. France, Griesmar and Briheche*)
 - 3.3 The measure should pursue the stated aim (see *Marschall* para. 26)
 - 3.4 The measure should rely on objective and transparent criteria (see *Commission v. France, Abrahamsson, Kalanke, Marschall*)
 - 3.5 In recruitment and promotion as regards gender, an automatic or unconditional preference for the under-represented sex is not allowed. A saving clause is needed, giving a member of the over-represented sex the possibility to prevail based on his individual merits or personal circumstances (see *Abrahamson, Kalanke, Marschall, Badeck*)
 - 3.6 Automatic preferences may be given in the context of allocating training places and calls to interviews, where the over-represented sex are not completely excluded from the possibility of getting training or being called to interview when they have equal qualifications (see *Badeck*).
 - 3.7 The measure must be temporary, i.e. it should end when equal opportunities exist in the target area for the specific measure.

Chapter 2: Distinguishing features of positive action

Positive action must be distinguished from the other provisions of anti-discrimination law of the European Union, especially indirect discrimination, reasonable accommodation and exceptions to the prohibition of discrimination¹³.

As mentioned above, positive action is a means of preventing or compensating for disadvantages linked to protected characteristics. It focuses on achieving full equality in practice and the discriminatory treatment and experiences of a group. This fact brings it somewhat closer to the concept of indirect discrimination, which also aims to eliminate concealed barriers faced by vulnerable groups.¹⁴ However, it is clear from CJEU case law that indirect discrimination does not entail an obligation to put in place positive action measures. Conversely, positive action measures may give rise to *prima facie* legitimate indirect discrimination complaints by members of the non-promoted group that can be justified by the objectives of the positive action measures¹⁵.

Positive action in EU law is traditionally seen as a special exception to the prohibition of discrimination, with a well-defined social aim, namely the achievement of ensuring full equality in practice. Positive action (from the viewpoint of the person holding one or more protected characteristics) always takes the form of (more) favourable treatment.

Positive action and reasonable accommodation have a common objective (attaining *de facto* equality) and common means of achieving that objective (granting special advantages). However, a reasonable accommodation is always taken in relation to an individual and his specific needs. In contrast, positive action is directed at a whole group of potentially discriminated persons.

In addition, advantages provided to persons with disabilities in the form of a reasonable adjustment, or special treatment of pregnant women (special conditions at the workplace, aids, etc.) cannot be regarded as positive action because other persons outside the vulnerable group need not and cannot be favoured in this manner. On the contrary, failure to create such conditions could be found discriminatory.

A significant distinguishing feature of positive action lies in three main reasons that trigger such action. The possible actions may include elimination of barriers in society, redress of wrongs caused in the past accompanied by increasing participation of the vulnerable group's representatives in public affairs and strengthening diversity in society.¹⁶ The reasons for such action are generally absent in other forms of differential treatment.

¹³ Genuine and determining occupational requirement, special occupational exception for religious bodies, provisions protecting women, difference of treatment based on nationality, the armed forces, justification on grounds of age, additional exceptions contained in the Goods and Services Directive, etc.

¹⁴ See Ellis, E., Watson, P. *EU Antidiscrimination Law*. 2nd edition. Oxford University Press, 2012, pp. 176 – 177.

¹⁵ See Prof. Marc De Vos, *Beyond Formal Equality, Positive Action under Directives 2000/43/EC and 2000/78/EC*, European Communities, 2007, p. 14-15.

¹⁶ See Fredman, S. *Discrimination Law*. 2nd edition, Oxford University, 2012, p. 259.

The last, but no less important, feature of positive action, which cannot be considered e.g. in respect of a reasonable accommodation measure or exceptions to the prohibition of discrimination, is that positive action is temporary. The legitimacy of positive action is established and its effectiveness measured by its temporary nature. However, temporariness is a relative notion and may differ from case to case. Where positive action is directed at structural inequality in society, it may sometimes be in place for decades.

Chapter 3: Examples of positive action measures

This chapter gives an overview of some selected positive action measures in the countries represented in the Equinet Working Group. All of these countries have legislation on positive action: some have voluntary provisions for the public and/or private sector (Hungary, Denmark, the Netherlands, Slovakia, Latvia, UK, Germany) while others have a more obligatory system (Slovenia, Romania, Sweden).

This chapter includes positive action measures in the following areas:

3.1 Access to the labour market/employment

- 3.1.1 Gender
- 3.1.2 Ethnic Origin
- 3.1.3 Disability
- 3.1.4 Gender

3.2 Access to goods and services

- 3.2.1 General
- 3.2.2 Education
- 3.2.3 Housing

3.3 Elections

3.4 Other

3.1. Access to the labour market/employment

3.1.1 Gender

In order to advance up the professional ladder, men and women need to have access to appropriate education and training. This indicates that special measures are necessary in education/training where women (or men) are under-represented in particular careers.

Poland launched a campaign to promote women doing technical studies in 2012 which led to an increase of women on these courses. From the beginning of the programme, the number of women in technical studies has increased by nearly 24.000, while at the same time the number of male students has decreased by some 9.000. In the academic year 2007/2008 the overall percentage of female students in technical studies was 30.7%, whereas today (2013/2014) it reached 37%. According to the report this trend is stable and it will continue during the coming years.

Another way to tackle under-representation of one sex in certain sectors of the labour market is for employers to have a policy to take on apprentices. Such policies can be found for example in **Sweden**.

In the **Netherlands**, quotas are not allowed, however several organisations have introduced measures which were very similar to quotas, such as the Universities of Groningen and Delft whose cases came before the Netherlands Institute for Human Rights (NIHR). An example in the Netherlands that can be deemed effective was the ASPASIA-program of the Netherlands Institute for Scientific Research, which falls under the Ministry of Education, Culture and Science. This program provides a grant to allow women promotion at universities. Although women were well represented as lecturers at universities, there were few female professors. Positive action was introduced to encourage women into senior lecturer positions so that there would be more women eligible to become professors. This project is currently being evaluated to see if it was effective and should therefore be continued.

A similar project was introduced in **Finland** where grants for women in science were awarded in biomedicine every other year (L'Oreal Finland for Women in Science Fellowships), with the support of the Finnish National Commission for UNESCO. One fellowship (15 000 €) every second year was awarded to a woman scientist who carried out her research in the field of Biosciences. The Ombudsman for Equality found this fellowship to be compatible with the Gender Equality Act given that women are under-represented as researchers and in the higher grades in this field. One of the purposes of the programme was to support women's positions in the world of research.

Preferential treatment is allowed in **Norway, Sweden, Austria, Germany** and the **Netherlands**. It can be successful when applied in accordance with the criteria developed by the CJEU, but since these criteria are very strict, it is not always applied correctly. In **Norway** preferential treatment for men is limited to jobs in education and care of children. In the **Netherlands** preferential treatment (and positive action in general) is only possible for women.

The equality body in **Malta** is currently conducting research into quotas for women in boardrooms to ensure at least a balance between men and women in decision-making. Such discussions about the role and proportion of women on company boards can be analysed also in the context of the **European Commission's** proposal for a *Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures* (2012/0299 (COD)) currently in front of the European Parliament and the Council. **Norway** was the first country to introduce a 40% quota for female directors of listed companies.

In **Portugal**, a resolution was approved that aims to increase the representation of women in decision-making positions in State-owned companies, particularly on boards

and in supervisory bodies. State-owned companies are also obliged to report every six months to the Secretary of State for Parliamentary Affairs and Equality on the results of the measures implemented. Portugal's Regulators' Framework Law (67/2013, 28th August) provides that there should be a minimum representation of each sex on Executive Boards.

