

Understanding Positive Action From Theory to Practice



european network
against racism

Results of an ENAR seminar on positive action



Brussels, 29 & 30 November 2007



OPEN SOCIETY INSTITUTE

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Layout and printing by Crossmark.

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Introduction and background to the seminar

Discrimination and inequality are part of the everyday lives of ethnic and religious minorities across the European Union. While for some the remedy is to be able to take a case to court and challenge an act of discrimination, and this is an important legal tool, it does little to tackle the entrenched inequalities that result from a long history of discrimination and oppression and that can be part of the structure of social institutions. Thus the gender pay gap endures, racial and ethnic minorities face continuing discrimination in employment and the educational attainment of Roma, Sinti and Travellers remains low across Europe.¹

In 2000 the European Union adopted the Race Equality and Framework Employment Directives (RED and FED)² with the intention of tackling such discrimination. The Directives contain a specific provision on positive action that allows Member States “with a view to ensuring full equality in practice” to maintain or adopt specific measures to prevent or compensate for disadvantages linked to the protected grounds.³

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 evidence shows it is insufficiently used and not always recognised as such. The question of institutional racism remains one of the most pervasive forms of racial discrimination and fails to be addressed in a consistent manner. Lack of ethnic data remains a barrier to taking effective measures to address such pervasive and systemic forms of discrimination and inequality.

ENAR considers that positive action is transversal and can apply across a wide range of policy areas, including social inclusion, migration, integration, policing and criminal justice. In the context of its assessment of the equality directives⁴ over the past few years, and most recently as part of the discussion on possible new anti-discrimination legislation⁵, ENAR has drawn particular attention to the failure to mandate positive action in EU law and policy. The network has adopted positions advocating for positive action, adequate ethnic data collection and mainstreaming of equality as well as highlighting the limits of the existing legal framework to tackle structural and institutional discrimination.

Held during the 2007 European Year of Equal Opportunities for All, the ENAR Policy Seminar “Understanding Positive Action: From Theory To Practice” enabled ENAR members and stakeholders to consider in a practical way the role of positive action as a human rights-based response to discrimination, inequality and disadvantage and to develop the basis for advocacy strategies on the way forward. The seminar has set a strong foundation for the work of ENAR. Over the next three years, the network will carry this forward through a series of national roundtables on positive action, supporting the ENAR national coordinations to take forward the work and to lobby at the national level for effective positive action measures.

The ENAR Policy Seminar was designed to enable participants to build their understanding of positive action, the contexts in which it can operate and to discuss and develop advocacy strategies on positive action. The first day focused on building understanding and included expert speakers on positive action in international and EU law, as well as its practical application at the national level and the different approaches that are used in different parts of Europe. It also placed the discussion in the context of the realities of discrimination and disadvantage of ethnic and religious minorities that provide the backdrop to the examination of positive action. On the second day participants worked to further develop their understanding and start the de-

1 The EUMC 2006 annual report states that: “Last year’s EUMC Annual Report underlined the patterns of labour market inequality that exist in the EU regarding migrants and minorities, who generally experience far greater levels of unemployment than majority workers, receive lower wages, and are significantly over-represented in the least desirable jobs within a labour market segmented by ethnic and national origin. The statistics drawn upon for this year’s Annual Report confirm these patterns of inequality.”

2 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

3 Directive 2000/43 (Article 5) and 2000/78 (Article 7.1).

4 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’).

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

bate on the practical application through a series of themed workshops, finishing with a series of parallel workshops through which participants debated and brought forward the conclusions of the seminar and practical actions for the way forward.

ENAR would also like to take this opportunity to warmly thank the European Commission’s Directorate General for Employment, Social Affairs and Equal Opportunities and the Open Society Institute (OSI) for supporting and making this seminar possible.

This report is a summary of the proceedings of the policy seminar. The speakers’ texts are edited summaries of the full presentations. The full texts of the speeches (where available) and the speakers’ presentations are available on the ENAR website at www.enar-eu.org/Page.asp?docid=16030&langue=EN.

Welcoming message from the ENAR President



Pascale Charhon, Commissioner Vladimir Spidla, Bashy Quraishy

Ethnic and religious minorities have difficulties in accessing the labour market but also in other areas of life. A level playing field for ethnic and religious minorities is therefore needed. In a situation where a person is not given a fair chance to compete or use his/her capacities, there needs to be efforts to provide extra help in the form of positive action. It does not matter whether it is called positive discrimination, affirmation action or proportional representation, what matters is that the result must be equality for all. Discrimination is found in all sectors of society. Positive action is not only required in relation to the labour market, but also in housing, education, health, etc.

Extra measures for gender equality have shown results, and even though they are not entirely satisfactory, they have improved the situation for women in the EU. The 2007 Eurobarometer on discrimination in the EU showed that 87% of Europeans favour specific measures in the case of age and disability. If explained properly, people would also understand that ethnic and religious minorities need positive action.

Taking a positive approach to achieving equality is becoming increasingly accepted in wider society. In addition, there are positive action provisions in many international human rights instruments. The UN International Convention on the Elimination of all Forms of Discrimination has positive action provisions. The European Court of Human Right has also considered positive obligations. The Framework Convention for the Protection of National Minorities explicitly states that adequate positive measures can be adopted where necessary. In the EU Race Equality Directive, however, positive action measures are only optional. Let’s hope that soon this option can become a requirement. Such a requirement would make governments aware of the seriousness of the problem racial discrimination in the EU.

This seminar will help to raise awareness and deepen understanding of positive action, as well highlight some practical examples of positive action measures taken in different countries. There are solutions to the problem of social inequalities and discrimination in Europe. Now is the time to talk about equality for all and about positive action as a concept and a useful tool.

Bashy Quraishy

1. Positive action in European policy

Opening speech by Mr Vladimír Špidla, Commissioner for Employment, Social Affairs and Equal Opportunities

Positive action is one of the most controversial issues in the fight against discrimination. It is a concept which is often poorly understood by those acting in good faith and caricatured by those acting in bad faith.

The Racial Equality and Employment Equality Directives have not so far obliged Member States to put in place positive action measures to compensate for objectively ascertained disadvantages. Yet the experience of implementing this legislation shows that, despite the fact that Member States are required to apply certain measures, legal change alone is not adequate to ensure equality. It is also necessary to raise awareness among victims of the discrimination they face and of their options for redress. At the same time, it is becoming increasingly clear just how far-reaching structural discrimination is.

Nevertheless, positive action is already practised in the majority of Member States, even though it is sometimes only allowed in combating certain types of discrimination. This begs the question of why positive action is such a difficult issue to tackle, both for politicians and for the media, in particular since the recent Eurobarometer survey shows that Europeans are largely in favour of positive action. Of course, the tabloid media and populist discourse often present positive action as nothing more than reverse discrimination against the majority, that is, against the natural order of things. This simply illustrates the fact that some of those who oppose positive action have never faced discrimination themselves and subscribe to an ideology that can best be described as social Darwinism. At the same time, many opponents of positive action can be found in progressive and even anti-racist circles. This attitude stems from a perceived contradiction between notions of freedom and equality which has its roots in the Cold War period and is based on the idea that one is promoted at the cost of the other. In reality, it is important for greater freedom and greater equality to be promoted simultaneously.

There are already many ways in which effective positive action measures can be developed without elements which are likely to invite charges of reverse discrimination (for example,

reasonable accommodation⁶ for disabled people). Through the PROGRESS programme the Commission supports a number of anti-discrimination networks. It has also initiated a study of the issue to establish an initial series of concrete actions which can be undertaken across the European Union. Civil society has an important role to play in lobbying for the implementation of these measures, producing high-quality reports on the subject and developing partnerships with both public and private organisations.

Work still remains to be done to further develop positive action through a political process between government representatives, social partners (trade unions and employers) and civil society. These exchanges should be undertaken in particular through peer review meetings, as well as at the Equality Summits, the next of which is due to take place under the French Presidency of the European Union.

Debate

In response to a question about what positive action measures the Commission itself has put in place, Mr Špidla referred to the programme which supports internships for Roma stagiaires within the Commission and the Parliament. Asked about funds to support NGOs working in this area, he noted that over €500 million has already been invested in projects on an ad hoc basis, but that the countries concerned have responded in very different ways. When he was asked whether positive action or positive discrimination is preferable, he said that there was no universal rule and that each situation must be considered on a case by case basis, positive discrimination, in the form of quotas for instance, sometimes being the only option.

The Commission is also working on corporate social responsibility. One section of the Commission's study shows that it is through companies' accounts that the significant financial benefit of their positive action measures can be seen. Regarding the issue of what pressure the Commission is able to put on Member States, it was pointed out that the Commission has already brought 14 infringement procedures for failures in the transposition and implementation of Directive 2000/43/EC. Further such actions are currently being prepared. On the whole this is a positive experience, because Member States do not really reject this process of forced dialogue; on the contrary, they demonstrate willingness to make improvements.

⁶ 'Reasonable accommodation' is defined as modifications and adjustments made to jobs or working environments to give disabled people equal opportunities in employment.

2. Positive action in context: the concepts and the reality

2.1 Keynote speech: Positive action, institutional discrimination and mainstreaming equality: a framework for discussion

Barbara Cohen, Independent expert on anti-discrimination law in the UK and other parts of the EU

Positive action is what has brought us together today. One could say that the struggle for equality for ethnic or religious minorities is about combating “negative action” and “negative inaction” - the racism, discrimination, harassment and victimisation - totally negative ways in which, for reasons of people’s identity, or perceived or assumed identity, their race or ethnicity or their religion or belief, they are denied full participation in the economic, social and political life of our societies, denied access to work and housing and education, denied the dignity and respect that belongs to every human being.

Indeed institutional racism, as it has been defined by the Stephen Lawrence Inquiry in Britain, i.e. the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin, can be seen as negative inaction on a grand and truly dangerous, destructive scale. The Inquiry team emphasised both its negativity and how it can occur from “inaction”:

It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.

If daily experience continues to include racism and discrimination - if this is where we are, where are we trying to go? Positive action will be an important vehicle, but we need to know our destination. What will the absence of direct and indirect discrimination look like? What does “equality” mean? Can we envisage institutional anti-racism, institutional equality?

Today “equality” is described in at least three different ways:

The first model, **equal treatment or formal equality**, requires removal of group identity - each individual is to be treated on her/his merit without a racial or religious identity (there-

fore implicitly having the race/religious, gender, sexuality identity of the majority). Equal treatment is symmetrical - if race is irrelevant then equal treatment would protect members of white majority groups as well as ethnic minorities, men as well as women etc. However to be “colour blind” is not the whole answer, since it ignores the actual race or ethnic imbalances of power, wealth etc. in society.

