



European Network Against Racism

Réseau européen contre le racisme

Europäisches Netz gegen Rassismus

FACT SHEET 35

Positive Action

March 2008

This fact sheet aims to explain the concept and practice of positive action with a view to enhancing the capacity of ENAR members to develop mechanisms to address, in their work, positive action as a tool and a concept. It begins by giving an outline of the key themes in the debates around positive action and explores why it is both controversial and topical. It then goes on to explain the concept in more detail and outlines the applicable standards from EU and International Law.

1. Introduction

Positive action is both a **tool** and a **concept**, which has a long history of recognition in European Law and in International Human Rights Law. However, as a concept it is multi-faceted and not always easily understood and as a tool the evidence is that it is insufficiently used and not always recognised as such. In the context of its assessment of the equality directives¹ and most recently as part of the discussion on a possible new anti-discrimination initiative², ENAR has drawn particular attention to the failure to mandate positive action in EU law and policy. During its policy Seminar on Positive Action held in December 2008 a key conclusion of the ENAR network was the need to dispel the myths surrounding positive action.

2. Context and Key themes in the Debates

Positive action is not adopted in a political vacuum. As a concept its development is informed by the context in which it is being debated and as a tool it is shaped by the uses to which it is put.

¹ Directive 2000/43/EC of 29 June 2000 implementing the principle of Equal treatment between persons irrespective of racial or ethnic origin. (Hereafter 'Race Directive') and the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation into national law.(Hereafter 'Employment Directive')

² The European Commission launched a consultation on a 'possible new initiative on non-discrimination outside employment' in the summer of 2007.

2. 1. Recognition of the limitations of individual enforcement

It is increasingly recognised that while the prohibition of discrimination is essential, reliance on individual litigation as a reaction to individual acts of discrimination is unable to tackle inequality and disadvantage faced by many racial and ethnic minorities in Europe. Difficulties in accessing redress have been consistently noted as a major challenge with many victims of discrimination unable or unwilling to use the legal system for enforcement. Discrimination often comes hand in hand with extreme poverty and social exclusion and the interconnection of disadvantages reduces the capacity of ethnic and religious minorities to access legal redress.³ Positive action is brought into the discussion because it can place the burden on the State, rather than the individual to not only remedy acts of discrimination but also to take a proactive approach and prevent discrimination.⁴

2.2. Expanding understandings of ‘equality’

At the same time, the conceptual understanding of equality and non-discrimination has moved to recognise structural or institutional forms of discrimination, which go relatively untouched by traditional prohibitions and require more proactive tools and positive measures:

“Equality is itself an open-textured term, which can have a variety of meanings. Three commonly accepted meanings are: equal treatment, equal opportunities and equality of results. Proactive models generally move beyond the equal treatment model, in that it is generally recognised that equal treatment of those with differential levels of advantage can cement and reinforce inequality.”⁵

Sandra Fredman has identified four key functions of a concept of equality, which fit with this emerging discussion:

“The new concept of equality...should encompass four central aims:

- *to break the cycle of disadvantage associated with membership of a particular group;*
- *to promote respect for equal dignity and worth of all persons, redressing stigma, stereo-typing, humiliation based on membership of the group;*
- *to provide positive affirmation of individuals as members of the group;*
- *to facilitate full participation in society.”⁶*

On this understanding the opposite of positive action is not neutrality, but “negative inaction”.⁷

³ See for example, Lana, Hollo ‘Equality for Roma in Europe – A roadmap for action, January 20063

⁴ See for example, Cohen, B, Positive Obligations: Shifting the Burden in Order to Achieve Equality in Roma Rights Quarterly, Number 1, 2005

⁵ (Fredman, S, Changing the norm: positive duties in equal treatment legislation,

Sandra Fredman, Professor of Law, Oxford University, UK <http://www.e-quality.nl/e-quality/pagina.asp?pagkey=45067>)

⁶ Fredman S, quoted in Cohen, B, Positive Obligations: Shifting the Burden in Order to Achieve Equality op cit fn 3

⁷ Cohen, B. Keynote Speech, Report of the ENAR Policy Seminar ‘Understanding Positive Action: From Theory to Practice’ p. 5

2.3 Institutional discrimination

Closely linked to changes in understandings of ‘equality’ is the recognition of institutional discrimination. ‘Institutional’ or ‘structural’ discrimination is a form of discrimination which refers to rules, norms, routines, patterns or attitudes and behaviour in institutions and other societal structures that represent obstacles to certain people in achieving the same rights and opportunities that are available to the majority of the population. The recent publication on educational segregation of Roma children typifies ‘segregation and institutional discrimination’ as a form of structural discrimination, for which both the prohibition of discrimination and the promotion of positive action measures are necessary. The report specifically links this with the need for the ‘new concept of equality’ outlined above, in particular its aim to ‘break the cycle of disadvantage’⁸.