The **German** Federal Government defined in its coalition agreement benchmarks to increase the number of female managers in Germany. The German Parliament will adopt a law concerning gender quotas for management boards and supervisory boards of enterprises. Supervisory boards of co-determined business enterprises¹⁷ listed on the stock exchange will have to reach a gender quota of a minimum of 30 per cent. Enterprises that do not abide by this quota will not be allowed to fill up their boards with men. In this case, there will be empty places on the supervisory board. Furthermore from the beginning of 2015 co-determined business enterprises listed on the stock exchange will be legally required to define binding benchmarks for increasing the number of women on supervisory boards, management boards and top-management levels. They have to publish these benchmarks and report on them in a transparent way. The first benchmarks must be achieved within the eighteenth election period of the German parliament. They must not be diminished subsequently. Furthermore, the government will take measures in the private sector to promote women's careers within all business hierarchies. The federal government will increase the number of female managers within the federal administration and within public boards. Also scientific boards shall achieve a quota of 30 percent women. The number of women among scientists shall be increased generally. Therefore, benchmarks using cascade principles will be set, referring to the proportion of women employees at lower qualification levels.

Based on the coalition agreement, the Federal Ministry for Families, Elder People, Women and Youth and the Federal Ministry of Justice are working on a law on gender quotas for management boards and supervisory boards of enterprises. This law is expected to enter into force in 2016 and will affect all supervisory boards being appointed thereafter.

In **Serbia**, the law obliges public employers with less than 30% women in management positions to implement measures to increase the number of women. The law on gender equality stipulates that private companies employing more than 50 employees are obliged to adopt a plan of action for elimination or alleviation of unbalanced gender representation. They also have to report their progress and used to be required to

¹⁷ The term „co-determined enterprises” refers to enterprises that are bound by the Codetermination Act. The Codetermination Act stipulates provides employees a codetermination right if the enterprise employs more than 2000 employees. In such companies 50% of the supervisory board are represented by employees.

submit this to the Ministry responsible for gender equality, however since 2014 the relevant Directorate ceased to exist.

In **Sweden**, employers are obliged to prepare a gender equality action plan every three years, including cost calculations and a timetable to address pay inequality between men and women. Over the period 2001–2008, several thousand pay surveys from employers were analysed by the Ombudsman. Together, they involved more than a quarter of all employees in the Swedish labour market.

The Ombudsman reported to the Government on the results yielded by the strong rules which were introduced in 2001 and was granted further funding to enable it to intensify its efforts to support and scrutinize employers' action on pay surveys. This prompted the Ombudsman's most ambitious study to date, encompassing almost 600 employers. The results showed that 60% of employers had introduced pay adjustments or other measures in order to achieve equal pay for women and men performing work regarded as equal or of equal value; 44% had identified unjustified pay differentials that had to be remedied. Pay adjustments totalled at least SEK 72 million (approximately 7 million euros). The pay adjustments concerned at least 5800 employees, of which about 90 per cent were women. It meant an average monthly pay rise of just over SEK 1000 (100 euros) per person. A third of the employers had taken steps other than pay adjustments to achieve equal pay. These included professional development for staff members, training for pay-setting managers, recruitment measures to install more women in senior positions, a brake on wage growth for men who, by comparison with female colleagues, had received a higher wage than their current position justified, e.g. because they had previously held managerial posts. The pay survey provisions are a valuable instrument for achieving equal pay at individual workplaces. They have been a success and have resulted in pay adjustments both for individuals and for groups in female-dominated occupations. The latest report shows that half of the employers targeted had detected unjustified pay differentials

A similar obligation to report exists in **Poland** where companies are required to publish information on their websites on the number of women and men in management and advisory boards in the previous two years. The Minister of Treasury in Poland has announced the intention to reach a proportion of at least 30% of women on boards of state owned companies. It is yet unclear how the Polish government intends to reach this percentage.

In **France**, every company that employs more than 50 workers has to set up negotiations every year on equality between men and women. First, they have to write a gender breakdown for each occupational category. These indicators must include: a gender breakdown of the company's workforce; the number of men and women recruited; the average annual number of hours of professional education per worker; the types of employment contracts; the number of promotions; working hours, average

age, average seniority and compensation. This report must be submitted to the work council of the company. Then it must be made available to the work inspectorate, along with the work council's opinion.

The next step is formalizing a collective agreement, including at least three policy areas (four for companies employing more than 300 workers) to enhance gender equality. Remuneration must always be included as one of the policy areas addressed. Others can include recruitment, professional education, promotion, qualification, professional grading, working conditions and work/life balance. The collective agreement must include target figures.

If no agreement can be reached, the employer must adopt a unilateral action plan. Then, it must be sent to the work inspectorate. A company that does not have an action plan can be sanctioned by a fine equal to 1% of all the salaries paid each month.

In **Portugal**, a resolution of the Council of Ministers was adopted, setting out measures aimed at ensuring and promoting equality between women and men in the labour market, in particular towards the elimination of the gender pay gap, promoting work/life balance, encouraging corporate social responsibility and tackling labour market segregation.

In **Slovakia** research, monitoring and awareness-raising activities are carried out not only by the Ministry of Labour, Social Affairs and Family of the Slovak Republic, but also by NGOs and one of the major organisations advertising work.

With the entry into force of Act No.20/2011, a new Chapter has been added to **Italian** corporate law: governing bodies of specified companies must change membership on their boards periodically and reserve at least one-fifth of places for women (who are currently under-represented) until they make up at least one-third of the board. The process for amending the statutes of the above companies should not be underestimated however. The statutory amendments in question are not of a mere regulatory significance, but have an impact on the policies of corporate governance of the companies as the composition of long-established boards is changed by this process.

Other measures to increase women's opportunities to work include special training for positions that are currently dominated by men, as applied in **Sweden**. The **Austrian** Public Employment Service offers special programs for women, e.g. "Women in the crafts and technology". **Malta** initiated a broad campaign promoting diversity in employment that included Television and Radio Public Service Announcements on local media to disseminate information about role models from different occupational backgrounds as well as available education, training and labour market opportunities. In order to promote future female politicians, **Slovenia** has introduced a project called 'a day with a politician' for young women.

Portugal has adopted active measures to advance the labour market prospects of low qualified women in general and to increase the number of workers from the less represented sex in sectors with gender stereotyped activities. Financial support of up to 60% of the monthly remuneration is given to the worker¹⁸. Also a more favourable regime was introduced to help unemployed single parents.

3.1.2 Ethnic origin

The **Norwegian** government has a temporary project for some public sector employers. When there are job applicants with non-western ethnic minority background, at least one must be called in for an interview. The aim of this scheme is to ensure that certain groups are guaranteed an opportunity to be assessed for a job and are not excluded because of their name. This project has been evaluated and it is considered to be successful. Of all minority job applicants called for an interview 32% of them were offered the job. During the 1.5 years evaluation period, 5.1% of all new employees had a minority background, compared to 3.6% of all employees previously employed.

The same argument was used by the municipality of Nijmegen in the **Netherlands**. It applied a policy where applications would be made anonymous. However, they ended the policy because they found that just removing the name was not enough to successfully increase the percentage of people with an ethnic background. One could always see where someone's place of birth was or where they had received their education.