A second model is **equality of opportunity** which involves removing the barriers that prevent equal access for different racial groups to employment, housing, education, health services etc. It is concerned with group, rather than individual, equality. Equality of opportunity developed on the recognition that equal treatment could, in practice, reinforce the inequalities that are part of the experience of minority groups. Treating all job applicants equally will not benefit members of ethnic minorities if they never apply, because job vacancies are not publicly advertised or because irrelevant job requirements easily met by members of the dominant majority are beyond their reach.

A third model, “**substantive equality**”, reflects the fact that formal equality and equality of opportunity are not sufficient to realise what the directives refer to as “full equality in practice” - equality of results. It is based on the recognition of the need to treat differently people whose circumstances are different, it is colour aware not colour blind. It recognises the disadvantages or needs that are specific to particular racial or ethnic groups which, if not removed, will ensure that inequality for those racial groups will persist indefinitely. There is no benefit in saying the door (to work, housing, education, services) is open to all and all of the institutional barriers are removed if members of particular groups still cannot reach the door, let alone pass through it, because they lack education or skills or the language or knowledge of the system and how to use it, and so will continue to be excluded. To achieve substantive equality needs more than the eradication of direct and indirect discrimination, it calls for more targeted measures to secure equality of outcomes for members of otherwise disadvantaged groups - it calls for positive action.

Positive action will have far more meaning if we consider some examples. A very helpful list of types of positive ac-

tion is set out in a recently published report by the European network of independent legal experts in the non-discrimination field.⁷ Thus “positive action” can include:

1. Examining, identifying and eradicating any discriminatory practices; this could be measures as simple as advertising jobs publicly rather than recruiting by word of mouth or allocating flats on the basis of housing need not on length of time in the area, reviewing dress code etc. The crucial factor is examining practices to identify any adverse impact on particular groups and then taking appropriate remedial steps.
2. Adopting policies that are neutral on their face, that do not overtly discriminate, but which seek to increase the proportion of members of the under-represented groups; for example using criteria like living in a particular area (where a high proportion of residents are members of a particular ethnic minority group), giving priority for jobs in a new factory to long-term unemployed (a majority of whom will be from certain ethnic groups).
3. Using outreach programmes to accelerate the inclusion of under-represented groups; considering both the content of advertisements - encouraging applications from particular groups - and how/where adverts appear - including publications or websites which are likely to be seen by target groups; offering training to members of under-represented groups so they can compete with majority applicants on more equal terms. Where under-representation has an historical context, no one from that group had done such work, then outreach programmes could include ways of making the particular area of work more familiar.
4. Adopting diversity policies with targets for under-represented groups - targets not quotas - so not involving preferential treatment. The UK government, responding to negative publicity about the under-representation of BME⁸ men and women in the police, set targets (not quotas!) for every police force - requiring the percentage of new recruits and percent of total staff from BME communities after 3 years, 5 years etc. to approximate the BME local population. To try to make this happen each force needed to train officers doing recruitment, consider forms of outreach to attract BME applicants, review employment practices generally so that BME officers were not leaving because of racism and harassment.

If you can carry forward one message from this conference, my wish is that it would be that positive action is positive, it is not threatening, should not set one group against another, should not be divisive or raise political hackles or concerns about breach of fundamental constitutional principles of equal treatment.

5. Devising accommodation programmes to meet special needs of disadvantaged groups. A frequent example is language classes, but it could also be basic education or training for particular types of jobs so that people from under-represented groups can compete on more equal terms with members of the dominant majority.
6. Actual preferential treatment - favouring members of under-represented groups over members of the dominating group. It has been this form of positive action to overcome under-representation of women which EU Member States have adopted and on which the European Court of Justice has been asked to rule. Any such provision must not be an “absolute and unconditional rule” and must meet the test of proportionality, about which you will hear more later this afternoon.
7. Making group membership part of “merit”. In an EU context the Legal Experts Group suggest this is only theoretically possible, but in the US the Supreme Court upheld what it described as a “race-conscious” admissions policy of the Law School at the University of Michigan (*Grutter v Bollinger et al.* Supreme Court of the United States 23 June 2003) accepting the Law School’s educational judgment, that “diversity is essential to its educational mission”. The Court also received findings of expert studies showing that such diversity promotes learning outcomes generally and better prepares students for an increasingly diverse workforce, for society and for the legal profession. While quotas or separate admission tracks for ethnic groups could not have been accepted, the Court was satisfied that the use by the Law School of ethnicity as a ‘plus’ alongside other non-academic factors meant that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the application.

A common essential precondition for each of these forms of positive action is an analysis of the factors creating or maintaining the inequality or disadvantage - what is happening and why? - so that the appropriate forms of positive action can be chosen to achieved the desired outcome. Both in the US and in the EU sweeping positive action measures that could not be shown directly to rectify situations of disadvantage or discrimination have been rejected by the courts. Of course, the better your data and your analysis the better able you will be to plan and carry out well-targeted measures that go directly to the problem. Positive action measures should not be continued “after the objectives for which they were

⁷ 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

⁸ Black and Minority Ethnic



Tarafa Baghajati, Barbara Cohen, Lilla Farkas

taken have been achieved”⁹. One of the very important points to note from this list of 7 different forms of positive action is that most of what is being done, or could be done, to work toward full equality in practice will not conflict with the rules of formal equal treatment and non-discrimination: **in most cases, positive action will not involve exception or exemption from the prohibition of discrimination.**

The challenge is to bring about any of the different forms of positive action. One answer is that the State, through its very institutions, should be expected, preferably legally bound as well as morally bound, to be committed to securing “full equality in practice” for groups currently protected under the Directives and national equality laws. In practice, what this would mean is that all public bodies would see achieving substantive equality as an integral part of their functions and would build the promotion of equality, including relevant positive action, into all that they do. The only equality legislation that specifically imposes a duty on the state to achieve equality outcomes is the UK equality law and the Bulgarian Protection Against Discrimination Act. Yet all EU Member States are signatories of UN conventions requiring equal treatment, including the mandatory duty to take positive action in Article 2(2) of Convention on the elimination of racial discrimination, as well as of the European Convention on Human Rights which commits them to ensure that Convention rights may be secured without discrimination, and of the Framework Convention for the Protection of National Minorities. All have approved Treaty Articles 13 and 141 in the full knowledge that EC legislation would require every Member State to give effect to the principle of equal treatment.

But even without international legal obligations, the experience in the UK is that **proper mainstreaming of equality has the result for the public authorities concerned that it helps rather than hinders them to do more effectively what they were set up to do.** So, for example, if there is evi-

dence of inequality in educational achievement of children from different racial groups, then the municipality that has responsibility for education mindful of equality obligations, should be expected to act to bring about change: firstly to collect data and analyse why such disparities exist and then to take appropriate steps to achieve more equal outcomes - so they can do properly, professionally and appropriately the job of educating all of the children for whom they are responsible.

In addition, picking up another increasingly important thread, as public authorities enter into contracts with the private sector, for services and for goods and works, authorities with a commitment to mainstreaming equality will ensure that their contractors adopt the same approach. Where contractors are providing public services, for example leisure services or welfare services, it will be possible for the contract specification to require some types of positive action to secure equal take-up by all potential users.

In conclusion, let us make a parallel with the 1984 EU Council Recommendation 84/635/EEC on promotion of positive action for women. These recommendations were issued eight years after the Equal Treatment Directive when the need to go beyond providing individual rights to equal treatment had been recognised. Today, only seven years after the Race and Framework Equality Directives, we are giving careful thought to these same issues, with the benefit of the experience of gender-related positive action and with the knowledge and experience of participants.

2.2 Positive action in context: substantive equality and human rights

Dr. Lilla Farkas, Network of Independent Experts on Anti-discrimination, Chance For Children Foundation Hungary

It is interesting to note that the Racial Equality Directive and the International Convention on the Elimination of all forms of racial discrimination (ICERD) use the same terminology. The human rights language is indeed very strong in the Racial Equality Directive. It makes reference to ICERD, as well as to the UN Covenants on civil and political rights and on social, economic and cultural rights, and to the European Convention on Human Rights.

Human rights law has had an effect on the Racial Equality Directive. However, when examining positive action, it is only optional in the Racial Equality Directive, whereas in ICERD it is mandatory. Additionally, ICERD specifically mentions the obligation to prohibit and eradicate/eliminate racial discrimination and segregation (Articles 3 and

⁹ As required by the United Nations Convention On The Elimination Of All Forms Of Racial Discrimination (ICERD) and Convention On The Elimination Of All Forms Of Discrimination Against Women (CEDAW).

5), whereas the Racial Equality Directive only provides for sanctions in case of racial discrimination (Article 15) and leaves it to the courts to apply this to segregation cases.

When one examines the European Court of Human Rights' case law, a number of cases point to positive action measures, and sometimes positive obligation on states to ensure positive action in certain cases or for certain communities (e.g. Thlimmenos¹⁰, Connors¹¹). Another example is the recent D.H. and others v. Czech Republic case¹², which stipulates that where special measures are not taken to accommodate Roma minority needs, 'objective' tests could not justify the difference in treatment. It established that if a discriminatory administrative practice with a disproportionately prejudicial effect on the Roma community is found, then there is no need to examine the individual circumstances as the applicants as members of the Roma community necessarily suffered the same treatment.

The Committee on the elimination of all forms of racial discrimination (CERD) has made a series of recommendations in relation to positive action. For instance, General Recommendation No. 19 (relating to apartheid) introduces an obligation to take positive action to fight discrimination in the private sphere. It noted that in many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race so that individuals suffer a form of discrimination in which racial grounds are mixed with other grounds. CERD therefore invited States to work for the eradication of any negative consequences that ensue, and to describe any such action in their periodic reports.

The Framework Convention for the Protection of National Minorities mentions community rights in order to accommodate minority needs, which allows the possibility for group remedies. It also stipulates that measures should aim at accommodating minority needs in order to achieve full and effective equality but does not impose a positive obligation on States. It has to be noted that there is a distinction between national minority rights and racial minority rights. Yet the fact that there are different levels of protection for national minority and racial minority rights challenges the constitutional order and this needs to be accommodated.

¹⁰ Thlimmenos v. Greece, 6 April 2000, Application No. 34369/97.

¹¹ Connors v UK, App No 66746/01, Judgment of 27 May 2004.

¹² D.H. and Others v. Czech Republic, November 2007, Judgement of the European Court of Human Rights.