2.4 Recognising multiple identities and multiple discrimination

There is an increasing tendency to move from a ‘single-ground’ to a ‘multi-ground’ approach with equality bodies and legislation covering a number of grounds of discrimination. Whatever the legal or political framework, there is a need for measures that recognise the specific needs and issues of different groups. Examples include rules that only women can apply for a job in a domestic violence refuge, housing programmes open only to specific disadvantaged groups or programmes designed to address youth unemployment.

2.5 Increasing recognition of the benefits of taking a proactive approach

Increasingly organisations, both public and private, are voluntarily adopting positive action measures as part of diversity strategies in response to a recognition of the value of diversity in the workplace and as part of recognition of corporate social responsibility more broadly. Models of good practice are emerging from many different companies, from small to medium enterprises through to large multi-nationals.

2.6 Awareness of continuing discrimination

The above strands of discussion can help to explain why positive action is becoming increasingly accepted as a concept and considered as a valuable tool. However, additional key themes in the debate are the **concerns** raised about **potential negative effects** of positive action.

Opponents believe that it is demeaning to members of minority groups, and that positive action wrongly sends a **condescending message** to minorities that they are not capable enough to be considered on their own. In Slovakia the Constitutional Court declared in October 2005 that affirmative action i.e. “providing advantages for people of an ethnic or racial minority group” is not compatible with the Slovak Constitution.

Recent research on desegregation measures for Romani children in education has shown that “Desegregation policies cannot be successful if they are not accompanied by a broader impact assessment of policies and practices which may have the effect of deepening inequalities and facilitating segregation trends”⁹. Thus there is a danger that targeted

⁸ Farkas, L. ‘Segregation of Roma Children in Education: Addressing structural Discrimination through the Race Equality Directive’ October 2007, p. 41

⁹ ‘The Impact of Legislation and Policies on School Segregation of Romani Children: A study of anti-discrimination law and Government measures to eliminate segregation in Education in Bulgaria, Czech Republic, Hungary, Romania and Slovakia’ ERRC, 2007, P.56-57

measures can **mask inaction** in other areas which negate their purpose. An additional, linked, concern is that where the focus is on positive action measures to address, for example, training needs of minority groups, this ignores the **continuing fact of discrimination** in employment. For example, the EUMC 2006 annual report states that:

“...there is evidence that previous blanket assumptions about educational and other deficits of immigrants as the main reason for employment inequality are becoming balanced by a greater awareness of the operation of discrimination, and the need to combat it.”

3. What is Positive Action?

There are many different terms used in this area. People can refer to ‘positive action’, ‘positive discrimination’, ‘affirmative action’ and ‘positive duties’. In the EU the most commonly used term is ‘positive action’.

The publication on **positive action** by the EU network of independent experts on anti-discrimination states that:

“While positive action has as a common denominator its ambition to alter group representation in a given environment, it can be conducted in myriad ways. Building on McCrudden’s classification (1986, 223-225), several categories of increasing intensity can be identified:

- 1. Consciously examining, identifying and eradicating any discriminatory or distorting practices. This might be labelled “positive fairness” and can result in systematic mainstreaming.*
- 2. Facially neutral target policies that seek to increase the proportion of members of the under-represented group by using criteria that do not overtly discriminate, e.g. focussing on a geographical area or on the unemployed.*
- 3. Outreach programmes that do use group affiliation and seek to accelerate the inclusion of the under-represented group, either through targeted support (information, training, education, advertising, the creation of lobby groups, etc.) or through targeted sensitisation. This might be labelled “positive mobilisation”.*
- 4. Facially biased diversity policies that seek to increase the proportion of members of under-represented groups through soft targets that do not resort to actual preferential treatment.*
- 5. Accommodation programmes which seek to reduce barriers by offering personal accommodation for members of certain groups and which therefore combine both group consideration and personal merits.*
- 6. Actual preferential treatment through reverse discrimination: favouring members of the under-represented group over members of the dominating group.*
- 7. Redefinition of “merit” by making group affiliation a relevant job qualification. This is in fact a rather theoretical proposition.”¹⁰*

10 De Vos, M ‘Beyond Formal Equality: Positive Action under Directives 2000/43/EC and 2000/78/EC’ June 2007, p. 12

In general, the term **‘positive action’** refers to strategies identified at 1-5 above, designed to counteract the effects of past discrimination and to ensure equal opportunities, such as recruitment policies which ensure that job advertisements reach potential ethnic minority candidates. Examples could include training for selection panels to eradicate any unconscious discrimination in recruitment, a policy on improving housing conditions that focuses efforts on areas that are known to be mainly occupied by migrants, without requiring that every person who benefits is a migrant, advertising in mother-tongue publications of particular minority groups and resourcing an Asian Women’s support group to provide support services to Asian women. Positive action should not be confused with **positive discrimination**, which can be identified in 6 & 7 of McCrudden’s definition, and could include ‘quotas’ and taking into account group membership, for example, in selecting a candidate for a job.