A similar and successful project was conducted in **Germany**. During a period from November 2010 until December 2011, the Federal Antidiscrimination Agency in Germany initiated a pilot project on Depersonalised Application Procedures. Five enterprises and three public employers took part in this first nationwide pilot project on depersonalised application procedures; 246 vacancies were filled, more than 8,550 female and male applicants submitted their depersonalised application documents. The Institute for the Study of Labour and the Unit for Cooperation between Science and the Working World of the European University Viadrina in Frankfurt an der Oder evaluated this project and found that applicants were invited for interview based on their qualifications, rather than on their gender or ethnic origin.

Moreover, compared to traditional application procedures, there were clear indicators showing that particularly women benefit from depersonalised application procedures. For example, younger women with professional experience found it difficult to change jobs because employers were concerned that they may wish to start a family (In Germany women get three years' leave per child).

¹⁸ MEDIDA ESTIMULO 2012, Order 45/2012, 13th February and MEDIDA ESTIMULO 2013, Order 106/2013, 14th March

The advantages of the depersonalised application process were also significant for applicants of migrant origin as it improved their chances of being invited to an interview.

The assessment of many HR managers participating in this pilot project was also positive. The lack of personal data in the application documents, such as name, gender, age and civil status, did not present a problem for the majority of the personnel managers and many found that the introduction of depersonalised application procedures had triggered a discussion about their current recruitment methods.

A survey among applicants who had filled in a standardised application form revealed that there was a clear approval for the concept of depersonalised application procedures. When being asked about their preference, the majority of the respondents preferred depersonalised application procedures.

From 2005 till 2007 **Denmark** aimed to increase the number of civil servants with an ethnic minority background to 4% of the workforce. In 2012 3.2% of the civil servants had an ethnic minority background. In 2007 there was also an agreement with local authorities to increase the number of their employees from an ethnic minority; each authority was allowed to set its own targets.

Since 2002, **Croatia's** Constitutional Law on National Minorities provides that members of national minorities are to be represented in the state administration, judiciary and local government. Data from the period of introducing this obligation are only available for the judiciary and public prosecution, where the proportion of the Serbian minority varied between 0% and 3.8%, whereas the proportion of other national minorities varied between 0.7% and 4.4%. A national action plan required reports to be made annually on the levels of representation achieved and in December 2013, 3.51% of those employed at state level were from national minorities (the target is 5.5%). Compared to 2012 the increase is minor, as on 31 December 2012 representation of national minorities' members in state administration was 3.38%.

Austria and **Croatia** have special training for migrants and ethnic minorities, respectively, to improve their professional qualifications. In **Slovenia** some positive action includes training/qualifications and public works programmes which are reserved among others for members of the Roma community.

In **Italy** a project was launched called NET-KARD, funded by the Fundamental Rights and Citizenship Programme of the European Union. Using an integrated approach, the main aim of NET-KARD is to provide resources to lawyers and jurists, police services, Roma associations and media professionals to prevent discrimination against the Roma, provide support for victims and to foster networking and exchange of working methods.

In 2013, meetings, reports and training courses were carried out, with particular emphasis on the media sector and social media.

Croatia offers subsidies for employers who hire employees with a Roma background.

In **Latvia** subsidies are also offered to unemployed people from under-represented groups such as Roma. Employers can receive a grant of 50 % of the minimum wage per employee (160 €). In 2014 only four people of Roma origin received this support. More needs to be done to improve Roma integration in the labour market in Latvia.

3.1.3 Disability

There's a wide range of measures for people with a disability. Quotas are widely accepted and applied in several countries: **Hungary, Belgium, Slovenia, France, Germany, Poland, Italy, Romania, Slovakia, Austria and Serbia**. In **Germany, Slovenia, Slovakia, Serbia, Romania, Austria** and **Poland** fines are applied if quotas are not met.

In **Poland**, where the employment rate of disabled people is less than 6% in the public sector, suitable disabled candidates must be employed. It was reported in 2013, however, that most governmental administration services do not apply the 6% threshold successfully. The overall employment rate of disabled people in government administration has increased by 0.26% since this amendment was introduced and is now at 2.4% (not even half of the threshold).

In **Romania**, if the quota is not met, the company has to pay a fine to the state.

In **Slovenia**, a fine is paid to a fund which is used to improve the inclusion of disabled people in the labour market.

In **France**, employers can fulfil their duty to comply with quotas by subcontracting with an organisation that employs only disabled people, welcoming disabled interns, or by paying a contribution to the organization which manages the fund for the inclusion of disabled people. If they do not fulfil their duty to employ disabled workers, the companies will be fined. If a firm employs at least 80% of people with a disability, it can be State-recognized as an "Entreprise Adaptée". This status allows them to receive a substantial State aid. Among other things, this aid is meant to compensate for any potential lack of productivity of its workers.

In **Belgium** 'quotas' (or rather 'target figures') for persons with a disability only exist in public services. They vary at different political levels and are not compulsory. However funding for certain accommodations or other promotional measures is only provided if

the public service is compliant with the foreseen quota. The target figure for Federal public authorities is 3%, as compared with 2.5% in the Walloon Region, 2% in the Brussels Region, 5% in the COCOF (Brussels) and 4.5% in Flanders. Federal public authorities that don't achieve the employment target of 3% are legally obliged to recruit from a specific list with candidates with an occupational disability, until the quota is reached. Applicants with a disability can choose to be on this list or not.

Estonia does not have quotas for persons with disabilities. However, the Unemployment Insurance Fund helps employers to adapt offices and/or equipment for the needs of the disabled. The Fund covers no less than 50% of the costs incurred for this purpose. In some cases the Fund can cover up to 100% of the costs. The Unemployment Insurance Fund also compensates expenses if a newly-hired disabled person needs the services of a support person on the job, up to 1000 work hours per annum. Furthermore, if the employer files an application to the Social Insurance Board, the state will pay part of the social tax for employees who are hired and who receive a pension for incapacity for work (except for recipients of national pensions).

A refund on the compulsory insurance paid by the employer is given to employers of disabled people in **Poland**, depending on their degree of disability: 100% for people with a considerable degree of disability, 60% for people with a moderate degree and 30% with a light degree of disability.

Slovakia also has a system where less social security premiums are paid for people with a disability.

“We are looking for talents to offer equal opportunities in the world of work” was the motto of a project launched in 2008 in **Italy**. Entitled "Diversity at work", the project was organised by the Italian equality body UNAR, Sodalitas, Synesis and the Adecco Foundation for equal opportunities. It drew the attention of hundreds of people from every corner of Italy and around the world, all of whom had the opportunity to apply for a job interview. This project was organised to create an opportunity for businesses to meet disabled people and foreign nationals, thus fostering a facilitated encounter between companies and persons that are often discriminated against in the world of work. The event brought media success, an increasing interest in the business world and was a very effective recruitment tool.

3.1.4 Age

In **Serbia** employers who hire employees over 45 or 50 are partially or completely released of their obligation to pay taxes for compulsory social insurance. There are also subsidies for employing young people. In addition, the National Employment Service

provides financial assistance for 3 months for an internship with an employer and 12 months salary should the employer hire this person.

Slovenia has a similar arrangement of subsidies for employing younger people. The age limit for this subsidy is higher for women than for men, thus suggesting that women have more difficulties in finding work.

France also has a system where a company will receive 2000 euro a year for each employee under 26 or over 57 years old. The scheme, implemented between 1997 and 2002, in favour of young workers seems to have been quite effective. It consisted of state aid for the employment of workers under 26 to accomplish “socially useful activities” in NGOs, schools, local communities, public departments or in the police. These employment contracts had to last at least 40 months (it could also be a permanent contract) and allowed many people to get their first work experience. Most of them were employed after their initial aided contract came to an end.