2.3 What is the reality for those directly affected? Discrimination and disadvantage in the EU

Tansy Hutchinson, ENAR Policy Officer: ENAR Shadow Report on Racism in Europe 2006

In considering positive action, it is important to remember that this discussion has emerged because discrimination and disadvantage exist. ENAR's 2006 shadow report on racism in Europe is based on a comparison of national shadow reports from 26 EU Member States and gives a comprehensive overview of the manifestations of racism and discrimination across Europe.

Communities particularly vulnerable to racism include Roma, Sinti and Travellers; migrants (including EU nationals and third country nationals and asylum seekers/undocumented workers); religious communities, especially Jewish and Muslim; and long-standing ethnic minorities and 'national minorities'. A number of cross-cutting issues were highlighted in the report, including the fact that issues intersect, the phenomenon of multiple discrimination and the difficulties regarding the collection and availability of data on racism and discrimination. Manifestations of racism were highlighted in a range of areas, including employment, housing, education, health, policing, access to goods and services, and the media. In the employment sphere, concerns were notably raised in relation to career progression and exploitation, forced labour and prostitution. In housing, issues of concern included discrimination when purchasing property, homelessness among ethnic minorities and segregation. The report also reveals a worrying trend towards increased levels of racist violence and crime as well as a rise in extremism. Racism within the police force is highlighted as a problem in many EU Member States, including the practice of racial profiling, which appears to have become more widespread and acceptable in the context of counter-terrorism measures.

The reports found that EU anti-discrimination legislation has brought improvements. However, restrictive migration policies have a negative impact on integration of ethnic and religious minorities and social inclusion strategies do not sufficiently include ethnic and religious minorities. In addition, counter-terrorism measures negatively impact on ethnic minority communities, with an increasing racialisation of the security agenda.

A number of these findings are relevant for the debate on positive action. Discrimination continues to exist, even where there have been legal prohibitions for many years,

but also inequalities exist in all spheres of life. Thus there is a need for improved implementation of anti-discrimination provisions to deal with the reality of racism and discrimination, but the evidence also demonstrates a clear need for positive measures aimed to remove inequalities and not just combat discrimination. It is interesting to note, in this context, that NGO good practice examples in the report, although not defined as 'positive action' by the authors, tend to be targeted measures, designed to address a particular disadvantage or meet a particular need, which is exactly what positive action aims to achieve.

Vera Egenberger, Executive Director, European Roma Rights Centre: The situation of the Roma

The situation concerning human rights and discrimination of Roma in Europe is very complex and encompasses a number of issues, ranging from women/children's rights to economic and social rights, torture, discrimination, etc. Some snapshots of the situation of Roma in Europe include: the overrepresentation of Roma children in childcare institutions, the coercive sterilisation of Roma women, very bad housing conditions in some countries, limited basic access to healthcare and lower life expectancy, high unemployment rates among Roma communities, and lower levels of education of Roma children, often due to segregation. Two of these areas, education and employment, are particularly relevant for positive action. The Roma are also a good target group for positive action given their long history of discrimination and disadvantage.

A number of positive measures can be introduced in the area of education, including: offering scholarships for Roma children/youth to access higher education and establishing long-term programmes with sufficient funding. It is also essential to set specific targets and an evaluation process in order to measure success and in this way achieve change. Positive action is allowed in EU legislation, but the focus should be on achieving positive duties.

The ERRC recently undertook a survey of 11 international NGOs in Europe to find out whether they had equal opportunities policies in place. Most do but do not have positive measures. In conjunction with this survey, the ERRC equal opportunities policy has now set the target of achieving one third of Roma staff, at all levels of the organisation including senior staff. In order to achieve this, the ERRC offers language training if needed, long-term traineeships for possible future recruitment and management training. This policy is driven by the understanding that an NGO can set the example by implementing positive action measures.

Mary Collins, Policy Co-ordinator, European Women's Lobby: Migrant Women in the EU

There is an intersectionality between gender and ethnicity which compounds women's inequality and discrimination. For instance, there are more unemployed women than men in the EU and within this group the rates are even higher for non-European women. The European Women's Lobby (EWL) launched the project "Equal rights, equal voices - migrant women in the EU" in order to address this issue. Migration is an increasing issue in the EU and there is currently a lack of a gender perspective. The project aims to provide a channel for migrant women to voice their concerns and shape European migration policies, as well as to initiate a debate at European level on the urgent need for an approach to integration/migration policies which take women's rights into account.

The project objectives are: to bring together migrant women activists from across the EU to debate and exchange on the main challenges they experience in terms of integration and empowerment in European "host countries"; to develop and strengthen networking between migrant women and NGOs and with women's organisations at national and European levels; and to ensure a better visibility and representation of migrant women with the EWL's structures. The ultimate objective of the project is to develop a specific space for migrant women in order to facilitate their voices, either as an independent structure or a specific structure within EWL.

A number of actions have been taken so far, including a public seminar with migrant women activists in January 2007. Several issues were identified at this seminar, including the need for an independent status regardless of the reasons of migration; equality of rights; a European legal framework for protection from Female Genital Mutilation; and gender sensitive data on migration. It was highlighted that cultural relativism should not be used to justify or legitimise violence against migrant women and that the UN Convention on the rights of migrant workers must be ratified and adopted by EU Member States. Capacity building of migrant women's grassroots organisations needs to be reinforced and cooperation with women's organisations in countries of origin developed.

3. Legal and political context

3.1 Positive action in European law

Professor Marc De Vos, University of Ghent, Belgium

The purpose of the presentation was to illuminate what is lawful under EC law in terms of positive action and to highlight possible avenues for development. The presentation did not touch upon disability discrimination, Member State experiences or international human rights law.

Positive action as an instrument has historically been developed in sex discrimination but with the adoption of the Race Directive and the Framework Directive positive action has been recognised in relation to the grounds covered by the directives. Nonetheless, there is no definitive answer as to what it is. It could be argued that anything that goes beyond formal equality could be considered as positive action. It is more of a process than a concept: “any measure that contributes to the elimination of inequalities in practice”.

The concept of discrimination in EC law itself is understood more procedurally than substantially: “the application of different rules to comparable situations (as in Article 2 of the Race Equality Directive), or the application of the same rules to different situations”. This concept follows a formalistic approach, which doesn’t take into account group characteristics or historical patterns of disadvantage. Consequently it can be argued that positive action can be any measure or initiative that goes in the direction of achieving real equality: positive action to some degree addresses substantive equality. It harbours a whole range of potential measures by state or private actors: from encouragement (facilitation, promotion, outreach, accommodation, diversity) to reverse discrimination and soft or hard quotas.

Now the question is: how does the formalistic view of EC law accommodate non-formalistic approaches to equality, such as positive action? Analysing the original positive action clause on equal treatment¹³, which has shaped the case law so far and the newer clause under the TEC¹⁴ and the recast Equal Treatment Directive¹⁵ we can conclude that the latter

is much stronger and has a remedial and forward looking approach. Nonetheless, the new provision hasn’t automatically opened the door for a new era in achieving substantive equality; it is for the European Court of Justice (ECJ) to move forward from its current practice of blending the two provisions together and to recognise that the substance of the new provision is different from the previous one. So far the ECJ has not (yet) widened the scope for positive action under 141(4) TEC. Only a small fraction of positive action is liable to generate conflict with EC law, namely reverse discrimination directly contrary to formal equality. Thus it is the ‘hard’ cases that are tested.

The ECJ examines a concrete case and applies a proportionality test to investigate whether the action in question has a legitimate aim. A legitimate aim of positive action measures can be correcting a proven and genuine group imbalance, even if in that particular case the favoured individual is not directly harmed by that imbalance. The second test is proportionality; is it an appropriate and necessary action? If these tests are satisfied a derogation of formal equality is allowed to implement positive actions. Automatic quotas however are not allowed under EC law. In sum it is lawful under EC law to favour an individual irrespective of merit solely on the basis of group realities - which is the core of any positive action measure - but only where it objectively addresses imbalances. Furthermore the action cannot extend beyond what is absolutely necessary to correct imbalances. The ECJ however hasn’t issued any guidance or concrete illustrations of what it considers being absolutely necessary and what action would go beyond that.

This has been the case for gender. When we compare the text of provisions for sex and the other grounds it can be argued that although very similar, there are differences in wording.¹⁶ On the one hand the wording of the Race Equality Directive and the Framework Directive is more restrictive as it does not allow the provision of specific advantages; on the other hand

ing 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.’

¹³ Art 2 (4) of the Equal Treatment Directive: ‘This Directive shall be without prejudice to measures to promote equal opportunities for men and women, in particular by removing existing inequalities which affect women’s opportunities’.

¹⁴ Art 141 (4) TEC

¹⁵ ‘With a view of ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintain-

¹⁶ ‘With a view of 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 specific 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) linked to any of the grounds.’ Art 5 D2000/43 and Art 7.1 D2000/78 (provisions relating to gender in brackets).

it is more extensive as it encompasses any specific measures and any disadvantages outside the labour market. Nonetheless when examining the principles and concepts of the different provisions it could be argued that they are the same for all protected grounds.

So the question remains: what are the avenues of development? As we have seen there has been only a marginal evolution in the concepts. What the ECJ might embark on is developing the scope of positive action measures to reach beyond employment and gender. But the key remains proportionality: the legitimate aim for positive action might have been evident in gender, but for other grounds it may vary and reasoning for positive actions has to be established. Furthermore the effectiveness of actions needs to be examined: what is the cost/benefit of different actions? How much proven and genuine imbalance is reasonable to be corrected by positive action measures? Are actions planned necessary or are there any other alternatives to be considered? How is it possible to establish actions and measures on a temporary basis to comply with the temporary test? To answer these and other related questions will be a real challenge for the ECJ - so bring cases before the Court!

3.2 Data collection and positive action

Professor Olivier De Schutter, University of Louvain, Belgium

The presentation sought to shed some light on the issues and concerns of data protection law that arise in relation to positive action. Data collection is a very useful instrument for anti-discrimination measures as it enables monitoring of the situation of different groups in society according to certain characteristics, such as race and ethnic origin, disability or religion.

At least four main functions of data collection can be identified depending on the purpose of collection. In addition to guiding anti-discrimination policies, assessing the practice of private or public organisations and allowing victims to rely on statistics to challenge discriminatory practices, data is required to grant special treatment to members of underrepresented groups - for implementing positive action measures, in which case *personal*¹⁷ data is collected and processed.

