

EQUINET LEGAL TRAINING POSITIVE ACTION MEASURES

SUMMARY

16 - 17 October 2014, Belgrade, Serbia

Equinet warmly thanks the Commissioner for Protection of Equality of Serbia for having co-hosted the training event, as well as all the speakers and participants for having contributed to the success of this event.

BACKGROUND INFORMATION ON THE TRAINING EVENT

The Equinet Legal Training analysed the legal questions relating to the application of positive action measures on the basis of EU Equal Treatment Directives by discussing concrete cases and policies on different grounds of discrimination. This Equinet training strived to provide staff members of equality bodies with a space for peer learning and for discussing key challenges as well as good practices in the field.

It was expected that participants would:

- Learn about the legal concept of positive action measures.
- Familiarise with the practice relating to positive action measures in different European and non-European countries.
- Share their knowledge and experience both formally during the sessions and informally during the breaks.
- Learn about good practice initiatives and projects by other equality bodies.
- Return to their jobs better equipped to judge the legality and effectiveness of positive action measures.
- Provide more informed recommendations to decision-makers.
- Upon their return inform their colleagues about the lessons learned at the training.

This Equinet training was dedicated to an audience of approximately 50 staff members of equality bodies with responsibilities in dealing with case work and policies relating to positive action measures. The training programme was designed primarily for staff members with a legal or policy background.

The following key topics have been addressed at the training:

- Legal framework, case law and preconditions: what is and what isn't positive action?
- Making the case for the use of positive action and improving the take up of such measures
- Good practice examples: positive action measures that work
- Ensuring and evaluating the effectiveness of positive action

POSITIVE ACTION MEASURES AND THE EXPERIENCE OF EQUALITY BODIES

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 on Equality Law in Practice](#) conducted an analysis of and issued a report on the question of positive action on the basis of the EU Equal Treatment Directives. The 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. 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.

OPENING ADDRESS

Evelyn Collins, Chair of Equinet and Chief Executive of the Equality Commission for Northern Ireland, opened the training event by welcoming all the participants and speakers, and thanking the co-hosting Commissioner for Protection of Equality of Serbia. She underlined the importance of this training for Equinet and the work of equality bodies: while at the European level and in most countries the legal concept of positive action is a topic that gets relatively little attention and is not often discussed, there is a widespread consensus that formal equal treatment will not suffice to bring about a more equal society and we need more proactive measures and support to disadvantaged groups. Evelyn Collins referred to the relevant work of the Equinet Working Group on Equality Law in Practice and welcomed their report on [Positive Action Measures: The Experience of Equality Bodies](#).

INTRODUCING EQUINET'S WORK ON POSITIVE ACTION

Tamás Kádár, Senior Policy Officer at Equinet, gave a short overview of the work of the Equinet Working Group on Equality Law in Practice. The Working Group is a permanent platform for legal staff of equality bodies to exchange experience, share expertise and work to improve the level of legal protection from discrimination across the EU. During the working group meetings held in 2013-14, members of equality bodies analysed the legal provisions and case law addressing positive action at European and national level, attempted to find a common definition distinguishing it from other similar concepts, tried to identify good practices for data collection, monitoring and evaluating the effectiveness of good practice measures, and discussed what role could equality bodies play in making positive action measures more widely used, accepted and effective. The results of these discussions and analysis are presented in the Equinet Report *Positive Action Measures: The Experience of Equality Bodies*. This Report summarises 24 country reports from Equality Bodies on the implementation of positive action measures across Europe and it touches upon the following topics:

1. Legal framework: international and European legislation and CJEU case law
2. Distinguishing positive action from other provisions (e.g. reasonable accommodation and exceptions to the prohibition of discrimination)
3. Examples of positive action measures
4. Monitoring and data collection
5. Promoting positive action: improving the acceptance and take up of such measures
6. Case study of the use of positive action measures addressing religious and political discrimination in Northern Ireland

Key conclusions:

- Most positive action measures are taken for women

- 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
- The rules of positive action are often seen as too complex and unclear
- 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
- The state and its authorities should play a leading role in implementing positive action measures
- Positive Action measures need to be part of complex equality policies

SESSION 1 – POSITIVE ACTION IN EUROPE AND IN THE WORLD

The first session of the training was dedicated to a comparative analysis of positive or affirmative action in different countries and legal systems, including its objectives, its applications, its risks, its history and its future.