The **Netherlands** have recently (March 2013) adopted measures which encourage the recruitment of people between 18 and 27 years of age and of 55 years and over (including additional measures to encourage the employment of older unemployed people). Measures include financial compensation for the discrepancy between higher costs and supposedly lower productivity of older employees (2013-2014, Kamerstuk 29544, nr. 497).

Slovakia has positive action measures in the form of ensuring practical experience for graduates to promote the employment of people under the age of 26 registered at the Office of Labour, Social Affairs and Family for at least one month. The aim of this measure is to allow graduates to obtain professional skills and practical experience with the employer. The skills and experience obtained should relate to the graduate's achieved level of education in the relevant field of study or training. The Office of Labour, Social Affairs and Family provides graduates with a flat-rate allowance corresponding to 65% of the subsistence minimum, i.e. € 128.76.

In **Latvia** a measure was adopted to increase employment of persons over the age of 50. Employers receive a grant to the amount of 50 % of the state determined minimum monthly wage to cover the salary for the employee.

3.2. Access to goods and services

3.2.1 General

In the Rulebook of the city of Belgrade, **Serbia**, provisions are made to ensure that the cost of public transport and services are reduced for people with a disability and those over 65.

Slovakia has also introduced similar discounts for people with disabilities and for people above 70 years of age.

Romania has similar regulations which provide free urban transport and discounted train fares for retired people.

Parking spaces for disabled people are provided in **Hungary**.

Romania also has legislation providing free parking for people with a disability. 4% of the total number of parking spaces must be reserved for free parking for the vehicles of disabled people.

In **Slovakia**, parking spaces for the disabled are provided at a discount and free of charge in public parking places.

3.2.2 Education

In **Poland**, the courts rejected a regulation that stipulated that 50% of students that were admitted to the Medical University should be men. This regulation was adopted in order to prevent the feminization of the medical profession. The Constitutional court said that any derogation from the principle of equality is only permissible if it is aimed at strengthening social equality.

Allocation of special places for Roma candidates for admission to high school, vocational training and higher education is a special measure applied in **Romania**. **Hungary** also aims at helping Roma children to start and finish secondary school and to obtain professional qualifications. Hungary and Romania also assist teachers working with Roma children by giving them special teaching methods, tailored materials, linguistic training and skill/competency development. Furthermore, Romania has set up a network of school inspectors to discuss Roma education issues as well as a network of school mediators.

Roma children can have education in their own language in **Croatia** in pre-school as well as in elementary and high school.

In **Serbia**, the government made the recommendation that if Roma students pass an entrance exam, regardless of their ranking, they don't have to pay tuition fees. In addition the Ministry of Higher Education allocates 10% of all student loans and scholarships to students from vulnerable social groups.

3.2.3 Housing

10 % of student accommodation in **Serbia** is reserved for Roma students and for students with a disability.

In **Slovakia**, a total of 126.000 euros was provided by the Office of the Plenipotentiary for Roma Communities to promote their social and cultural needs in 2013. It is a self-help programme for the construction of houses for the Roma community. Funds for the construction of houses were obtained by three local authorities after approval by the Commission. The maximum grant for the construction of one house is 14.000 euros, and only activities for the purchase of materials and construction supervision will be supported. The local authority provides the land and funds for building materials. People of Roma origin, as future tenants, must build the houses themselves. The house is owned by the local authority and the tenant must abide by the duties of tenancy.

3.3 Elections¹⁹

Electoral lists in **Poland** must consist of at least 35% women and no less than 35% men. However, there is a lot of debate in Poland as to whether this provision has a sound legal basis.

In **Slovenia**, there are obligatory quotas for candidate lists for political parties, thus ensuring that women will be elected. Candidate lists must consist of 35% women in Parliamentary elections and 40% women in local and European Parliament elections. There is also the obligation for political parties to provide an action plan to create equal opportunities for women and to secure their fair representation.

Portugal also has legislation on quotas for elections. Any list of three or more candidates (for Parliament, for European Parliament and for Local Authorities) must ensure a minimum of 33% of each sex. Additionally, the candidates' lists should not have more than two persons of the same sex successively. If the lists are not reviewed and consequently corrected, the party is penalised with a reduction of public financing for their electoral campaigns.

In **Croatia**, there are special provisions for the representation of national minorities in representative and executive bodies at the local level, as well as in the Parliament, where national minorities have their own representatives, elected at Parliamentary elections.

The Law on Election of MP's in **Serbia** stipulates that every third person (candidate) on the list must be from the less-represented gender. Before this quota was introduced there were 56 women MPs (22.4%). After the change in electoral legislation in 2012,

¹⁹ Elections are not covered by the Equality Directives however have been included here as they are an interesting comparison of how positive action works in that area.

there were 82 women MPs (32.8 %), while the latest Parliamentary election saw 84 women (33.6%) elected to the Serbian Parliament.

In **Italy**, the Ministry for Equal Opportunities has launched some initiatives to increase the percentage of women in elected assemblies and political offices²⁰. Art. 3 of Act no. 90/04 provides that in the next two elections for the European Parliament, neither gender shall be represented by more than two thirds of the candidates.

The **French** Constitution was modified so that political parties shall run 50% of women candidates in every election. Any ballot list which does not respect the female/male alternation is declared inadmissible. For other elections, parties that do not submit 50% of women candidates are fined.

3.4 Other

Police in **Slovenia** receive training which includes law, sociology and psychology, combatting stereotypes, prejudices and unconscious cultural patterns. Additionally, the training includes trainers of Roma origin. A similar training is also available for judges, prosecutors, public officials, NGOs but on an ad hoc basis.

In **Great Britain**, the scope for taking positive action under previous equality legislation was narrow and the provisions were little used as it was not clear when positive action would be deemed to be justified in light of European case law, an issue that is also mentioned by other countries (Germany, Netherlands). Also there appeared to be general hostility to positive action in the domestic courts.

The Equality and Human Rights Commission publication 'Buying better outcomes' (March 2013) contains some good practice examples relating to the process of procuring goods and services. It points out that in procuring goods and services, the state could encourage the introduction of positive action measures by those who provide those services. Pre-qualification questionnaires regularly require potential contractors to supply equal opportunities policies or similar evidence of implementation, review and/or monitoring of the policy. Other requirements may include confirmation of appropriate equality training and monitoring. Invitations to tender may include requirements to comply with domestic equalities legislation or specify desired diversity outcomes of the contract or workforce requirements.

²⁰ The Ministry for Equal Opportunities, in cooperation with the university, has organised some training courses for women in certain Italian universities in order to facilitate their access to political assemblies and elective offices. In July 2004, approximately 5000 applications for the cited course at the Universities concerned were submitted, whilst the available posts were 1700 (100 for each University).

Chapter 4: Monitoring and Evaluation

4.1 Under-representation

Under-representation of persons with a certain protected characteristic in a specific field of life is one of the most widely used indicators of disadvantage, inequality and the need for positive action. Quantitative and qualitative data is required to justify positive action and to determine if a group is under-represented. Consequently, most international organisations responsible for equality and human rights advocate for more statistical data collection. Yet in the EU Directives, the collection of statistics is not explicitly required to support positive action and the collection of statistics poses difficulties in most European countries.

Material which can be used to establish under-representation are:

- statistics and census data (hard data),
- social science research, studies, surveys, analysis of discrimination cases (secondary material).