In relation to these functions of data collection and anti-discrimination policies a number of studies have been pub-

lished, many with the support of the European Commission.¹⁸ These studies investigate substantive issues raised by positive action measures such as the limits imposed by data collection, specific instruments relating to the processing of data which safeguard that privacy rights of individuals won't be violated and that data collection is not used in order to implement discriminatory actions. These specific safeguarding instruments only apply if personal data is processed, which is not always the case; data collection does not necessarily comprise the processing of personal data, e.g. in case of anonymous questionnaires, direct observations, surveys, or personal data made anonymous for further processing.

There are different forms of positive action related to data collection. In case of monitoring the composition of the workforce data is needed but personal data is not necessarily processed. Furthermore no personal data is processed in outreach activities of a general nature targeting underrepresented groups, e.g. when job vacancies are advertised in newspapers which are more likely to be read by certain ethnic minorities. In case of outreach measures however, which specifically benefit members of targeted underrepresented groups, e.g. when it is guaranteed that applicants from a certain ethnic group will get interviewed for a certain job (but not the job itself) personal data is involved. Finally, personal data is also involved in preferential treatment programmes when strict quotas are followed.

The most important question that arises in relation to these anti-discrimination measures is: what are the limitations imposed by law on collecting and processing personal data?

Firstly, it is necessary to ensure that the processing of 'sensitive' data ('race', ethnicity, religion) for the purposes of positive action policies is compatible with the requirements of data protection legislation. The general principles governing the processing of personal data are to be found in Directive 95/46/EC. They include fair and lawful treatment of personal data, the principle of proportionality etc.¹⁹ According to the legislation the processing of sensitive personal data for the implementation of positive action schemes is allow-

¹⁸ For further details see p.29

¹⁹ Art 6 of Directive 95/46: Personal data must be:

- (a) processed fairly and lawfully;
- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;
- (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- (d) accurate and, where necessary, kept up to date: every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are eased or rectified;
- (e) kept in a form which permits identification of data subjects for no longer than necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored no longer periods for historical, statistical or scientific use.

¹⁷ Definition of personal data: Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995: personal data are 'any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity' (Art 2.a).

able either where the data subject has given his/her free and informed consent; or where this is made obligatory under national legislation; but the data collected must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed; and they must be processed fairly and lawfully.

Secondly, the processing of 'sensitive' data ('race', ethnicity, religion) for the purposes of positive action policies needs to be compatible with the requirements of the right to privacy as 'self-determination' (*Selbstbestimmung*) – individuals' right to choose to be considered as members of a certain group. National and international legislation provide for the right of self-determination²⁰, nonetheless this is not an absolute-right and may be over-ridden or restricted by positive action measures, as was the case in Northern Ireland under the Fair Employment and Treatment (Northern Ireland) Order 1998.²¹

Finally, advantages and risks implicated in racial and ethnic classifications need to be measured against the benefits hoped to be achieved by positive action policies. Do advantages of preferential treatment measures outweigh the threat of reinforcing stereotypes and that certain kinds of integration measures might be based on visibility? The question is open for debate.

3.3 Case studies: national legal and political frameworks

Affirmative action in France by Sophie Latraverse, Deputy Legal Director, High Authority to Fight Discrimination and to Promote Equality (HALDE)

French administrative law allows compensatory differential treatment in the pursuit of the general good but such a scheme must be created by law. It has been held to be compatible with the Constitution if it is based on the grounds of disability, sex, age or socio-economic consideration, but not race or ethnic origin, as France generally rejects the concept of race and of ethnicity. The French Constitution prohibits the construction of policy based on ethno-racial considerations as such criteria are considered to be subjective and uncorroborated by objectivity. Moreover, all policies have to address the nation as an undivided entity in order to ensure respect for the principle of equality. Therefore at present no legislation authorises affirmative action based on ethno-racial grounds.

²⁰ Council of Europe Framework Convention for the Protection of National Minorities (1995), art. 3: every individual shall have the right freely to choose to be treated or not to be treated as belonging to a national minority and no disadvantage shall result from this choice.

²¹ As regards the implementation in Northern Ireland of the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO), see FCNM Advisory Committee, Second Opinion on the UK.

In this context there has been considerable debate in France on the opportunity to construct ethno-racial indicators. Considering the importance of data for the purpose of constructing anti-discrimination policies, the data protection agency (CNIL) had put in place two successive working groups in order to consult and issue a position paper on the proper conditions in which to pursue research on racial discrimination. It concluded that indicators had to be created by law and that it was not appropriate for employers, on the pretext of promoting diversity, to improvise the management of ethno-racial indicators. Finally, it also stated that all data collection on origin should be pursued under the supervision of the data protection agency, the French anti-discrimination national body (HALDE) and national statistical agencies.

Following draft legislation that was introduced by way of an amendment to the new law on immigration, in order to formally authorise research on discrimination and the use of ethnic indicators, the Constitutional council was petitioned to quash this provision. It decided that it was illegal for technical reasons and stated that it would not authorise the construction of indicators based on subjective considerations of race and ethnicity.²² The purpose of this reasoning was to eliminate a question on race which was put in very important national research relating to discrimination on the ground of origin. In the meantime, however, major national statistical institutions are undertaking research on discrimination based on origin and working on the construction of indicators based on objective data.

As for positive action in favour of groups discriminated against on the basis of ethnic origin, French policies target these through positive action based on socio-economic considerations or deprived areas. The generally accepted idea is that you don't need to count to help and the critical portion of the discriminated population can be reached through such an approach. There are therefore a number of schemes for differential access to social rights and education e.g. priority education zones in which budgets are increased, the number of students per class is lowered and homework support is put in place; access to French language education for immigrants; promotion of employment in disadvantaged areas; specific devices to accompany and encourage employment of younger unskilled workers, older workers and immigrant women.

The debate on anti-discrimination policies based on race or ethnic origin is evolving rapidly and research seems to be ready to move forward but solutions will necessarily question the use of the concept of race and attempt to establish

²² <http://www.conseil-constitutionnel.fr/decision/2007/2007557/2007557dc.htm>

more legitimate criteria of intervention. The creativity that ensues might however in the end contribute to the evolution and development of anti-discrimination devices, policy and research in Europe.

Roma policies in Hungary by Andor Urmos, Head of Department, Ministry of Social Affairs and Labour

Andor Urmos started by highlighting that although positive action is not allowed under the Hungarian Law on Equal Treatment and Equal Opportunities (2003), it can be argued that the Roma policies of the Hungarian Government include positive action measures.

Under the Decade of Roma Inclusion (2005-2015) “group target” and “territorial target” measures have been drawn up, which incorporate programmes and actions for groups (the long-term unemployed, people with low educational attainment, early school leavers etc.) and geographical areas (most disadvantaged territories, Roma settlements, ghettos) where the Roma are overrepresented. In addition, applying an equal opportunity criterion to policies means that governmental initiatives ought to focus on educational and housing segregation and support the establishment of Roma networks, experts and professionals to enable Roma representatives to take part in decision making procedures.

There have been considerable efforts to avoid developing separate minority policies as they have increased the segregation of the Roma in the past. Other examples of positive action measures include the setting up of local Roma self-governments across the country, which is an exceptional initiative in Europe. Roma civil servants have been recruited in all government departments, Roma managers are employed at county level labour offices, assistants of Roma origin are working in primary schools. A scholarship has been set up to help students to access secondary and university education.

In order to benefit from these programmes however, a person needs to identify themselves as being a member of the Roma community, which carries a deeply entrenched stigma in Hungarian society. According to official statistics there are 190,000 Roma in Hungary - one third of the figures independent research suggest.

Fair employment in Northern Ireland by Tim Cunningham, Committee on the Administration of Justice

Tim Cunningham started by arguing that the turning point in Northern Ireland for equality law was the passage of the 1989 Fair Employment Act. The 1989 Act introduced legally enforceable and compulsory employment monitoring duties in relation to specific equality grounds and the no-

tion of “group justice” in the workplace with a requirement that employers seek to achieve “fair participation” between two dominant groups. Where fair participation has not been achieved provision of limited affirmative action measures has been granted, including “goals and timetables” for recruitment of under-represented groups. In practice, affirmative action measures have included welcoming statements encouraging applications from under-represented groups, and targeted recruitment.

The 1989 Act came about as a result of pressure on the UK government from the US regarding the lack of Catholic representation in employment. US pressure was originally focused on South Africa (via the Sullivan Principles)²³ and led by African Americans; however their campaign was adapted for Northern Ireland in the form of the McBride Principles.²⁴ The passage of legislation shows the power of international networks and shareholders in achieving social change.

The next step in Northern Ireland was the passage of the Northern Ireland Act 1998. This introduced a legal duty on all public authorities to promote equality.²⁵ As a result all public bodies in Northern Ireland are required to examine what they do in order to establish if changes can be made to achieve greater equality. These changes take place within the context of Equality Impact Assessments, which examine in particular how policies and programmes can be amended to deliver greater equality, across a range of grounds including race.

Northern Ireland also has a more proactive form of positive action currently in place with respect to recruitment to the Police Service of Northern Ireland which takes place on a 50:50 basis for Catholics and non-Catholics. The measure was put in place to increase Catholic representation which has been a problem historically in Northern Ireland. By the late 1990s, Catholics made up over 40% of the population, but just over 10% of the police service.²⁶

²³ The South-African Sullivan principles demanding equal treatment for employees regardless of race gained wide adoption among United States-based corporations and in the 1990s were expanded to increase active participation of corporations in the advancement of human rights and social justice at the international level.

²⁴ The McBride principles, named after Sean McBride, a key figure in securing the European Convention on Human Rights and a Nobel Peace Prize Winner, were adopted as US law in 1998 creating a fair employment code for US companies in Northern Ireland.

²⁵ Section 75 of the Northern Ireland Act offers a unique and proactive way of delivering greater equality. According to Section 75 of the Northern Ireland Act 1998:

(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity

(a) Between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; (b) Between men and women generally; (c) Between persons with a disability and persons without; and (d) Between persons with dependants and persons without.