‘Affirmative action’ is the term more commonly used in the United States, and has a tendency to be equated to quotas and ‘reverse discrimination’ as this is the most controversial method used. However, as with positive action in the EU, affirmative action in the United States utilises a range of methods and is not limited to ‘quotas’.

‘Positive Duties’ is generally used to refer to placing on certain bodies (usually State authorities) a duty to actively take measures to promote equality. Thus in the United Kingdom public authorities are under a duty to produce Race Equality Schemes, to collect monitoring data on ethnicity and to carry out race equality impact assessments of policies. In Finland, there are similar duties that require public bodies to both measure and address inequalities. Such duties can apply to employment, service provision or both and can be on a range of different grounds. In Northern Ireland the duty covers nine equality grounds and all functions of a public body. The extent to which such duties are positive action themselves is open for discussion.

5. Positive action in Human Rights Law

5.1 The United Nations

The International Convention on the Elimination of all forms of Racial Discrimination (CERD) contains provisions requiring positive measures¹¹ and in relation to the International Covenant on Civil and Political Rights (ICCPR) the Human Rights Committee “has acknowledged that the principle of equality **imposes legal obligations** on states ‘to take affirmative action measures in order to diminish or eliminate conditions which cause or help perpetuate discrimination prohibited by the Covenant.’”¹².

5.2 The Council of Europe

The European Court of Human Rights is yet to decide explicitly on positive action. However, it has considered the existence of **‘positive obligations’** on Member States to take measures to ensure fulfilment of certain rights. Thus in a 2004 judgment, *Connors vs. United*

¹¹ Article 2(2) States that “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...of certain groups or individuals belonging to them, for the purpose of guaranteeing the full and equal enjoyment of human rights.”

¹² HRC General comment 18, in Kostadinova, G. ‘Substantive Equality, Positive Action and Roma Rights in the European Union’ *Minority Rights Group International*, 8 September, p.5

Kingdom of 27 May 2004, the European Court of Human Rights found a positive obligation of local authorities to undertake specific measures for a Roma family.

The Framework Convention for the Protection of National Minorities (FCNM), explicitly states that: “The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, **full and effective equality** between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.” (Article 4 (2)). This has been used extensively by the FCNM Advisory committee, including in recommending measures for Roma inclusion such as positive action.¹³

However, Human Rights law does not give an unfettered right to take positive action measures. For example, the FCNM explanatory report states that such measures need to be ‘**proportionate**’, “in order to avoid violation of the rights of others as well as discrimination against others” and that such measures should not extend, in time or in scope, “beyond what is necessary in order to achieve the aim of full and effective equality”¹⁴.

6. Positive action in EU Law

The European Community has long had powers to act in relation to sex equality and nationality discrimination, and since 1997 with the adoption of **Article 13** of the Treaty of Amsterdam, has had new powers to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Since the Treaty of Amsterdam came into force in 1999, new EC laws, or directives, that have been enacted in the area of anti-discrimination are the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive, (2000/78/EC), the recast equal treatment Directive (2006/54/EC) and Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

As well as a number of important protections against discrimination, the Directives include provisions to ensure that those protections are effective, such as the shift in the burden of proof and the provisions empowering NGOs to support those subject to discrimination. Among these are provisions related to positive action, which provide that:

“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 (a protected ground).”¹⁵

However, this provision does not *require* positive action measures by Member States and therefore it remains optional.

¹³ Kostadinova, G. ‘Substantive Equality, Positive Action and Roma Rights in the European Union’ Minority Rights Group International, 8 September, p.5

¹⁴ Explanatory Report to the Framework Convention for the Protection of National Minorities, p.16

¹⁵ Race Equality Directive Article 5, Employment Equality Directive, Article 7

6.1 Interpretation by the European Court of Justice and the principle of proportionality

There is a body of case law from the European Court of Justice on what is and isn't positive action in sex discrimination law, although the ECJ has not considered the whole range of possible positive action measures. The case law relates mainly to actions that may amount to 'reverse discrimination' and focuses on 'proportionality', mirroring the requirements of International and European Human Rights Law outlined above. The following key features have emerged from the case law:

- The measure has to aim to remove an **existing inequality** which must be **objectively demonstrated** and the measure has to **aim to remove** that inequality.
- It must be shown that the proposed action will **actually reduce** that inequality; and
- It has to be shown that the method chosen, and its impact on equal treatment for those that do not benefit from it, are **proportionate**, i.e. the method is necessary, appropriate and does not go beyond what is necessary.¹⁶

So if a company wants to increase the number of women in their senior management team, they first have to objectively show that there are not enough women in the team, then show that the measure chosen will actually increase the number of women. Finally, it will need to be objectively demonstrated that the measure only goes as far as is necessary to achieve higher representation and that it does not involve absolute or automatic preferences.