Ms. Uduak Archibong, professor at the University of Bradford, provided an overview of relevant international perspectives on positive action measures. Ms. Uduak Archibong presented the working definition of positive action and what role positive action measures play in preventing or remedying discrimination. Ms. Uduak Archibong underlined that there is no common understanding on the concept of positive action, which is often defined by inconsistent terminologies and reflects the particular context and politics of a country. Ms. Uduak Archibong pointed to the importance of clear guidelines on the nature and purpose of positive action measures. Her presentation also listed key barriers to positive action, including that there is a lack of resources and continued support, that there is an inconsistent application of legislative framework and difference among countries in implementing sanctions, and that there is a lack of awareness of the benefits of positive action. On the other hand, factors which may support the application of positive action measures include individual commitment, leadership and senior management buy-in, involvement of the target groups, and support of the wider society. Ms. Uduak Archibong gave an overview of key differences and good practices around the world in using positive action. In this context, it is important to highlight that there is confusion about the scope of positive action measures and overlap with other complementary measures, that there are limited examples of positive action on the grounds of religion and gender identity, and that there is more focus on employment rather than service delivery and on specific groups reflecting the particular context or politics of the country. Ms. Uduak Archibong concluded her presentation by pointing to some recommendations for law and policy development: there should be a clear EU level guidance on the meaning of positive action; member states should revise national legislation where this prohibits or restricts the application of positive action; adequate funding should be provided through national government or EU funds; minimum operating standards for the application of positive action should be developed.

Ms. Peggy Mastroianni, from the U.S. Equal Employment Opportunity Commission, presented the affirmative action experience in the United States. Ms. Peggy Mastroianni explained the reasons that have been articulated in the U.S. to justify race-based affirmative action. She pointed out that affirmative action was and is meant to make amends for the terrible history of blacks in America, to combat today's subtle forms of discrimination and, most relevant nowadays, to enrich the institutions and organisations that have historically been 'all-white'. Ms. Peggy Mastroianni

continued her presentation by outlining the history of affirmative action in the U.S, including the stance of the Supreme Court in affirmative action cases. In her closing, Ms. Peggy Mastroianni underlined the current affirmative action landscape in the U.S. In this context, she highlighted that affirmative action is only permitted to redress specific, proven discrimination, or to redress a manifest imbalance in a traditionally segregated job category, or, in higher education, to advance diversity. Furthermore, affirmative action cannot result in an absolute bar to the selection of nonminorities and it must be a temporary measure. Ms. Peggy Mastroianni mentioned that at the heart of affirmative action there is a debate around meritocracy and the role of individual merit. People who support affirmative action believe that luck, support systems (legal and social), family connections, etc. also play a part in addition to individual merit - which is still central, but cannot be isolated; and when we have a minority that has been historically discriminated against in such a grievous way, we do have to ask ourselves if long term reparation measures aren't a necessary solution.

SESSION 2 – CHALLENGES OF APPLYING POSITIVE ACTION

The second session focused on the key legal and practical challenges of positive action.