²⁶ Further reading: Christopher McCrudden, “Mainstreaming Equality in the Governance of Northern Ireland”, *Fordham International Law Journal*, April 1999. Christopher McCrudden, “Human Rights Codes for Transnational Corporations: What can the Sullivan and McBride Principles Tell Us?”, *Oxford Journal of Legal Studies*, 1999. www.caj.org.uk/equality

4. Training workshops: understanding positive action

4.1 Workshop 1: Understanding the theory

Facilitator: Facilitator: Jean-Pierre Gauci, ENAR Malta, Board Member

Contributors:

- Omar Khan, Research & Policy Analyst, Runnymede Trust
- Dr. Lilla Farkas, Network of Independent Experts on Anti-Discrimination, Chance for Children Foundation Hungary

Positive Action: Presenting the theory by Omar Khan

Criticisms of preferential policies are widespread. Much of this criticism, however, stems from confusion about why preferential policies can be justifiable in principle, whatever their consequences in practice. Thus the presentation focuses on moral rather than legal questions. The common view that positive action and quotas are controversial contrasts with the increasing agreement that such policies may be necessary to realise equal opportunities. A wider global trend views these policies as non controversial. For example, the US and UK governments accepted a form of quotas to ensure representation of women in the parliaments of Iraq and Afghanistan. Indeed, all countries - from Sweden to Rwanda²⁷ - with high female representation have some sort of quotas.

Preferential policies are defined as measures that treat members of certain groups preferentially on the basis of *unjust disadvantage*. The individual members of the groups in question therefore have a *valid claim* because of *current racism or sexism*. Two questions help frame preferential policies and make their ethical justification clear: 1. Who benefits? 2. What benefits do they get?

Too much focus has been placed on the relatively small numbers of individuals who in fact benefit. Preferential policies were designed to benefit *every* member of a disadvantaged group, resulting in a greater moral importance. If every member of a disadvantaged group is treated unjustly, they have a legitimate moral claim on the rest of us to ensure that they are treated fairly.

Preferential policies address unjust disadvantage and advantage of the whole group because individuals who get a job or position can serve as *agents of integration*, transmitting knowledge and skills on how to use opportunities (what

works in job and university applications, for example) to fellow group-members who have little experience of this because of the way “what we know” is compromised in a racist or sexist society.

Participation is perhaps the most important justification for preferential policies. All individuals should have the opportunity to participate in public institutions and the public sphere. When members of disadvantaged groups participate in important public institutions, their actual interests and needs are represented.

Respect is another important result of participation. Visibility of people with disadvantaged backgrounds in important roles in public institutions increases every member’s standing. A more forceful variant of this claim is that it is more important for blacks and Asians to have publicly important roles than for them to be represented in Olympic teams or football or as successful shop managers.

It is worth indicating briefly how *everyone* in society benefits from preferential policies. We all benefit because it is a *public* good to live in a society where everyone is treated with equal concern and respect and we further benefit in knowing that our institutions are fair.

Finally, all policies target the “groups”: public housing is built in areas it is most needed, public transport is built in areas with commuter and tourist needs and even redistributive taxation targets individuals above and below a certain income threshold. We need to remember that individuals vary in the strength of their claim because they vary in their lived experience of disadvantage.

Liberal democracy was founded as a response to the unjust privileges of the *ancien regime* in France, ultimately strengthened in the movement against slavery and racist separatism in US. This, however, has led to an improper or misapplied standard of equal treatment. It is of course important to treat citizens as equals and to ensure that our public institutions do not discriminate unjustly. But **existing unjust disadvantage justifies measures to improve the situation of the individuals who suffer from it**. In a democracy, further reasons to be concerned about representation arise where

²⁷ Both at over 48%.

patterns of disadvantage hinder a certain class or classes of citizens from participating as equals.

Addressing educational disadvantage and discrimination: positive equality in practice by Dr. Lilla Farkas

Although the Race Equality Directive does not oblige Member States to develop and implement positive action measures, there are already in place specific policies and programmes to prevent or compensate for disadvantages linked to racial or ethnic origin.

The study “Segregation of Roma Children in Education”²⁸, discusses the components of positive action that can be found in national or regional programmes promoting the education of Roma children and adults across Europe. These have included:

- Promotion of minority language: In Slovakia, even though the Slovak Constitutional Court ruled out positive action measures as being contradictory to the Constitution, social policy arguments have led to zero grade classes facilitating language adaptation prior to enrolment to primary education. Nonetheless, the question arises whether education in the minority language should be promoted instead of language adaptation courses?
- Teaching assistants maintain important links to Roma communities in Poland, Slovakia, Bulgaria, Finland and Hungary;
- Return programmes from special to mainstream education in Slovakia and Hungary;
- Curriculum and/or teacher training on Roma language and culture in Slovakia, the UK, Hungary and Ireland;
- Pre-school education, which in some Member States is seen as positive action;
- Mainstreaming and inspecting Roma needs within national education;
- Extra teachers for Roma in Ireland, Sweden, Germany and Italy and enhanced per capita support in Ireland, Cyprus, Italy, Greece and Hungary. But the question arises whether a teacher could legitimately claim that it is more difficult to teach a Roma child than a non-Roma?
- Programmes to access secondary or university education, scholarships in Hungary and Slovakia, which are questionable under EC law as automatic preference is given to members of the Roma community;
- Training centres for adult Roma in Ireland, outreach for early school leavers and distance learning.

The main difference between approaches in common law countries and continental Europe is that in the latter justifica-

tions for positive or preferential measures are based on social policy arguments, on socio-economic disadvantages suffered by particular groups in the society. It shouldn't be forgotten that class is a very valid ground for much of the discrimination experienced by different racial or ethnic groups, like the Roma. An interesting exercise would be to look at the positive action measures introduced during the socialist rule in Eastern Europe in the 1950s, which were very far reaching policies at that time.

4.2. Workshop 2: Legal approaches – requiring and enabling positive action

Facilitator: Nicoletta Charalambidou, KISA - Action for Equality, Support, Anti-racism, ENAR Board Member, Cyprus

Contributors:

- Galina Kostadinova, Human Rights Law Officer - Europe, Minority Rights Group International: Positive action as required by Minority Rights Law
- Tim Cunningham, Committee on the Administration of Justice: Positive action in Northern Ireland

The workshop began with a presentation by Galina Kostadinova addressing the questions of what is the link between positive action and minority rights and do minority rights give an obligation to take positive measures? There is a potential contradiction: Minority Rights tend to be defined in law as permanent provisions and are not, in general, as controversial, while positive action is seen as a temporary exception. On the other hand, positive action can entail preferential treatment that could put the majority at a disadvantage and as such it is much more controversial.

Minority rights do not in general provide for compulsory positive action. It is mandatory in special circumstances, such as to combat structural, systemic discrimination. For example, General Comment number 18 of the Human Rights Committee²⁹ requires specific action to correct conditions that impair the ability of minorities to enjoy their rights, including preferential treatment. We have a lot of these “certain circumstances” in Europe, which raises the question of what influence this will have on EU law. The EU started as an economic organisation and, historically, left Human Rights to the Council of Europe. However, fundamental rights have become general principles of EU law, meaning that any law transposing an EU Directive can be reviewed by the European Court of Justice for compliance with these principles, including minority rights. It was established in the 1970s that equality is a fundamental

²⁸ Farkas, L 'Segregation of Roma Children in Education: Addressing structural Discrimination through the Race Equality Directive' October 2007. http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/seg07_en.pdf

²⁹ General Comment number 18 on non-discrimination of the United Nations Human Rights Committee, 1989.

right³⁰ and the reference in the Race Equality Directive to a number of international law instruments makes it clear that it should be interpreted in accordance with these.



Julia Kovalenko, Sophie Latraverse, Urmos Andor, Tim Cunningham

Tim Cunningham from the CAJ in Northern Ireland gave a brief overview of the Northern Ireland legal framework, highlighting that as far back as 1989 Northern Ireland had a legal requirement to undertake positive action in the workplace on grounds of religion. This included compulsory workforce monitoring and a legal duty to set goals and timetables. In 1998, there were two further advances. Firstly, a time-limited compulsory quota of 50% Catholic recruitment to the Police Service of Northern Ireland³¹, which required a specific exception in the EU Framework Employment Directive. Secondly, a general duty was placed on Public Bodies in Northern Ireland to actively promote equality in relation to all their functions and to carry out equality impact assessments on the most important policies. The duty covers nine different groups, including ethnic minorities³² meaning decision makers have to compare and think about different grounds and avoid hierarchies. However, securing legislation is one thing, seeing it implemented is another. Some public authorities have made real progress but many are not doing enough. Nevertheless it has started a dialogue on how to take positive, proactive measures. There is no basis in international law to compel states to introduce this, but it is a very positive way to go beyond the traditional “let’s not discriminate” model.

Discussion

Minority Rights are a recognition that liberal democracy can lead to assimilation and that equality as such cannot guarantee the existence of minority groups. However, we don’t see special minority rights in EU law and this is a problem. For example, in Estonia prior to EU accession there were many positive developments as a result of the Copenhagen criteria, but this stopped after they became EU members and the European Commission lacks the powers to require action. It

was highlighted that the reference in the Reform Treaty could help, but that it isn’t enough.

A concern was raised that by talking about who is and who isn’t a minority we are following constructed divisions between minorities, migrants etc. used to restrict rights. Human Rights and Minority Rights regarding positive action cover more than “national minorities”. Human Rights bodies prefer to use more neutral language. So, for example, the International Labour Organisation Convention on discrimination allows Member States to determine special measures to meet particular requirements on race, sex etc. but also on social or economic status. ICERD requires special and concrete measures for racial groups or individuals.

Positive action is not compulsory under EU law. In Greece this has meant there is no provision for positive action as the law implementing the Race Equality Directive only covers the minimum required. Member States tend to only look at EU law, not their international duties. How can we strategically use more tools? The inclusion of the Charter of Fundamental Rights in the new EU Treaty is a possible avenue, particularly the chapter on solidarity, which includes social and economic rights as most positive actions needed by minorities are in this area. Strategic litigation is one method. The Ostrava³³ case was the outcome of strategic litigation and could be a vehicle to take forward desegregation measures. Such cases need to be used by NGOs as the law is only as good as the extent to which it is put to test. The Race Equality Directive and Framework Equality Directive give legal standing to NGOs to take cases.

Funding strategic litigation can be difficult. Resources are needed to see a case through for a number of years. The suggestion was brought forward that the EU should consider funding strategic litigation as a measure with more impact than awareness raising. It was argued that the European Commission is not just responsible for passing laws but also to make sure those laws are implemented in practice. For example in the UK funding for the national equality body includes funds for litigation. On the other hand, concerns were raised that this was not the role of the European Commission and would lead to a conflict of interest. It was argued that that there need to be a range of funding sources.

We also need to consider policy aspects. Requiring the promotion of equality through audit and inspection bodies was attempted in the UK. In Northern Ireland, economic and political pressure from the US led to the adoption of extensive

³⁰ The Defrenne Case established that equality is a fundamental right in the 1970s.