Statistical facts and secondary material can build knowledge useful in analysing and explaining the results of surveys and census data to show structural disadvantage and support the need for positive action. Establishing differences between groups and under-representation of a group is, however, only the first step.

The next step is to analyse the reason for the under-representation and investigate if it arises from a disadvantage associated with a protected characteristic. Under-representation is not automatically linked to disadvantage, e.g. the under-representation of men in caring-professions is not considered to be linked to any disadvantage. It is nevertheless the result of stereotypes that circumscribes male and female roles. Furthermore, even if there is no under-representation, there may be a need for positive action in order to combat stereotypes. These steps can be seen as starting-points and part of the cyclic effort of monitoring, evaluating and follow-up on the result of the use of positive action.

Regarding the discrimination ground of sex, most WG members report that hard data is readily available as sex is typically easy to determine and usually not controversial to collect and register (with the exception of inter-sex and transsexual people). Statistics are often easily available and comprehensive as the public and private sectors in many countries are required to report gender based statistics, e.g. on equal pay. There is also good access to secondary material on equality between women and men.

Nonetheless, however reliable and comprehensive the statistics and data are, they need analysis in order to draw conclusions regarding disadvantage and lack of equality. Unemployment and labour market statistics for example need to be matched with statistics regarding persons available for work and education to establish if there is under-representation of one sex.

To register and collect data on other protected grounds such as ethnicity, disability, religion, gender identity or sexual orientation raises potential obstacles from a legal, ethical and practical point of view. For example the right to personal data protection can be potentially interfered with and therefore it may be required to work only with anonymous disaggregated data and ensure that informed consent and other principles of data protection are respected.

Some countries are reporting that the members of under-represented groups themselves are reluctant to provide data or to consent to gathering them in the first place, as such activities are suspicious (i.e. counting the number of the members of the minorities)²¹. This makes the task of deciding if a group is under-represented or disadvantaged more complicated and demanding. One WG member reported that there is no experience of gathering data on these characteristics in that country. Another WG member reported that the equality body conducted a study mapping the workers' participation in the labour market on the basis of their ethnic background and that this monitoring was implemented following the advice of the privacy commission²². Some countries reported that certain groups (persons with disabilities, ethnic and linguistic minority groups) are targeted with positive action measures based on general observations and labour market reports of their difficulties²³. Since research, studies and surveys show that persons with a disability are under-represented both in education and employment, quotas have been introduced by several states. These require duty bearers (employers, education institutions) to take on a certain percentage of persons with a disability when they reach a certain number of employees. For example a requirement to employ one person with a disability for every 25 employees or 5 % of disabled employees where there are at least 20 employees.

In one country there is under-represented if one sex represents less than 50 %²⁴. In other countries the level is 40%²⁵. One WG member reports that there are minimum levels of representation required for gender, age, disability and ethnicity in relation to general employment rates for professions, employment sectors and sub regions²⁶. Another country has local government targets on ethnic minorities evaluated by the local government board²⁷.

In some countries the collection of statistics and data is centralised and courts can turn to that material if the existence of discrimination and inequalities are questioned²⁸. In one country there is an obligation for companies to publish statistics on female and male representation in management and advisory boards on their websites²⁹.

²¹ e.g. Austria, France, Slovenia, Sweden

²² Belgium

²³ e.g. Germany and Italy

²⁴ Germany

²⁵ e.g. Sweden, France

²⁶ Belgium

²⁷ Denmark

²⁸ Belgium, Sweden, Latvia, Germany

²⁹ Poland

Collecting and processing data on grounds of sexual orientation, religious belief and transgender identity or expression is perceived to be even more sensitive and restricted than regarding ethnicity or disability. WG members have reported that it is not happening in their countries³⁰. One WG member has reported that obtaining and keeping statistics based on race, origin and religion is forbidden.³¹

The build-up of knowledge by social science research, surveys and census data, as well as the development of indicators are necessary for discovering and detecting under-representation and for establishing disadvantage.

One WG member reports that the equality body prepared a methodological guide targeted at employers in collaboration with the national data protection authority in that country. The idea is that collecting and measuring data is necessary in fighting discrimination. The aim of the guide is to explain to employers how to establish indicators for reliable measurement of discrimination to allow them to promote equality in compliance with the law³².

4.2 Monitoring

One approach is to see monitoring as part of a cyclic effort in a framework. The starting point is analysing whether there is under-representation, if it is linked to disadvantage and/or discriminatory structures. If necessary, positive action measures are put in place and their effects are regularly measured. This assessment continues as long as there is justification for using positive action.

Depending on the positive action in question, the monitoring is differently designed and carried out by different organisations. There is monitoring by

- state/government authorities and agencies
- independent organizations (equality bodies, NGOs, trade unions)
- public employers, schools and universities
- contract partners

WG members report that monitoring and adequate follow up on results of the use of positive action is not carried out to a sufficient extent. One problem is the absence of a clear requirement/obligation to monitor and follow up, another is inadequate resources. One WG member reports that 40 % of companies in that country do not respect quotas for targeting positive action to disabled persons, with no consequences³³. In another country duty bearers neglecting requirements for quotas simply prefer to pay the fine. The fines go into a special fund for promoting inclusion of people with disabilities³⁴.

³⁰ e.g. Austria, Belgium, Sweden

³¹ France

³² (France)

http://www.defenseurdesdroits.fr/sites/default/files/upload/promotion_de_%20legalite/progress/fiches/ldd_cnll_interactif.pdf

³³ France

³⁴ Slovenia

If anti-discrimination and positive action clauses are used in procurement contracts, the monitoring is usually a task for the contract partner as part of fulfilment of the contract. The clauses often require the contractor to supply policies and evidence of fulfilment and review of policies. The common perception is, however, that contracts are rarely cancelled on the ground that the positive action clauses were not respected.

Depending on how a positive action is construed, it can be more or less difficult to monitor and follow up results. Quotas are the easiest form of positive action to monitor. Where positive action measures are less clear, for example plans for equal rights and opportunities, the monitoring can take the form of a duty to report. One WG member reported that monitoring of positive action deriving from national plans are ensured through pre-established parameters set out in the plan³⁵. In countries where mandatory positive action measures are required by law, compliance is monitored by a state agency or an appointed equality body³⁶. In one country the equality body is working on a monitoring system to monitor the UN Convention on the rights of persons with disabilities³⁷. Some countries mention that research is one way of indirect monitoring and evaluates the effectiveness of the use of positive action.³⁸

Positive action in the form of preferential treatment, i.e. choosing a candidate of an under-represented group over another candidate, can ultimately be monitored by the courts at the initiative of the disadvantaged individual. The courts can scrutinise whether the preferential treatment was exercised in accordance with national and EU law. Some WG members report that preferential treatment is only exercised if prescribed by law and almost exclusively on the ground of gender³⁹.

The WG's discussions suggest that:

- mandatory, systematic and cyclic monitoring and follow up on results is required,
- adequate resources need to be allocated to equality bodies and other monitoring bodies,
- reports from monitoring and follow-up need to be published,
- the fulfilment by duty bearers (state agencies, public employers, schools and organisations entrusted with public commitments, etc.) of requirements concerning duties such as surveys/mapping, action plans and reporting needs to be supervised,
- an EU-wide legal incentive for a mandatory monitoring system could be introduced.