Mr. Goran Selanec, Deputy Ombudsperson for Gender Equality of Croatia, provided an overview of the legality of positive action measures. Mr. Goran Selanec presented the notion and different types of positive action, as well as the conflicting normative background. Mr. Goran Selanec then analysed the development of positive action in the European legal framework. In this context, he recalled the constitutional foundations and the CJEU established framework (C-450/93 «Kalanke» (1995); C-409/95 «Marschall» (1997); C-158/97 «Badeck» (2000); C-407/98 «Abrahamsson» (2000); C-476/99 «Lommers» (2002)). Importantly, the EU case law on positive action is limited to gender. Mr. Goran Selanec pointed out that since *Badeck* the Court looks on any model that combines professional credentials with some list of indirectly favourable criteria. Hence, it is reasonable to assume that the Court would support a model requiring only “sufficient qualifications” supported by some list of indirectly favorable criteria. However, the real question implicit in the *Abrahamsson* reasoning is whether the Court was suggesting that it would allow a preference-model requiring only “sufficient qualifications” if there are clear indicators of concealed discrimination of women, under the condition that there is a saving clause. Mr. Goran Selanec argued that, if read together, *Abrahamsson* and *Lommers* are capable of providing strong support to the *Badeck*-based argument that the Court did not develop strict rule-like doctrine of positive action but rather a very context sensitive approach based on extensive balancing of all interests involved. The key question of this doctrine is whether the author of sex-related preferences is capable of convincing a court (and eventually the Court) that there are stubborn actual barriers to women’s ability to fairly compete with men that can be circumvented or eliminated only by the particular model of preferences – i.e. that such measure is truly appropriate, meaning capable of achieving such goal, and actually necessary. In such balancing, the context is the key. In that respect, the benefit at stake (type of employment or type of working conditions) is of great importance.

Following the plenary presentation, participants were arranged in four small groups hosted by equality body staff members to discuss the challenges of applying positive action and the role of equality bodies in supporting appropriate positive action measures. The groups were hosted by **Tena Šimonović Einwalter** (Office of the Ombudswoman, Croatia), **Ljiljana Lončar** (Commissioner for Protection of Equality, Serbia), **Peggy Mastroianni** (U.S. Equal Employment Opportunity Commission) and **Miroslaw Wróblewski** (Office of the Human Rights Defender, Poland). The participants had the opportunity to discuss the challenges equality bodies face in identifying the lawfulness of positive

action measures and what needs to be done to tackle these challenges, as well as the main factors that serve as a powerful incentive to promote and implement positive action measures.

Key lessons learned/recommendations:

- It is difficult for national equality bodies to communicate in a clear way what is (or isn't) positive action to the public and media – **recommendation**: national equality bodies should use simple examples.
- National equality bodies sometimes receive questions and complaints from members of the majority on existing positive action measures as being discriminatory – **recommendation**: national equality bodies have to be able to explain why positive action measures are introduced and why they do not constitute discrimination.
- It is questionable in some countries with more positive action measures whether they are really being implemented and whether they are producing results– **recommendation**: there should be measuring of effects (impact assessment of positive action measures) and national equality bodies could monitor the implementation of positive action measures.

SESSION 3 – BENEFITS OF POSITIVE ACTION (panel discussion)

The panel discussion focused on the potential and the benefits of positive action measures. The panel discussion aimed to give participants access to insights from the participating organisations into their work, policies and perspective on the potential, benefits, and challenges of positive action measures. **Rodolfo Cattani** (European Disability Forum), **Nicolas Iliopoulos** (European Commission DG JUST), and **Danica Todorov** (Deputy Provincial Ombudsperson for Gender Equality, Serbia) took part in the panel discussion and had the opportunity to share their organisation's view on and experiences with positive action measures. **Danica Todorov** underlined that the Ombudsperson for Gender Equality strives for women's empowerment and that positive action measures are part of the gender equality plan. She also argued that positive action measures need to be flexible and adjusted in accordance with the particular context. As key challenge, she pointed to the need for a clear understanding of what positive action is. **Rodolfo Cattani** highlighted the importance of eliminating barriers in society and promoting positive measures. He pointed out that it's a matter of social exclusion of people with disabilities, as mentioned in the [Madrid Declaration about Discrimination](#) adopted by the European Congress on Disability in March 2002¹. He recommended that positive action should be a priority to be put on the same level of antidiscrimination legislation. He also suggested that national equality bodies could support proper design of positive action measures and their correct implementation. **Nicolas Iliopoulos** observed that it is tricky to assess whether positive action measures are legal or not as there are no clear guidelines from the CJEU. The EU case law on positive action is limited to gender and despite the EC Directives allowing Member States to introduce positive action measures, they do not place an explicit duty on them to introduce such measures. He pointed out that the European Commission can't investigate on the field and evaluate the concrete impact of positive action measures. He suggested that national equality bodies could supervise that positive action measures do not produce any reverse discrimination.