³¹ To be removed when Catholic representation in the Police Service reaches 30%.

³² Race and ethnic origin, gender, sexual orientation, disability, age, marital status, religious belief, political opinion and those with or without dependants.

³³ D.H. and Others v. Czech Republic, November 2007, Judgement of the European Court of Human Rights.

positive action measures by a government hostile to equality legislation. Building coalitions is important. In Northern Ireland the original focus was religion and the “two communities”, but the duty to promote equality was achieved because of a coalition of equality groups across all grounds.

4.3 Workshop 3: Policy approaches to positive action

Facilitator: Sarah Isal, UKREN, ENAR Substitute Board Member, UK

Contributors:

- Gabriela Hrabanova, Decade Watch
- Cécile Gréboval, Policy Director, European Women’s Lobby

Assessment of the Decade of Roma Inclusion 2005-2015 by Gabriel Hrabanova

As such, the Decade of Roma Inclusion 2005-2015 is a good example of positive action measures. It is an unprecedented political commitment by governments in Central and South-eastern Europe to improve the socio-economic status and social inclusion of Roma within a regional framework. It is an international initiative that brings together governments, intergovernmental and nongovernmental organisations, as well as Romani civil society, to accelerate progress toward improving the welfare of Roma and to review such progress in a transparent and quantifiable way. The Decade focuses on the priority areas of education, employment, health and housing, and commits governments to take into account the other core issues of poverty, discrimination and gender mainstreaming.

Mainstreaming gender equality and positive action by Cécile Gréboval

Mrs Gréboval mentioned that gender mainstreaming had been used as an alibi for inaction or for eradicating positive action, some even pointing to the fact that decision-makers at EU level manipulated gender mainstreaming in order to “counteract the emerging demand of women for binding positive measures”. Assessing the current situation of women and men and evaluating their specific needs enables differential impact assessment of measures, which may lead to highlighting gender inequalities and structural barriers, and thus a better understanding of the situation, and to challenge stereotyped roles of women and men as products of history (culture) reinforcing inequalities. It will also require looking at women as a heterogeneous group with different life dimensions such as race, ethnic origin, sexual orientation, age, disability etc. Gender mainstreaming is about transforming the mainstream but it is clear that it is

one strategy to transform society equality between women and men beside other strategies, such as positive action.

Discussion

Mrs Hrabanova mentioned that the involvement of a country in the Decade depends on its government. NGOs have an important role to play in lobbying for them to enrol, the more so as more countries are joining the initiative. Countries like Spain could certainly join the Decade, contacts have already been initiated at governmental level.

Questions were raised about the differences of complexity between gender and racial equality. Mrs Gréboval refused to set a hierarchy between discrimination grounds. Even if the issues are different in nature, the common fight is about challenging actual social and power structures. Ensuring the focus on gender mainstreaming implies a constant presence of NGOs in the policy making process.

It was debated whether obliging a company, as a punishment for misdeeds, to implement positive action measures would be an effective a strategy for promoting positive action. It can deliver a bad message because it would be the result of punishment, but it can also be positive in bringing about change within the company. Sometimes it is also necessary to first target governments because the private sector would not change if the government does not, while it happens that the private sector is sometimes more progressive than governments. Lobbying and advocacy strategies must be adapted to the context.

The need to think about the consequences and impact of positive action measures before implementing them was also strongly underlined (e.g. establishing a positive action measure if the administration concerned does not have the resources to implement it).

The need to build the capacities of and to empower organisations or networks of people experiencing discrimination was also highlighted (e.g. EWL’s migrant women network which promotes gender based questions in the area of policy making on migration). It gives the victims the potential to impact on policies directly targeted at them. On the other hand, it will also give the victims the means to address the perpetrators of discrimination. The latter have to be included in any strategy aimed at changing the situation, as it is the case in the UK, where there is a huge effort to change the organisational culture of institutions where racism is embedded.

The urgent need for data collection as the prerequisite to the implementation of positive action measures was strongly

emphasised as was the need for greater coherence between policy areas and for horizontal approaches to problems.

4.4 Workshop 4: Diversity management

Facilitator: Christopher Ejugbo, Afro-Latvian Association, ENAR Substitute Board Member, Latvia

Contributors:

- Mr. Bruce Roch, Manager of the Unit Innovation and Diversity, Adecco France
- Maarten Messiaen, Minderhedenforum (Belgium)

Bruce Roch, Adecco: Positive action in practice

Adecco, a human resources specialist mainly dealing with temporary recruitment, is currently involved in a court case due to a discrimination issue with L'Oreal back in 2000. Bruce Roch highlighted the need for more legal cases relating to discrimination in Europe; however, if the judicial system is too slow (as in the L'Oreal/Adecco case), it limits the impact of the initial initiative and leads to wrong communication in the media.

It is important to point out that if there is a discriminatory issue in one branch, with one candidate or one client, it can put the whole company at risk. There is no reason to be discriminatory for a series of reasons: economic, legal, ethics, relationships, reputation.

Adecco have been working on diversity policies since 1999 and are currently active in four areas relating to discrimination: the fight against racial discrimination; discrimination and disability; age management; gender equality. The company has undertaken a series of long-term initiatives. With regard to actions towards people with disabilities, it has a disabilities and skills programme in place since 1986. It also has a partnership with a network of inclusion interim agencies since 1993 for people furthest away from the labour market. Adecco also invests in research & development by commissioning reports on discrimination since 1999. In 2004, Adecco launched an ambitious programme of 'Adecco commitments for companies and associates', amongst which Adecco commits to recruit without discrimination. The commitments have three goals: prevent discrimination in the business relationship and in the recruitment process, deal with all customers and candidates, and change mentalities.

Adecco also developed the "LATITUDE" project from 2002 to 2006, financed under the EU EQUAL programme. The project started following an external audit on discrimination among subsidiaries, which revealed that there were problems. The idea of the project was to start with racial issues and gender

equality by undertaking awareness raising activities, management training, and explaining the new French anti-discrimination legislation to clients. Adecco went to branch directors and recruiters and trained them to deal with discriminatory demands and convince them not make such demands. Adecco also drafted guidelines for human resources managers, CEOs and intermediaries on the labour market and produced communication material to achieve these aims, as well as a hotline for victims of discrimination. Adecco worked in partnership with trade unions and the national equality body (HALDE).

Maarten Messiaen, Minderhedenforum: Case study

The Minderhedenforum is the Flemish forum for intercultural minorities, an umbrella organisation of 700 local organisations in Flanders and Brussels. The organisation issues recommendations on employment, media, migration policy, education, etc.

The situation of migrant workers on the labour market in Flanders is not very good: unemployment rates for Belgians are 5% and 25% for non-EU workers. The Flemish government therefore introduced tools for positive action. In 1998, social partners signed an agreement for governments to give money to companies to start diversity action plans. There are approximately 500 plans each year and each company receives 10000€ to finance their diversity plan (which needs to be co-financed).

In 2002-2003, the Flemish government launched a specific action plan for migrant workers and disabled persons for a period of six years. Employers were encouraged to introduce vacancies exclusively for specific vulnerable groups on the labour market. There were also agreements at the middle management level in specific sectors. In addition, trade unions received funding for diversity consultants to promote diversity in the workplace. The government also set quantitative targets for their own staff.

The Minderhedenforum has made a series of recommendations in relation to these positive action measures. They have underlined that positive action is necessary but that there is a need for binding targets in order to produce the best results. In addition, the government must ensure that companies use the funding properly. Communication regarding good practices is very important as well as induction programmes for staff and internal communication within companies. It is also important to involve trade union in positive action measures. The Minderhedenforum has highlighted the problem of data availability regarding underemployment in relation to skills. Finally, they would like a 'black list' of companies to be established so as to know which ones they can work with.

Discussion

Participants exchanged their different experiences and suggestions concerning diversity management. It was noted that change comes about within a company if they are empowered to enable this, and that working councils might be able to take on this role more actively, using a bottom-up approach. All agreed that trade unions had a very important role to play as well as on the need for training sessions for companies.

Problems highlighted were the fact that risk groups are not encouraged to apply for jobs and that ethnic minorities with higher education are often unemployed. Another problem is the fact that diversity is not always “profitable” for employers, e.g. in Latvia, where shopkeepers will not employ Roma because they will lose their clients. Participants also highlighted the lack of evidence needed in order to be able to start legal procedures for discrimination cases (although in some countries, situational testing methods are in place to collect evidence of discrimination) and the fact that sanctions were not dissuasive as they were generally very low.



Julia Kovalenko, Marc De Vos

The question was raised as to how NGOs could put pressure on companies to deal with discrimination problems and convince companies to implement action plans. It was highlighted in this context that giving the business perspective was a key argument, possibly resorting to “blacklisting” as a further means of pressure. It was suggested to work together with companies which have good practices and a corporate social responsibility policy in place and to put them under the spotlight for their work against discrimination. It was also proposed to put Member States under pressure by doing peer reviews. Participants agreed that advocacy strategies needed to be adapted to the national situation. Cooperation with anti-discrimination and equality bodies was also highlighted as important.

5. Positive action: arenas for advocacy

5.1 Positive action in the EU legal and policy agenda on non-discrimination

Stefan Olsson, Head of Anti-discrimination Unit, DG Employment, Social Affairs and Equal Opportunities

Stefan Olsson put forward some ideas with regard to the political framework. There is a need to bridge the gap between lawyers and others on how to address positive action, bring the two debates together and see how legal and policy can work together. Moreover, in order to make an impact, it is important to have a factual basis for the need for positive action as well as sensitivity to the issue on the part of governments. The good examples that exist must be “stamped” by civil society and governments. There is also a need for political commitment at the highest level for positive action to be achieved; it is therefore crucial to put pressure on politicians and make the case for positive action.

The adoption of the Race Directive was driven by political events (the Haider government in Austria) and the same is happening now in relation to the Roma debate, however such a process is not sustainable. There is a need for a long-term approach which relies on efficient data collection. In addition, positive action requires money. The PROGRESS programme cannot deal with all the demands for direct funding of projects by the EU. It is therefore necessary to rely on other, more indirect sources of funding such as the Structural Funds for promoting positive action.

Dialogue between civil society and business is also essential. It must be acknowledged that companies will only invest in positive action for economic reasons, but NGOs must be pragmatic and see the end result.



Thomas Huddleston, Andre Wilkens, Stefan Olsson

Finally, it would be useful to create a forum where government officials, civil society and lawyers can discuss good practice in order to make them readily available and undertake peer reviews, as well as bring these good practices into the Structural Funds.