To meet this test, data that is capable of objectively demonstrating an existing inequality must be produced, as must a method of measuring impact to demonstrate that the proposed measure will actually reduce that inequality. To do this, statistics are used extensively in gender equality. This may present particular problems in adopting positive action measures in favour of disadvantaged racial and ethnic minorities, where difficulties regarding the collection and availability of data on racism and the experience of ethnic and religious minority groups have been highlighted consistently across all areas in the EU Member States.¹⁷ These include problems regarding the collection of data based on ethnicity, lack of priority given to this area and questions regarding the accuracy of data. A number of factors impinge on the accuracy of sensitive data, including community relations, understanding of racism and resources. Positive action without data collection has been described as "a car without petrol"¹⁸.

The extent to which the approach taken in sex discrimination law can, or should, be applied to the other grounds of discrimination is uncertain. Some commentators have concluded that "The state of the law delineating the scope for positive action in gender can and should...serve as a point of departure for interpreting the positive action provisions in the Race and Framework Directives"¹⁹.

An alternate view questions this, highlighting the existence of quotas for disabled people in many countries and pointing to the fact that positive discrimination (as identified by the

¹⁶ Adapted from De Vos, 'Putting Equality Into Practice: What Role For Positive Action' European Commission, March 2007 pp 7 & 8

¹⁷ ENAR Shadow Reports 2005 and 2006

¹⁸ Simon, P. 'Putting Equality Into Practice: What Role For Positive Action' European Commission, March 2007, p. 25

¹⁹ De Vos, M 'Beyond Formal Equality: Positive Action under Directives 2000/43/EC and 2000/78/EC' June 2007, p. 31

ECJ) is less controversial when there is strong evidence of severe inequality, drawing a parallel between the development of positive discrimination measures as a response to the legacy of racial segregation in the USA and the entrenched inequalities faced by the Roma in Europe today.²⁰ It has also been claimed that, due to the clearer requirements of positive action under international human rights law related to racial discrimination and minority rights²¹, “...it may be easier to justify certain affirmative action measures benefiting racial or ethnic minorities than it has been to justify similar measures adopted in order to promote the professional integration of women.”²²

20 Bell, M, 'Putting Equality Into Practice: What Role For Positive Action' European Commission, March 2007 p. 6

21 In particular, ICERD article 2 (2) and FCNM Article 4

22 Schiek, D, Waddington, L & Bell, M Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, IUS Commune Casebooks for the Common Law of Europe, 2007 p.823

Selected Resources on Positive Action

- Cohen, B, *Positive Obligations: Shifting the Burden in Order to Achieve Equality in Roma Rights Quarterly*, Number 1, 2005 <http://www.errc.org/cikk.php?cikk=2208>
- De Vos, M '*Beyond Formal Equality: Positive Action under Directives 2000/43/EC and 2000/78/EC*' June 2007
http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/bfe07_en.pdf
- ENAR *Report of the ENAR ad hoc expert group on social and economic inclusion of disadvantaged ethnic and religious minorities*, Brussels, 15-16 March 2007
http://www.enar-eu.org/en/events/SOCIAL_INCLUSION/index.shtml
- ENAR *Background Paper: Positive Action Policy Seminar*, Brussels, 29-30 November 2007. http://www.enar-eu.org/en/events/POSITIVE_ACTION/index.shtml
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- Niessen, J. Huddleston, T and Citron, L. in cooperation with Andrew Geddes and Dirk Jacobs, *Migrant Integration Policy Index* (MIPEX) 2007
<http://www.migpolgroup.com/documents/3901.html>
- Schiek, D, Waddington, L & Bell, M *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, IUS Commune Casebooks for the Common Law of Europe, 2007

Selected International Human Rights Documents

- The International Convention on the Elimination of All forms of Racial Discrimination.
- The Framework Convention for the Protection of National Minorities
- The International Convention on the Elimination of All forms of Discrimination Against Women
- The EU Charter of Fundamental Rights
- European Convention on Human Rights and Fundamental Freedoms

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ENAR is a network of some 600 European NGOs working to combat racism in all EU Member States. Its establishment was a major outcome of the 1997 European Year against Racism. ENAR is determined to fight racism, xenophobia, anti-Semitism and Islamophobia, to promote equality of treatment between EU citizens and third country nationals, and to link local/regional/national initiatives with European initiatives.



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