¹ BARRIERS IN SOCIETY LEAD TO DISCRIMINATION AND SOCIAL EXCLUSION. The way our societies are organised often means disabled people are not able to fully enjoy their human rights and that they are socially excluded. The statistical data that is available shows that disabled people have unacceptable low levels of education and employment. This also results in greater numbers of disabled people living in situations of real poverty compared with non-disabled citizens.

SESSION 4/5 – EXAMPLES OF POSITIVE ACTION (WORKSHOP)

This workshop session focused on positive action measures from different jurisdictions, allowing participants to apply their knowledge and discuss the challenges and benefits of positive action using practical examples. Participants rotated between the different groups so that each participant had the opportunity to discuss two topics.

Italy – Career days to foster diversity at work (Marco Buemi)

Mr. Marco Buemi, from the Italian equality body National Office against Racial Discrimination, presented the project [Diversitalavoro](#) that aims at promoting diversity in the workplace and targets three disadvantaged groups: people with disability, migrants and trans people.

Objectives of the project:

- Work with companies to promote the implementation of policies of inclusion promoting equality and non-discrimination.
- Strengthen the dialogue between companies and candidates.
- Job Matching according to the Italian Law 68/99

It was highlighted by the participants in the workshop that it is important to focus on what happens after the candidates get a job.

Norway – Positive measures in recruitment (Lars C. Kolberg)

Participants discussed the dilemma of choosing the right measure and identified some challenges relating to positive action measures in recruitment:

- Soft measures have unknown or limited effect.
- Hard measures exist – e.g. quota for gender, requirements to hire persons with disability. They are often criticized, or even circumvented.
- What works tend to be illegal and/or highly unpopular and not widely used. What is legal and is being used, has no/limited effect.

Romania – Parliamentary representation of minorities (István Haller)

Mr. István Haller, from the National Council for Combating Discrimination of Romania, presented the national legislation on positive action, as well as the case of parliamentary representation of minorities as a good practice of positive action. The Constitution of Romania establishes that organisations representing ethnic minorities, even if they did not reach the legal threshold, have a place assured in the lower chamber of the Parliament (one place for each organisation). Moreover, according to national legislation, organisations representing ethnic minorities could have the same candidate in all electoral districts.

Sweden – Equality clauses in public contracts (Paul Lappalainen)

Mr. Paul Lappalainen, from the Swedish Equality Ombudsman, opened his presentation by pointing out that discrimination is about the power to exercise both underlying prejudices and open prejudices. It is therefore interesting to examine how the cost and risks associated with discrimination can be raised, and how this can lead to positive action. The workshop focused on the use of anti-discrimination or equality clauses in public contracts. Equality bodies should be able to

develop a "model" clause, which could be adapted by national governments and/or local governments in their contracts.

Key ideas/lessons learnt:

- The idea of using public contracts to promote equality and counteract discrimination seemed to be somewhat new to some participants and it was pointed out that it was strange that the tool has not been more highly developed.
- Equality clauses are legal under EU law, particularly given the new EU directives and they are therefore legal under national law (in most instances).
- The use of equality requirements in public contracts needs to be developed at national level. Mr. Paul Lappalainen pointed out that as compared to various measures that require national action, the actions described could be carried out even by a city or regional government and that they may be more favorable since local governments often sense the need for equality tools sooner than national governments.

Austria – Positive action in housing for women (Monika Groser)

Monika Groser, from the Austrian Ombud for Equal Treatment, explained the case of the Association [ro*sa], which aims to develop a housing project for women. Under this project, an apartment building is designed by a female architect for the specific needs of women and tenancy contracts are provided mainly to women. This case has been brought before the Austrian Equal Treatment Commission by a man who argued that he was discriminated against as he was interested to rent one of the flats but did not have access to it as they were rented only to women who were members of the association developing the project. In its reasoning the Austrian equal Treatment Commission applied both the exception clause (Art. 4(5) 2004/113/EC) and the possibility to introduce positive measures (Art. 6 2004/113/EC) and it decided that the housing project serves various legitimate aims and thus could be justified. However, the Austrian Ombud for Equal Treatment argued that there needs to be a more detailed discussion and analysis in order to prove that the measure aims to remove an existing inequality which must be objectively demonstrated, that the proposed action will actually reduce that inequality, and that the method chosen, and its impact on equal treatment for those that do not benefit from it, are proportionate (the method is necessary, appropriate and does not go beyond what is necessary). The participants in the workshop had the opportunity to discuss which information is needed to find out whether the described housing project is an appropriate positive action measure and to share similar projects/cases that exist in their respective countries.