5.2 Positive action as an area for improvement in Europe's integration strategies

Thomas Huddleston, Migration Policy Group

Positive action is a good strategy for integration, given that it is a remedy against social exclusion, a pro-active measure to ensure equal opportunities and active participation in labour market, as well as a principle of good governance based on the “mirror concept” of promoting equality as well as intercultural competence. However, it is currently under-utilised by governments.

The migrant integration policy index (MIPEX)³⁴ is a biannual assessment of integration policies in Europe providing indicators per EU Member State with regard to labour market access; family reunion; long-term residence; political participation; access to nationality; anti-discrimination law. The aim of MIPEX is to identify strengths and weaknesses in different countries' policies and thus identify pathways to improvement.

In terms of proactive measures for integration in the labour market, the indicators included whether national targets are set to reduce migrant unemployment, promote vocational training and profession-based language courses; whether there is equal access to training and study grants and whether measures are introduced to facilitate procedures for recognition of qualifications and skills. The results of MIPEX showed that the EU is only halfway to good practice in this area.

With regard to the principle of good governance for promoting equality, the indicators included whether positive action measures were introduced in national administration, whether there was an obligation for public bodies and parties who receive contracts, loans, grants or other benefits from public

³⁴ <http://www.integrationindex.eu/>

bodies promote equality in their work, and whether mechanisms are in place to ensure present and future legislation comply with equality laws. The MIPEX results indicated that although the law provides slightly favourable definitions of anti-discrimination and applies them in various fields of life, the legal obligations for the state to promote equality are “unfavourable”.

MIPEX therefore provides a useful advocacy tool to help raise the debate on integration and the link with anti-discrimination policies; to set standards on positive action as an integration strategy; to identify pathways to policy improvement; to ensure best practice learning and encourage mutual learning; and to track raising or lowering standards over time.

5.3 Discussion

Participants highlighted the importance of using the facts concerning positive action that already exist, for instance in relation to the cost benefits it would bring in relation to the Roma. Participants also underlined the importance of launching an ambitious discussion, by asking for positive action to be included in legislation so that it becomes systematic. Participants stressed the need to address political parties and urge them to introduce positive action measures, for instance by calling for political representation of ethnic minorities. It was also pointed out that governments’ role in implementing laws should be strengthened. Finally, participants asked how to address the fact that there is no substantial political will at the highest level to generate change.

Stefan Olsson agreed that facts were available, such as the Eurobarometer on discrimination in the EU, but insisted that there is a need to establish comparable data between the EU Member States. He also suggested working in cooperation with the Presidency of the European Union, as they set the agenda for their six-month mandate.

Thomas Huddleston highlighted the way in which policies shape public opinion, i.e. in countries where there is a debate on discrimination, people think that there is a discrimination problem, which is not always the case in countries where there is no debate. He also stressed that MIPEX set the tone, but that policies then need to be implemented, and public perceptions need to be changed.

6. Parallel workshops: developing advocacy strategies

The final session of the seminar involved four parallel workshops where NGOs and other stakeholders considered the practical implications of positive action. They considered the potential advocacy options for positive action at the European and national levels, and put forward recommendations for the European Commission, ENAR and their own work.

Facilitators:

- Andreas Hieronymus, Institute für Migrations und Rassismuskforschung (iMir), ENAR Board Member, Germany
- Alice Mary Higgins, Comhlámh, ENAR Board Member, Ireland
- David Mark, OSI Roma Initiative Fellow
- Luciano Scagliotti, Centro di Iniziativa per L'Europa, ENAR Board Member, Italy

Participants were asked to consider obstacles and opportunities for the promotion and development of positive action in their own countries and in Europe. They were then asked to develop potential advocacy options for positive action at the European and national levels and put forward recommendations for the European Commission, ENAR and their own work as an NGO. Key questions were:

- What should ENAR's key messages be for taking forward advocacy on positive action?
 - As a network?
 - As co-ordinations?
 - As individual NGO members of the network?
- What are the priority advocacy arenas and targets for ENAR?
 - At European level?
 - At national level?
- What are the key themes for the ENAR roundtables on positive action in 2008?

Participants discussed the importance of engaging with agenda-setters, politicians, business academics, and different actors on the issue of positive action, as well as focusing on young people who are generally more aware of and open to diversity. The need for clarifying the concept of positive action among the broader public through awareness raising activities was also strongly outlined as a prerequisite for further advocacy and lobbying actions at this level. Another impor-

tant theme that emerged was the need to make the business case for diversity and make pragmatic arguments in favour of positive action. In order to achieve this, it is essential to have evidence of the benefits of positive action. The overall importance of data collection mechanisms was highlighted. Participants also discussed whether "name & shame" tactics would work. It was agreed that it would work for multinationals but not for companies working at the local level.

Participants also underlined the need to emphasize the social cost of not doing anything in the long-term, e.g. on the healthcare system, as well as the need to highlight the impact of not investing in positive action on the GDP growth rate. It was also noted that it might be useful to make the democratic case for positive action, i.e. insist on the democratic legitimacy it would confer to a country. In addition, given that democracy is a core goal of the EU, this case could also be made in the European Parliament. Linked to that, the question of the political participation of migrants and Roma was also underlined as a mean to mainstream their concerns in terms of positive action policies as victims of discrimination.

6.1 Obstacles and Opportunities

Key themes from discussion on obstacles included the existence of stigma around quotas, problems in recognition of vulnerable groups and of the existence of racism, the lack of rights for non-citizens, issues of political will and implementation including the role of the media in attaching stigma and the existence of informal preferential structures. Many companies are not convinced and society at large also needs to be convinced. The negative debate on migration and negative migration and asylum policies were particularly highlighted as political and public barriers.

On the other hand, positives include the recognition of influential bodies, potential new governments, the existence of individual allies, the potential to use work on gender and disability, and the potential to link with other groups. The negative political environment means that there is a greater awareness among NGOs of the problems and the need to put pressure on the EU. This is an opportunity for ENAR to use coalitions and put pressure on the international and European arenas.

6.2 Data collection

An important theme that emerged was the need to develop a comparative analysis of data collection legislation and practices in different Member States. It was recommended that the ENAR Secretariat evaluate the Shadow Reports of 2006 in light of data protection legislation and put together a working paper for national co-ordinations which they would be able to use in their national seminars and lobbying activities. This piece of work should include concrete positive NGO examples and reflect the categorisation of different positive action measures as mentioned by Barbara Cohen in her keynote speech. There might be some forms of positive action measures which do not require data collection, e.g. the business case for equality. The Shadow Reports could be further used to monitor the concrete implementation of the commitments taken by Member States at international level.

6.3 Advocacy strategies

Participants agreed on the need to create **different strategies for different arenas**. While target setting might be a useful approach for the public sector, selling “the business case” for positive action might be a better strategy for the private sector. There is a great willingness in the NGO sector to use positive action measures, but the lack of a general understanding of the concept makes this less attractive. Rolling out training programmes and issuing best practice guidance could contribute to a wider adoption of positive action.

At the European level it has been argued that a more **proactive approach** needs to be pursued. While positive action measures are not mandatory in EU law, with better **guidance from the European Commission** Member States might include more positive action measures in their equality policies, while the possibility to lobby for mandatory positive action was also advocated. There are strong cross-overs with social inclusion and this needs to be recognised by NGOs and the EU. It was underlined that the EU must ensure the transposition of the Race Directive as a first step, and set standards for positive action taking into account the necessity for greater policy coherence between



Tansy Hutchinson, Mohammed Aziz, Mary Collins, Vera Egenberger

the EU and national levels. The EU should also ensure that it provides funding for positive action measures, for instance through the Structural Funds.

Coalitions will be important. Different NGOs should be brought into the discussion and encouraged to use positive action. Intersectionality and multiple discrimination means that positive action is relevant across different grounds. There is potential for projects that bring all grounds of discrimination together.

Workshop Conclusions

What should ENAR's key messages be for taking forward advocacy on positive action?

The Concept: Anti-discrimination and equality are human rights issues and in this context positive action is not something to be afraid of. Anti-discrimination laws and the Race Equality Directive provide the base on which to build. When defined broadly as “any measure promoting equality” positive action does not necessarily entail a reduction in the rights of the majority, but is rather about providing equality for minorities. It is more than quotas to achieve representation. It is also about addressing disadvantage. Thus it is not “jumping the queue” but “levelling the playing field”. Democracy means minorities should have the same rights and the same access to rights.

The Reality: Positive action is already happening in the majority of Member States on a number of different grounds. The reluctance to take positive action measures on grounds of racial or ethnic origin is inconsistent with this reality. As ethnic and religious minorities have many aspects to their identity, positive action for minorities is also relevant for positive action on grounds of gender, disability, sexual orientation, age etc.

The Actors: Positive action is not just for governments; NGOs, business and others should take positive action measures and lead by example. However, the primary responsibility lies with those in the positions with the most influence. This means that Member States and the European Union institutions should be role models on positive action measures and diversity.

What are the priority advocacy arenas and targets for ENAR?

- The European institutions, especially the European Commission and the holder of the Presidency of the EU should be urged to provide clear leadership on this issue, provide better guidance on the use of positive action, data collection and investigate further positive duties. This can include:
 - The European Commission to become a role model and adopt further positive action measures;
 - The EU structural funds should include funding for positive action measures;
 - The project funded by the European Commission to provide anti-discrimination and diversity management training to NGOs, trade unions and business in the EU Member States provides an opportunity to ensure that the training addresses positive action;

- Advocate for ethnic minority candidates ahead of the European Parliament elections in 2009.
- National Equality Bodies and the Network of National Equality Bodies have a key role to play in advocacy on positive action.
- The media are a key target to promote a better understanding of positive action at both European and national levels.
- Political groups and parties are also key targets at both European and national levels.
- Alliances need to be built at all levels and especially across different grounds of discrimination.
- The private sector has to be approached with “business case” strategies.

What are the key themes for the ENAR roundtables on positive action in 2008?

ENAR has an opportunity to frame the debate around its understanding of positive action. The specific theme and method will depend on the national situation. There is a need to enable the ENAR Coordinations to build their understanding of positive action and to build alliances with key partners. Consideration should be given to projects that bring all grounds of discrimination together. Following from this advocacy campaigns can be developed that reach out further to reach priority advocacy targets such as the media, politicians etc. The national campaigns need to link into the European level in order to give them greater weight and credibility. There is much expertise in the ENAR network that can be shared.