³⁵ Portugal

³⁶ e.g. Sweden

³⁷ Latvia

³⁸ Malta

³⁹ e.g. Austria, Belgium, Sweden

Chapter 5: Promoting Positive Action – the role of Equality Bodies

It is generally acknowledged that the national systems of promotion and protection of human rights – within which equality and non-discrimination are key – are characterised by

- knowledge,
- capacity (sometimes commitment),
- and implementation gaps.

On the other hand, it is generally acknowledged that the EU and the acceding and candidate countries aim at playing a pivotal role in advancing human rights worldwide⁴⁰. Within this framework, relevant international binding instruments (i.e. CERD, CEDAW, CRPD), as ratified by most Member States, introduce temporary measures and/or positive actions. Therefore, public authorities should be required to make active, targeted and systematic efforts to promote equality on all discrimination grounds, in all sectors of society⁴¹. To this end, States should rely on the concept of obligatory positive action to promote (substantive) equality, in line with relevant international instruments.

Indeed, positive action can bridge the above gaps, though challenges remain in every country, especially due to a lack of knowledge and misperceptions. More specifically, a general lack of awareness and understanding of what positive action⁴² and its objectives are should be acknowledged. Lack of information should also be mentioned with regard to how the impact of positive action is measured in practice.

In times of economic crisis, it is also more difficult to persuade people that positive action is not reverse discrimination. Positive action measures should not be perceived as controversial tools or, worse, considered as “special rights for minorities”.

Therefore, it seems essential to clearly define the concept of positive action due to the many different approaches among Member States. At present, the following different approaches to positive action, as recognized in anti-discrimination law,⁴³ can be distinguished as follows:

- Formal approach: Great Britain may be considered an example of formal approach as reinforced by “hostile” judicial interpretation prior to the adoption of the Equality Act 2010. Although important changes have been

⁴⁰See EEAS Human Rights Plan of Action 2012, available at http://eeas.europa.eu/human_rights/index_en.htm. Within this framework, equality bodies (and Equinet) can play a major role to close those gaps.

⁴¹ Norway

⁴² **Striking Differences** - The legal boundaries of positive action differ within Member States. In some Member States, positive action is only allowed for special protected grounds. In Sweden, there is a duty to promote positive action in the field of employment in relation to sex, ethnic origin and religion. Preferential treatment (in the meaning of choosing one candidate of under-represented sex before a candidate of the other sex) is allowed only on the ground of gender/sex, not on other grounds. In Denmark positive action to promote equality for men in the employment sector is restricted to caring for or educating children.

⁴³ Fredman, Sandra. *Discrimination Law*. 2nd edition, 2013, Oxford, p. 237.

produced, the legislative framework preserves the commitment to formal equality;

- Informal approach: Introducing some forms of positive action without changing the legal background;
- Derogation approach: Positive action in EU law is based on the equality of opportunity principle. It is one of the means by which Member States can achieve equality in practice (substantive equality). However, in the Directives, positive actions have been formulated as derogation from the existing principle of equal treatment. Each derogation is strictly construed and shall be interpreted narrowly. This derogation approach is visible in the equality legislation of many countries⁴⁴;
- Positive actions as an aspect of equality: This can be seen in international human rights conventions and also in the fields which are not covered by EU law (elections and political representation, quotas, use of minority languages, etc.).

5.1 Implementation

Given that EU Legislation does not prescribe any specific form of positive actions, Member States have developed a number of different measures, including quotas, for the recruitment of persons with disabilities, with fines imposed for failure to reach the target. Various States have introduced provisions requiring that the under-represented sex be selected in tie break situations in recruitment. Specific duties on public authorities also refer to national minorities and Roma people and some States have duties in place to promote equality on some or all protected grounds.

The WG discussions show that it could also be useful to introduce positive obligations for public authorities to eliminate discrimination and advance equality relating to specific protected characteristics. Such public sector equality duties⁴⁵ would oblige public authorities to consider whether positive action is required to remove disadvantages and meet the needs of or address under-representation in public life of people who share the protected characteristics. Such a duty could potentially provide a driver for public authorities to use positive action measures when procuring goods and services from the private sector.

Therefore, public Authorities would be required to make active, targeted and systematic efforts to promote equality on all discrimination grounds.

5.2 Ways Forward

Complementing their central task of combatting discrimination, equality bodies also have the potential to contribute to advancing equality by improving the acceptance and

⁴⁴ Austria, Croatia, Denmark, Finland, Germany, Hungary, Malta, Poland, Serbia, the Netherlands

⁴⁵ See for example in the United Kingdom

take up of positive action at the national level. The experience of equality bodies suggests some clear ways for their engagement in this field:

- The role of the equality bodies can be to **promote and inform** all relevant stakeholders, including companies/work councils/trade unions in a more comprehensive manner, about positive action (To date, except for women and persons with disabilities there is less awareness about the fact that positive action can also be implemented for other under-represented groups). Equality bodies could promote and conduct **awareness-raising** campaigns, targeting companies and citizens, among others, to tackle the prejudice against positive action while promoting awareness of human rights
- Equality bodies could be involved in **research activities** to map the current situation of disadvantaged people with regard to the different fields in which positive action can be applied, e.g. employment, education, housing, healthcare, etc. relating to these different grounds.
- Equality bodies could **formulate specific recommendations** to Member States for the use of positive action, including also in their public procurement contracts. More generally, equality bodies can improve the use and foster the taking up of positive action through educational activities and by providing results of research to the governmental bodies and the other institutions.
- In some cases **sanctions and fines** should also be considered and applied to ensure the effectiveness of positive action measures. However, the experience of some equality bodies suggests that in certain cases, collaborating with duty bearers and using informal means of persuasion can be more effective than sanctions.
- To avoid positive action measures being used incorrectly to justify inequality, **strict criteria** are necessary and equality bodies can play an important role in developing these criteria and definitions.
- Equality bodies can play an important role in **monitoring** the legality and implementation of positive action measures. Data-collection, an appropriate process, timetable and indicators are essential for this monitoring work.
- In the course of their work, when assessing legality and legitimacy of positive action, equality bodies should make a **greater use of different international legal sources**, such as international conventions (i.e. CERD, CEDAW, CRPD);
- **Gathering and communicating good practices, ensuring easy access to qualified advice, and evaluating and analysing the impact** of positive actions are other key roles for equality bodies. Good practice examples can be helpful to improve the use of positive actions. Equality bodies can promote and disseminate these good practice examples also by giving quality labels for enterprises. Another method can be public competitions where the most successful enterprise gets a best-practice award.

- In evaluating positive action-related practices, their potential as good/best practices can be assessed and they can be **shared with other equality bodies through Equinet**.
- There is the specific need to **transfer the experience of positive action in the public sector to the private sector and vice-versa**, for instance in relation to gender-balance in management positions or members of the supervisory board;
- Equality bodies could, on a permanent basis, **foster dialogue** among central and local authorities to enable public and private entities to adopt policies, including positive action-related measures⁴⁶.
- Equality bodies could **contribute to broadening the scope** and application of positive action to grounds where positive action measures are currently rare and untested.

In conclusion, the acceptance and take up of positive action are two activities that shall go hand-in-hand. To this end, equality bodies should raise awareness of relevant international standards, while providing advice and support for the implementation of relevant positive action by Member States as well as by all the other relevant key stakeholders.