Great Britain – Public sector equality duty and positive actions in education and healthcare (Claire Lesko)

Ms. Claire Lesko guided the discussion on 3 cases studies on Public sector equality duty and positive action in education and healthcare: reducing exclusions among Somali and African Caribbean boys - Preston Manor School; raising ethnic minority staff aspirations through mentoring and professional development - The Open University; supporting job applications from disabled people: improving confidence and work experience for disabled people - Frimley Park Hospital.

Key lessons learnt:

- Isolating the effectiveness of positive action measures is extremely challenging.

- It is essential for equality bodies to build the business case for public authorities and others to take positive action measures. Examples of effective practice from the public and private sector could play a key role in this instance.
- A dedicated webpage on the Equinet website enabling equality bodies to share information about specific positive action measures that are taking place/ have been implemented (and evaluated where relevant) in their country with links to relevant documents would be extremely useful.

Serbia – Measures to improve the position of women (Tijana Milošević - Milica Pavićević)

Tijana Milošević and Milica Pavićević gave an insight into relevant legislative provisions on positive action in the Republic of Serbia. They also presented the quota for participation of women in political life as a positive action measure that significantly contributed to improve gender equality in the National Assembly of the Republic of Serbia (34% of women MPs). The discussion during the workshop focused also on the position of women in the workplace after returning from maternity or parental leave and on positive action measures tackling multiple discrimination.

SESSION 6 – THE EFFECTIVENESS OF POSITIVE ACTION MEASURES

The sixth session focused on making positive action measures effective, with particular attention to the role of statistics and the role of equality bodies in monitoring and evaluating the implementation and effectiveness of positive action measures.

Mr. Patrick Simon analysed the use of statistics to monitor the implementation and effectiveness of positive action measures. He pointed out that even though the EU Directives do not explicitly require the collection of statistics to support positive action, there is evidence that most equality bodies in Europe consider that statistics are not only useful but necessary for implementing effective equality. He argued that statistics are crucial for implementing positive action: statistics provide facts on discrimination, they measure the extent and impact of discrimination, identify targets, set goals and evaluate policies, provide evidence in court and it's a tool for awareness raising in the public opinion and decision makers. He also mentioned that statistics should be collected not only in experimental surveys or in social science research but mainly in institutions, administrations and censuses. His presentation also listed key reasons which make statistics a sensitive issue: the data protection provisions, the definitions of categories in national laws (race, ethnicity, sexual orientation, disability, religion) and methodology of data collection. In this context, he argued that a fair trade off between data protection, self-identification and availability of information should be obtained.

Mr. Aidan Fitzpatrick presented the Northern Ireland experience with positive action. He explained the Fair Employment (NI) Act 1976, and the 1989 Act on Pro Active Practice of Equality on Grounds of Religious Belief and Political Opinion. In this context, positive action is conceived as a mechanism for change and is designed to secure participation in employment by members of the Protestant or Roman Catholic community by adopting practices encouraging such participation and modifying or abandoning practices that have or may have the effect of restricting or discouraging such participation. Positive action measures are supported by a monitoring system which assesses the impact on the workforce (Protestant and Roman Catholic). Mr. Aidan Fitzpatrick identified some key lessons learnt: the effectiveness of positive actions measures is increased if accompanied by strong legislation, commitment from senior management, and efficient monitoring and reporting systems.

Following the plenary presentation, participants were arranged in two small groups hosted by the plenary speakers to continue discussing the challenges of making positive action measures effective.

In her closing remarks, **Ms. Anne Gaspard**, the Executive Director of Equinet, expressed her hope that the legal training provided participants and speakers with an interesting and useful opportunity to network and to exchange views and experiences.

If you wish to know more about the event please visit its dedicated [webpage](#) where you will find the detailed training programme, the presentations of speakers and other useful material.