Potential activities identified were:

- Dissemination of the findings of the seminar and analysis from the ENAR Shadow Reports;
- A mapping exercise on what exists in national practices on positive action and data collection;
- Identification of good and bad practices to enhance mutual learning;
- Studies to demonstrate that a diverse workforce is better in terms of efficiency as part of an evidence-based strategy;
- The promotion of ethnic minority candidates in elections, both national and European;
- Awareness raising of victims (migrants, Roma etc.) about discrimination and the possible remedies, including positive action.

Priority areas for consideration include raising awareness of the need for positive action, data collection, intersectionality/multiple discrimination and the political participation of ethnic and religious minorities at both national and European levels.

Conference conclusions

The ENAR Policy Seminar provided an important space for the development of a common understanding of positive action and for identifying collective advocacy objectives, targets and methods.

The common understanding that positive action is more than quotas and controversy - that it is, simply, a method to achieve a more equal society through recognising disadvantage and inequality and providing tools to "level up" the playing field, was an important marker for ENAR's work. It was this that also led to the conclusion that positive action is relevant to areas outside the traditional anti-discrimination field. The tools could be found and used in areas such as economic and social inclusion, migration and integration. Similarly, participants highlighted the need for data to enable the use of such tools, to provide a clear picture of realities of discrimination and disadvantage in the EU and for the use of benchmarks and indicators in enabling and measuring progress.

Consistent messages came through regarding the priorities for advocacy and the need to engage with all actors in this process, including not just the European Commission but also Member State governments, politicians, the media, national equality bodies, other NGOs and lastly, but by no means least, with business and the private sector where much good practice is developing and could be further promoted.

The Policy Seminar was the continuation of the substantial work that ENAR has completed on anti-discrimination and equality over many years. The seminar was not a start, but nor was it an end. The next stage in the process is perhaps the more important one. It is in the next stages that the understanding and the goals developed through the seminar can be put into practice.

Seminar programme

THURSDAY 29 NOVEMBER 2007

OPENING OF THE CONFERENCE

Chair: **Pascale Charhon**, Director, European Network Against Racism

Welcoming speech: **Bashy Quraishy**, President, European Network against Racism

POSITIVE ACTION IN EUROPEAN POLICY

Opening speech: **Commissioner Vladimir Špidla**, Commissioner for Employment, Social Affairs and Equal Opportunities

POSITIVE ACTION IN CONTEXT: THE CONCEPTS AND THE REALITY

This session set the scene for the discussions during the seminar, commencing with an outline of the framework within which positive action operates, defining the concepts and outlining the International and European legal standards, placing positive action into the current debates in Human Rights and Equality law.

Keynote Speech: Positive action, institutional discrimination and mainstreaming equality: A framework for discussion, Barbara Cohen, Independent expert on anti-discrimination law in the UK and other parts of the EU

Positive action in context: positive equality in human rights law, Dr. Lilla Farkas, Network of Independent Experts on Anti-discrimination, Chance For Children Foundation Hungary

What is the reality for those directly affected?

Positive Action is commonly justified by the history of discrimination and the existence of disadvantage. So measures encouraging more women to become engineers are justified by the lack of women in engineering. However, this will not benefit the minority woman who holds an engineering degree and cannot get a job because of racism and sexism. Effective positive action must be grounded in the reality of the experience of victims of discrimination. This session explored this reality and began considering the role of positive action.

Chair: **Mohamed Aziz**, Faithwise UK, ENAR Representative, Northern Region

- **Tansy Hutchinson**, ENAR Policy Officer: ENAR Shadow Report on Racism in Europe 2006
- **Vera Egenberger**, Executive Director, European Roma Rights Centre: The situation of the Roma
- **Mary Collins**, Policy Co-ordinator, European Women's Lobby: Migrant Women in the EU

LEGAL AND POLITICAL CONTEXT

The second session aimed to explore the legal and political approaches of the EU and different Member States to the use of Positive Action in addressing discrimination and disadvantage.

Chair: **Julia Kovalenko**, Legal Information Centre for Human Rights (LICHR), Representative, Eastern Region.

Positive Action In European Law, Professor Marc De Vos, University Of Ghent, Belgium

Data Collection And Positive Action, Professor Olivier De Schutter, University Of Louvain, Belgium

National Legal And Political Frameworks: An overview of the national legal and political frameworks on positive action in selected countries

- **Sophie Latraverse**, Deputy Legal Director, High Authority to Fight Discrimination and to Promote Equality (HALDE), France
- **Urmos Andor**, Head of Department, Ministry of Social Affairs and Labour, Hungary
- **Tim Cunningham**, Committee on the Administration of Justice, Northern Ireland

FRIDAY 30 NOVEMBER 2007

TRAINING WORKSHOPS: UNDERSTANDING POSITIVE ACTION

The objective of this session was to enable participants to examine the key themes in positive action: the concepts, legal basis, policy approaches and voluntary best practice. The workshops equipped participants with the knowledge

to engage in a meaningful discussion on the appropriate and effective use of positive action as part of the fight against racism.

Workshop 1: Understanding the Theory

The purpose of this workshop was to build the knowledge of participants of the debates around 'equality' and to consider the practical implications of these debates.

Facilitator: **Jean-Pierre Gauci**, ENAR Malta, Board Member
Contributors:

- **Omar Khan**, Research & Policy Analyst, Runnymede Trust: Positive Action: Presenting the theory
- **Dr. Lilla Farkas**, Network of Independent Experts on Anti discrimination, Chance For Children Foundation Hungary: Addressing educational disadvantage and discrimination: positive equality in practice

Workshop 2: Legal Approaches – requiring and enabling positive action

The purpose of this workshop was to enable participants to consider the different legal approaches to requiring positive action.

Facilitator: **Nicoletta Charalambidou**, KISA – Action for Equality Support Antiracism, ENAR Board Member, Cyprus
Contributors:

- **Galina Kostadinova**, Human Rights Law Officer – Europe, Minority Rights Group International: Positive action as required by Minority Rights Law
- **Tim Cunningham**, Committee on the Administration of Justice: Positive Action in Northern Ireland

Workshop 3: Policy Approaches to positive action

The purpose of this workshop was to enable participants to discuss different policy approaches to the implementation of positive action measures in practice.

Facilitator: **Sarah Isal**, UKREN, ENAR Substitute Board Member, UK

Contributors:

- **Gabriela Hrabanova**, Decade Watch: Assessment of the Decade of Roma Inclusion 2005-2015
- **Cécile Gréboval**, Policy Director, European Women's Lobby: Mainstreaming Gender Equality and positive action

Workshop 4: Diversity management

This workshop considered the experiences of organisations in voluntarily adopting positive action as part of an overall diversity strategy in employment and service delivery.

Facilitator: Christopher Ejugbo, Afro-Latvian Association, ENAR Substitute Board Member, Latvia

Contributors:

- **Bruce Roch**, Manager of the Unit Innovation and Diversity, Adecco France: Positive action in practice: presentation of the LATITUDE project
- **Maarten Messiaen**, Minderhedenforum: Case study

POSITIVE ACTION: ARENAS FOR ADVOCACY

This session aimed to explore the arenas for advocacy on the use of positive action at European and national levels.

Chair: **Andre Wilkens**, Director, Open Society Institute, Brussels

Positive action in the EU legal and policy agenda on non-discrimination, Stefan Olsson, Head of Anti-Discrimination Unit, DG Employment, Social Affairs and Equal Opportunities

Positive action as an area for improvement in Europe's integration strategies, Thomas Huddleston, Migration Policy Group

PARALLEL WORKSHOPS: DEVELOPING ADVOCACY STRATEGIES

The final session of the seminar involved four workshops where NGOs and other stakeholders considered the practical implications of positive action for their work. They considered the potential advocacy options for positive action at the European and national levels, and put forward recommendations for the European Commission, ENAR and their own work.

Facilitators:

- **Andreas Hieronymus**, Institute für Migrations und Rassismuskforschung (iMir), ENAR Board Member, Germany
- **Alice Mary Higgins**, Comhlámh, ENAR Board Member, Ireland
- **David Mark**, OSI Roma Initiative Fellow
- **Luciano Scagliotti**, Centro di Iniziativa per L'Europa, ENAR Board Member, Italy

PRESENTATION OF PROPOSALS FROM THE WORKSHOPS & CONFERENCE CONCLUSIONS

Chair: **Clara Lopez De Letona**, Red Europa Contra El Racismo, Vice Chair of ENAR

Closing speech: **Bashy Quraishy**, President, European Network Against Racism

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
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<http://www.enar-eu.org/Page.asp?docid=16042&langue=EN>
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http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/broch/thembroch07_en.pdf
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<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

Seminar participants

Amoranitis Spyros	IRFAM	Belgium	Macormac Helena	NICEM	Northern Ireland
Andor Urmos	Ministry of Social Affairs & Labour	Hungary	Mandache Marian	Romani Criss	Romania
Aziz Mohammed	Faithwise	UK	Mardaki Andriana	SOS Racism Greece	Greece
Baghajati Tarafa	Init. Muslimischer OesterreicherInnen	Austria	Mark David	Open Society Institute	Belgium
Baila Ba Mamadou	SOS Racismo	Portugal	Marzec Balli	Wspolnota Kazachska	Poland
Barillozzi Franco	CLAE	Luxembourg	Mazzone Chiara	CECODHAS	Belgium
Baussand Pierre	Social Platform	Belgium	Messiaen Maarten	Minderhedenforum	Belgium
Bechev Tano	SSDID	Bulgaria	Monnou Brice	Planète Sans Frontière	France
Calabrese Patrizia	Compagnia di San Paolo	Italy	Niang Ioanna Carmen	Culture of Peace Association	Romania
Charalambidou Nicoletta	KISA	Cyprus	Olsson Stefan	European Commission	Belgium
Charhon Pascale	ENAR	Belgium	Onyeji Chibo	Intern. Centre for African Perspectives	Austria
Cohen Barbara	Expert on antidiscrimination law	UK	Peschke Doris	CCME	Belgium
Collins Mary	European Women's Lobby	Belgium	Petchova Anna	Athinganoi CZ	Czech Republic
Cunningham Tim	Com. on the Administr. of Just.	North. Ireland	Petersheim Anita	ENAR Luxembourg	Luxembourg
De Feyter Myriam	ENAR	Belgium	Poleshtchuk Vadim	LICHR	Estonia
De Schutter Olivier	University of Louvain	Belgium	Privot Michael	ENAR	Belgium
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A conference organised by the European Network Against Racism with the support of the European Commission's Directorate General for Employment, Social Affairs and Equal Opportunities and the Open Society Institute (OSI).