⁴⁶ See Belgium Interfederal Centre for Equal Opportunities Memorandum for the Election 2014, www.diversite.be

Chapter 6: The Northern Ireland Experience of Positive Action Measures in the Area of Religious and/or Political Discrimination

6.1 Background

Northern Ireland is one of the four countries of the United Kingdom. Issues of inequality arising from religious and/or political discrimination between Roman Catholics and Protestants led to the introduction of the first Fair Employment Act in 1976. This legislation created the Fair Employment Agency and provided the Agency with extensive investigative powers of private and public sector employers and also provided for a Declaration whereby employers could publicly state their commitment to equality. This legislation rejected the option of positive discrimination in the form of quotas or fixed ratios of Protestants and Roman Catholics in workplaces.

Following a review of the effectiveness of the 1976 legislation, strengthened legislation was introduced in 1989. The new Fair Employment (NI) Act 1989 was characterised by adding to the requirement to avoid unlawful discrimination and additional duty on employers, in both the private and public sector, to **actively practice equality**. It was largely based on a system developed in Canada in the 1980s which provided for monitoring of workforces and allowed for **affirmative action**.

There were three key elements to employers' new duties:

6.1.1 Compulsory Registration and Religious Monitoring By Employers

Each employer with eleven or more employees is required to collect and retain data on the religion and sex of each employee and job applicant and to send to the equality body a return setting out the number of Protestant and Roman Catholic employees and employees whose community background cannot be determined in each occupational group. More than 70% of all employees in Northern Ireland were brought within these monitoring provisions.

6.1.2 Employer Triennial Reviews

Each employer is required to carry out a review of the composition of their workforce and their employment practices for the purpose of determining if members of the Protestant and Roman Catholic communities are enjoying and are likely to continue to enjoy "**fair participation**" in the workplace. Fair participation is not defined by the legislation. However, the equality body interprets the concept to mean that fair participation will be present in a concern when the religious composition of each workplace reflects that of persons available for work in the catchment area. Each employer is required to carry out this review at least once every three years.

6.1.3 Employers must decide on affirmative action

Where fair participation does not exist or is not likely to continue to exist, employers have a duty to introduce **affirmative action, including the use of goals and timetables** where appropriate. Affirmative action is defined as action designed to ensure fair participation in employment by means including,

- the adoption of practices encouraging such participation;
- the modification or abandonment of practices that had or may have the effect of restricting or discouraging such participation.

A major tool available to the equality body under the legislation is the power to establish agreements with employers to improve the representation of an under-represented group. The equality body considers an employer's Triennial Review to determine if an agreement is necessary.

In addition, the equality body has significant powers to conduct a formal investigation into any employer and does not have to have a belief that the employer was engaged in discrimination.

*6.2 Affirmative Action/Positive Action*⁴⁷

The Equality Commission for Northern Ireland (ECNI) has produced a Guide to the Law and Good Practice for Employers on [Outreach Positive Action](#)⁴⁸.

Outreach positive action involves reaching out to specific under-represented or disadvantaged groups of people. Through such outreach methods, employers may be able to increase the diversity of their workforce and promote equality of opportunity in employment for a wider group of people.

6.3 Things To Do Before Taking Outreach Positive Action

Positive Action is more likely to be successful if it is built on a **firm foundation of good employment equality practices**. ECNI encourages all employers to adopt good practice employment policies and practices *prior* to engaging in outreach positive action. Examples of good practices include,

- having and implementing an equal opportunities policy and ensuring that the policy is effectively communicated throughout the workforce;
- promoting a good and harmonious working environment;

⁴⁷The terms positive action and affirmative action are often used in Equality Commission publications and training materials. However for practical purposes they are essentially the same thing and in the rest of this paper the term positive action alone will be used to refer to both.

⁴⁸ <http://www.equalityni.org/Publications/Employers-Service-Providers/Employment-issues/Positive-action-employer-guide?ID=463>

- dealing effectively with discrimination and harassment complaints;
- operating systematic, fair and objective recruitment and selection procedures;
- promoting flexible working.

Such good practices will often remove the barriers that prevent some groups from enjoying full equality.

Outreach positive action is more likely to be successful if it is soundly based on the findings of **equal opportunities monitoring and reviews**. Monitoring and Reviews can help employers to:

- Identify the particular groups of people who might be in need of assistance from outreach positive action.
- Identify which of the lawful outreach positive action measures would be most suitable to use.
- Provide the evidential basis for justifying the taking of lawful outreach positive action and can thus offer legal protection to employers.

After conducting an equal opportunities review, an employer should develop a written **Employment Equality Plan**. This plan should describe the actions that the employer proposes to take to address the issues identified in the review. This plan should assist employers to set priorities and focus their attentions, resources and efforts. Employers are encouraged to set goals and timetables which are aspirational, reasonably achievable goals that will help them to measure the success or otherwise of the plan. These are *not* legally binding targets or quotas that must be achieved. ECNI has developed a Model Employment Equality Plan and encourages employers to monitor the successfulness of their plan.

Employers are also encouraged to review their **redundancy selection policy**. If the outreach positive action is successful it should eventually lead to an increase in the numbers of employees in the workforce who are from an under-represented or disadvantaged community or group. As these new employees will on average have relatively shorter lengths-of-service than other employees, they may suffer a further disadvantage if length-of-service is used as a redundancy selection criterion.

6.4 Understanding Lawful Positive Action

6.4.1 Encouraging People to Apply for Jobs and training opportunities

Employers may be permitted to take outreach positive action steps to encourage members of particular under-represented or disadvantaged groups to apply for jobs or training vacancies or to encourage them to consider taking up work in a particular occupation or profession. Employers are only permitted to encourage members of

targeted groups to apply to work for them and are *not permitted* to reserve actual jobs for members of the groups.

Encouraging people to apply for jobs and training opportunities can be done when advertising job and training vacancies and/or by developing links with influential individuals, community groups, schools, job clubs, voluntary organisations and other agencies associated with particular groups. Employers may also consider sponsoring community, sporting and youth events associated with particular groups and creating networks with other employers or vocation or professional organisations for the purpose of taking joint positive action.

6.4.2 Offering Training Opportunities and Facilities

Employers may be permitted to provide access to facilities for training *exclusively* to members of particular under-represented or disadvantaged groups. This form of outreach positive action is especially appropriate where there is a group of people that is under-represented in the workforce and where the reason for this under-representation is largely because they are more likely than other groups to lack the qualifications or experience to do the work in question. Employers are only permitted to provide training opportunities and are *not permitted to reserve actual jobs* for the trainees. The trainees have to apply for the actual jobs in the same way as other candidates and undergo the same selection process.

6.4.3 Reserving Job Vacancies for Persons who are Unemployed

Employers are permitted by the religious/political discrimination law and race discrimination law to reserve a quota of jobs for people who are unemployed or who have been unemployed for a specified period of time. To promote the use of this positive action measure and to protect employers who use it from potential claims of religious, political or racial discrimination, the law provides employers with an absolute defence to claims of religious, political or racial discrimination. ECNI has developed Good Practice recommendations for employers who may wish to use this outreach positive action measure to enable them to set goals and timetables, as well as plan to take action that is proportionate and time-bound. For example, employers are encouraged to set a time-limit for the operation of the measure and only reserve a percentage of the job vacancies for members of the unemployed group. Employers are advised to review the operation of the measure and assess its effectiveness. Employers who use this measure could be vulnerable to complaints of *indirect* sex, age and sexual orientation discrimination and therefore it is essential that employers carefully consider the use of this outreach positive action measure.

6.5 Impact of Positive Action Measures in Northern Ireland

There has been a significant body of research conducted into the effectiveness of

enforcing positive action in Northern Ireland employment⁴⁹. The research identified the agreements entered into by the equality body and employers as a key aspect of the positive action programme and that these agreements were successful⁵⁰.

