

# **Putting Equality into Practice**

## **What role for positive action?**

**European Commission**

Directorate-General for Employment, Social Affairs and Equal Opportunities

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For Diversity



Against Discrimination

## FOREWORD

2007 is the European Year of Equal Opportunities for All. During this year, the EU is putting a particular focus on working towards a society that is free from discrimination, where all have real choices regardless of their gender, sexual orientation, ethnic background, religion, age or disability.

The European Union has come a long way in creating legal rules that give individuals the right to not face discrimination. However, experience has shown that individual complaints and litigation are not sufficient to bring about full equality in practice. For example, many women and persons from minority groups remain gravely under-represented in posts where law and policy are shaped and where decisions with far-reaching consequences are taken. Without adequate representation, it is simply impossible to achieve equal opportunities for all.



In spite of this fact, equal opportunities are often assumed to exist, while the existence of discrimination is denied. In such a situation, positive action can play an important role as a tool to redress the lack of substantive equality in our societies. Indeed, sometimes positive action appears to be the only means to confront deeply engrained structural discrimination in such a manner that positive results are achieved within a reasonable time. It is true that positive action is a controversial issue. However, I believe that to a large extent this is due to a lack of full understanding of the concept and the context. Both of these need more explanation and debate.

This thematic brochure aims to contribute to this goal. Following an introduction to terms and legal aspects, the brochure presents a number of views of positive action in employment and non-employment contexts. Thanks to the various contributors, with their wide range of backgrounds and perspectives, the brochure offers an impression of what positive action might mean in different fields including, for example, education and the integration of minorities in the police. In its final part, the brochure looks at the future, raising issues that are increasingly becoming important in the debate, such as the collection of data.

I hope that this brochure will encourage creative use of the tools offered by EU law for the furthering of full equality, in particular positive action.

*Professor Christa Tobler, LLM  
Europa Institutes of the Universities of Leiden, the Netherlands, and Basel, Switzerland*



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## PART 1

# INTRODUCING POSITIVE ACTION

## Positive action – introducing the concept

*Professor Mark Bell, Centre for European Law and Integration, University of Leicester, UK*



*Prof. Mark Bell:*

*“There is no consensus on what the different terms relate to.”*

One of the difficulties frequently encountered when discussing the topic of positive action is the range of different terms that are used – for example, positive action, affirmative action, reverse discrimination and positive discrimination. These often have different meanings in different countries, and even within academic writing there is no consensus on exactly what each term relates to. This article aims to provide an introduction to this debate by setting out some of the main concepts.<sup>1</sup>

Within European Union law and policy, the term most frequently used is ‘positive action’. This is typically understood to cover a wide range of measures taken to compensate for present and past disadvantages that exist because of discrimination. The rationale for such measures is to achieve ‘full equality in practice’ (e.g. Article 141(4) EC).

Equality is sometimes assumed to mean simply that all individuals are to be treated in exactly the same way, regardless of sex, ethnicity, etc. Whilst identical treatment results in ‘formal equality’, it may not be sufficient to bring about equality in practice. In academic literature, this is summarised in the term ‘substantive equality’.

For example, it is now well documented that Roma communities have experienced serious disadvantage in education, most notably through the segregation of Roma children in some countries.<sup>2</sup> Even if all present-day discrimination against Roma could be eliminated, inequality would persist because of the legacy of past discrimination. Achieving equality in practice – substantive equality – may require compensatory measures designed to redress the effects of discrimination in the past, as well as discrimination that continues today.

<sup>1</sup> For a detailed analysis, see O. de Schutter (2007) Positive action, in D. Schiek, L. Waddington and M. Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*. Oxford: Hart Publishing.

<sup>2</sup> European Commission (2004) *The Situation of Roma in an Enlarged European Union*.



### ***'Hard' and 'soft' measures***

So what kind of measures does positive action include? At one end of the spectrum, there are 'soft' forms of positive action. These steps do not directly impinge on the prerogatives of advantaged groups (e.g. men or able-bodied persons), but rather constitute extra efforts on the part of the employer or service provider.

Outreach advertising is a good example; this is where a firm includes a statement in a job advertisement specifically welcoming applications from a currently under-represented group (e.g. women). In the educational context, this might mean universities providing special recruitment activities within disadvantaged neighbourhoods.

'Hard' forms of positive action impact more directly on the prerogatives of advantaged groups. For example, a firm might decide to provide a vocational training scheme that was only open to workers over the age of 55. Alongside its general traineeship programme, the European Commission provides a specific number of traineeships that are reserved to Roma graduates.

### ***Positive action in the eyes of the law***

Legal and political controversy has often surrounded the strongest forms of positive action. In the context of gender equality, a distinction has been drawn by the Court of Justice between permissible positive action and unlawful discrimination.

Measures that seek to provide automatic and unconditional preferential treatment at the point of selection for employment have been regarded as unlawful discrimination. This would include quotas for the employment of women or appointing a less qualified female applicant in order to raise the proportion of women in the workplace.