The statistical analysis concluded that there were significant effects on the growth of Roman Catholic and Protestant employment and that the benefits were not restricted to lower-level employment but were associated with improvements in redressing under-representation at the professional and managerial level as well. The research identified the key mechanism the equality body used to deliver favourable positive action outcomes included:

- intensive negotiations with employers
- the appointment of a designated employee to ensure compliance with Commission guidelines
- the use of formal advertising and recruitment methods rather than word-of-mouth recruitment
- targeted advertising of vacancies to encourage applications from the under-represented group
- the introduction of criteria-based redundancy policies.

The research identified that a broader approach to achieving equality in employment, as adopted in Northern Ireland, was more successful than an approach which focused solely on discrimination at the point of application for a job. There is extensive evidence that the positive action agreements have played an important and successful role in revising the profile of employers in Northern Ireland. Further research carried out by the Nuffield Foundation concluded that the monitoring and review provisions and the positive action agreements had been successful in that, where employers had positive action agreements, there has been a shift towards employment equality and the overall composition of the workforce is now reflective of those available for work.

⁴⁹Enforcing Affirmative Action in Northern Ireland Employment: Comparing the effects of Agency negotiation, NGO Activism and Litigation by Raya Muttarak, Anthony Heath, Heather Hamill and Christopher McCrudden.

⁵⁰See Background information Section C page 1 of this paper.

Conclusions

This report shows that many positive action measures are being taken in Europe to improve the position of certain disadvantaged groups. Most positive action measures are taken for women, people with disabilities and ethnic minorities and they typically relate to the field of employment.

Despite the wealth of positive action measures implemented across the EU, the impact of these steps are not generally measured or evaluated. This is despite the fact that evaluation is shown to be a useful and indispensable tool for effective positive action.

Quotas for people with disabilities are widely disregarded with ineffective sanctions and quotas for women seem to have only limited success (except in relation to elections, an area not covered by EU law). Quotas can sometimes bring a certain stigma where the benefits of diversity are not fully explained or understood. It is clear that positive action measures alone are not sufficient to tackle inequality; they must be part and parcel of a scheme of equality measures in order to guarantee long term success.

It is also noteworthy that none of the country reports cited examples of positive action measures on grounds of religion or belief or sexual orientation, although provision is made for such action in the context of employment in the General Framework Directive.

Further, dual discrimination is not currently covered by the Equality Directives and there were very few reports of measures targeted at people who experienced particular disadvantage because they have two or more protected characteristics (e.g. the example of young women in subsidised employment). Research has shown that those who have a combination of protected characteristics experience the most severe disadvantage in society and who perhaps are most in need of positive action. This is an area which would benefit from future equality legislation to encourage the development of targeted positive action measures aimed at tackling multiple disadvantage.

Based on the experience of equality bodies, there are several factors which contribute to the success of positive action measures:

- The rules of positive action are often seen as too complex and unclear. Clarifying these rules and providing guidance is an effective way to promote the take up of positive action.
- Positive actions need to be built on a foundation of good employment equality policies and practice. It is not a replacement, but rather a complement, to complex equality policies.
- There needs to be clear evidence of disadvantage available which demonstrates the need for action provided through data, monitoring and reviews.
- Evaluation of the project is necessary to demonstrate the impact it has had and to correct any shortcomings.

Positive Action Measures. The Experience of Equality Bodies

- The state and its authorities should play a leading role in implementing positive action measures. Obligations imposed by the state to take action can be effective, including placing duties on public authorities to promote equality and including the use of anti-discrimination and positive action clauses in public procurement contracts.

EQUINET MEMBER EQUALITY BODIES

ALBANIA

Commissioner for the Protection from Discrimination
www.kmd.al

AUSTRIA

Ombud for Equal Treatment
www.gleichbehandlungsanwaltschaft.at

BELGIUM

Interfederal Centre for Equal Opportunities
www.diversite.be and www.diversiteit.be

BELGIUM

Institute for the Equality of Women and Men
<http://igvm-iefh.belgium.be>

BULGARIA

Commission for Protection against Discrimination
www.kzd-nondiscrimination.com

CROATIA

Office of the Ombudsman
www.ombudsman.hr

CROATIA

Ombudsperson for Gender Equality
www.prs.hr

CYPRUS

Office of the Commissioner for Administration (Ombudsman)
www.ombudsman.gov.cy

CZECH REPUBLIC

Public Defender of Rights
www.ochrance.cz

DENMARK

Board of Equal Treatment
www.ast.dk

DENMARK

Danish Institute for Human Rights
www.humanrights.dk

ESTONIA

Gender Equality and Equal Treatment Commissioner
www.svv.ee

FINLAND

Ombudsman for Equality
www.tasa-arvo.fi

FINLAND

Non-Discrimination Ombudsman
www.ofm.fi

FRANCE

Defender of Rights
www.defenseurdesdroits.fr

GERMANY

Federal Anti-Discrimination Agency
www.antidiskriminierungsstelle.de

GREECE

Greek Ombudsman
www.synigoros.gr

HUNGARY

Equal Treatment Authority
www.egyenlobanasmod.hu

HUNGARY

Office of the Commissioner for Fundamental Rights
www.ajbh.hu

IRELAND

Irish Human Rights and Equality Commission
www.equality.ie

ITALY

National Office against Racial Discrimination – UNAR
www.unar.it

ITALY

National Equality Council
www.lavoro.gov.it/ConsiglieraNazionale/

LATVIA

Office of the Ombudsman
www.tiesibsargs.lv

LITHUANIA

Office of the Equal Opportunities Ombudsperson
www.lygybe.lt

LUXEMBURG

Centre for Equal Treatment
www.cet.lu

(FYRO) MACEDONIA

Commission for the Protection against Discrimination
www.kzd.mk/mk/

MALTA

National Commission for the Promotion of Equality
www.equality.gov.mt

MALTA

National Commission for Persons with Disability
www.knpd.org

NETHERLANDS

Netherlands Institute for Human Rights
www.mensenrechten.nl

NORWAY

Equality and Anti-Discrimination Ombud
www.ldo.no

POLAND

Human Rights Defender
www.rpo.gov.pl

PORTUGAL

Commission for Citizenship and Gender Equality
www.cig.gov.pt

PORTUGAL

Commission for Equality in Labour and Employment
www.cite.gov.pt

PORTUGAL

High Commission for Migration
www.acidi.gov.pt

ROMANIA

National Council for Combating Discrimination
www.cncd.org.ro

SERBIA

Commissioner for Protection of Equality
www.ravnopravnost.gov.rs

SLOVAKIA

National Centre for Human Rights
www.snsip.sk

SLOVENIA

Advocate of the Principle of Equality
www.zagovornik.net

SPAIN

Council for the Elimination of Ethnic or Racial Discrimination
www.igualdadynodiscriminacion.msssi.es/

SWEDEN

Equality Ombudsman
www.do.se

UNITED KINGDOM - GREAT BRITAIN

Equality and Human Rights Commission
www.equalityhumanrights.com

UNITED KINGDOM - NORTHERN IRELAND

Equality Commission for Northern Ireland
www.equalityni.org



Co-funded by the PROGRESS Programme of the European Union

ISBN 978-92-95067-81-3

© Equinet 2014

www.equineteurope.org

facebook.com/EquinetEurope

[@eqineteurope](https://twitter.com/eqineteurope)



 Equinet
European network
of equality bodies