In order to clarify this distinction, the term 'positive action' is frequently reserved for those steps that are lawful, whilst measures going further have been described as 'positive (or reverse) discrimination'.

Whilst the case law on gender equality shows that some Member States have been willing to experiment with positive discrimination in respect of gender equality, there are fewer examples of positive discrimination in Europe with regard to other discrimination grounds. A major exception is disability, where many Member States continue to operate laws that set minimum quotas for the employment of disabled people.

Positive discrimination has been more actively used to tackle ethnic inequalities in the USA, but here the term 'affirmative action' is adopted. Such techniques can also be seen in Northern Ireland, where a quota scheme has been introduced in order to increase the proportion of Catholics in the police service.

Whilst EU gender equality law has evolved towards an acceptance of positive action and a (judicial) rejection of positive discrimination, it remains an open question whether the same approach can or should be applied to other discrimination grounds. Although positive discrimination clashes with the prerogatives of advantaged groups, it appears to be less controversial where there is strong evidence of severe inequality.

In the USA, positive discrimination measures were initially developed in response to the deep-seated legacy of racial segregation. As recognition grows of the entrenched inequalities faced by Roma communities, this might provoke a fresh debate within the European Union on when positive discrimination should be allowed.





# The European Community's discrimination law provisions and practice on positive action<sup>1</sup>

*Professor Mark De Vos, Ghent University and Brussels Bar*

The first provision in EU legislation in the field of gender-based positive action measures was Article 2(4) of the Equal Treatment Directive 76/207, which held in its original wording:

*“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 in the areas referred to in Article 1(1).”*

First through the Maastricht Agreement on Social Policy and then through the revised Treaty of Amsterdam, positive action was introduced in the Treaty Establishing the European Communities (TEC) in Article 141(4):

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

While the wording of Article 141(4) appeared to go beyond that of the initial Equal Treatment Directive, this textual difference did not result in a clear extension of the scope of positive action in

the case law of the Court of Justice. The Revised Equal Treatment Directive (Directive 2002/73/EC) eventually brought its positive action provision more in line with that of the TEC.

## **Positive action and gender discrimination: European Court of Justice**

Only a small part of the wide range of possible positive action measures has appeared before the European Court of Justice (ECJ). The case law of the ECJ essentially deals with forms of preferential treatment that may amount to reverse discrimination. For these types of positive action the Court’s scrutiny can be summarised as follows.

To be justified under the initial Article 2(4) of the Equal Treatment Directive, on which even the most recent case law in gender-related positive action is still based, a national measure should aim at “remedying an existing situation of imbalance between men and women in a specific sector or career grade”.<sup>2</sup> This means that evidence should be provided of the existence of such an imbalance for the positive action measure to be legitimate. A measure aimed at compensating for inequalities rather than

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<sup>1</sup> This article is not a research paper and is not intended for citation.

<sup>2</sup> Case C-476/99 *Lommers* [2002] ECR I-2891.



removing them does not fall under the scope of Article 2(4).

Secondly, a measure of positive action should be adequate. The ECJ will assess whether it is likely that the scrutinised measure will achieve the aim of remedying the existing concrete situation of imbalance.<sup>3</sup>

Finally, the measure of positive action must be *proportionate*<sup>4</sup> – weighed up against the principle of equal treatment for persons who do not benefit from it. The measure should be necessary, appropriate and not going beyond what is needed to achieve its objective. This implies that automatic or absolute preferences can never be allowed.<sup>5</sup> In its most recent decisions, the ECJ increasingly refers to the proportionality requirement, although no clear set of criteria have been developed.

### **Observations on the 2000 Equality Directives**

Both Directives 2000/43 (Art. 5) and 2000/78 (Art. 7.1) confirm that:

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

The genesis and preparation of this positive action provision offers little or no guidance as to its meaning, purpose and relationship with the ‘acquis’ in gender discrimination. The wording of the provisions appears to be more permissive than the old Article 2(4) of the Equal Treatment Directive, but it may appear weaker than the wording of Article 141(4) EC. Indeed, Article 5 of the Race Directive fails to mention the positive element incorporated in the Treaty Article, namely the conferring of “specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity”. Similar conclusions may be drawn from the examination of Article 7 of the Framework Directive.

Neither of the 2000 Directives uses the wording “equal opportunity” from the old Article 2(4) of the Equal Treatment Directive, which had led Attorneys-General in both *Kalanke*<sup>6</sup> and *Marschall*<sup>7</sup> to the conclusion that positive action measures aiming at results are inadmissible. On the contrary, in targeting “full equality in practice”, both Treaty and Directives appear now to envisage result-oriented as well as procedural means. Nonetheless, in the light of the *Abrahamsson* case, it is not evident that these textual differences will lead to a significantly altered scope for positive action.

All in all, while it is unclear how the Directives will coordinate precisely with the existing law on gender discrimination, it is highly likely that the

<sup>3</sup> Case C-366/99, *Griesmar* [2001] ECR I-9383.

<sup>4</sup> Case C-407/98, *Abrahamsson* [2000] ECR I-5539; Case C-79/99, *Schnorbus* [2000] ECR I-10997 and Case C-476/99 *Lommers* [2002] ECR I-2891.

<sup>5</sup> Case C-407/98, *Abrahamsson* [2000] ECR I-5539.8.

<sup>6</sup> Case C-450/93, *Kalanke* [1995] ECR I-3051.

<sup>7</sup> Case C-409/95, *Marschall* [1997] ECR I-6363.



body of case law will provide the guidelines for interpretation of the new Directives. Regarding the scope of positive action, this has the benefit of promoting clarity and uniformity, and extending the awareness of non-discrimination rules achieved in gender matters to the other grounds in the 2000 Directives.

### ***The drive towards uniformity in positive action***

Directives 2002/73 and the Recast Directive 2006/54 do not shed a lot of new light on changing scope for positive action measures. What they do make clear, however, is a willingness to bring into line all positive action provisions based on Article 141(4) EC and in legislation based on Article 13 TEC. This may imply or justify a similar interpretation of all provisions concerned, with that of Article 141(4) EC as the beacon.

In Directive 2002/73 amending the Equal Treatment Directive, the old Article 2(4) was deleted in favour of a reference to the positive action provision in primary legislation, where a new Article 2(8) provided that “Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women.” The Preamble clarified that Member States are allowed

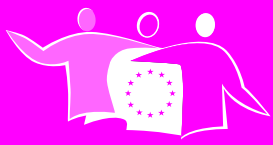


*Prof. Marc De Vos: “There is a willingness to bring all positive action provisions into line.”*

to maintain or adopt 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.

Consequently, the Directive is said to implement Article 141(4) EC and also introduces the obligation for the Member States to report regularly on their activities in this field. The Commission did not expand on a possible new scope for positive action measures, but restricted itself to a *tour d’horizon* of the limits of positive action in gender discrimination case law, while highlighting the dominating force of Article 141(4) EC.

The preparatory documents in the most recent legislation on sex discrimination show the Commission’s policy to apply “identical concepts of equality that encompass the room for positive action”. In the Recast Directive 2006/54, Article 2(8) of Directive 2002/73 amending the Equal Treatment Directive was resumed in its Article 3 on positive action, keeping the referral to Article 141(4) EC and the goal of “ensuring full equality in practice between men and women”.



## PART 2

# POSITIVE ACTION AND EMPLOYMENT

## Introduction

Employment is arguably the single most important key to full, active and equal participation in society. Jobs bring economic benefits and help raise social standards. When discrimination, prejudice and negative stereotypes restrict access to the labour market to certain groups, the impact is devastating. The discriminated groups are not the only victims – employers themselves lose out if they do not choose the best candidate for the job, as do the public or consumers they serve.

Fair and equal treatment must apply not only in getting a job, but also in the conditions and opportunities that are available to those who are already working. Hard facts show that those in key positions of responsibility in business and public service do not reflect the diversity of society. In a world where attitudes and perceptions change slowly, positive action is a tool that can make significant changes to redress these imbalances in the short and medium term.

In Belgium, for example, the Selection and Recruitment Office of the Federal Government (Selor) has a clearly structured approach to using positive action to increase diversity in the public sector workforce. Vincent Van Malderen, diversity project manager at Selor, highlights in his article how information campaigns, databases and other tools in recruitment and selection procedures play a role.

György Makula from the Hungarian police outlines the work of an international association to promote better representation of Roma in law enforcement authorities, and better cooperation and understanding between police and Roma communities. Positive action measures aim not only to boost recruitment, but to support officers of Roma origin.

Paul Lappalainen is senior legal expert at the Swedish Integration Authority, and author of a report on structural discrimination in Sweden. He highlights how clauses in public procurement contracts can make a positive impact on the recruitment and employment practices of private companies. The financial implications of contract compliance, he argues, are a strong incentive for them to think in terms of 'inclusion' not 'exclusion' and initiate their own positive action measures.



## Equality processes in selection and recruitment

*Vincent Van Malderen, diversity project manager, Selor, Belgium*

The Belgian Federal Government's Selection and Recruitment Office (Selor) is the organisation responsible for the recruitment and career development of civil servants. Equal opportunities are at the heart of Selor's organisational structure. Diversity is one of the 'supportive processes', and as such, it interacts with the main processes (selection, orientation, certification) and other supportive processes such as communication and innovation.

The main end product and aim of the diversity process is to create objective and neutral reserve lists of competent candidates for specific posts. In order to achieve this goal, selection and screening methods must be accessible to all. Selor has launched a number of diversity projects since 2003. These have been developed in accordance with the latest principles of good diversity management.

### ***Ensuring non-discrimination***

The first task of any organisation in terms of equality is to ensure that it applies all existing non-discrimination laws. At Selor, the philosophy is that all personnel must be aware of the legislation, not just the management and the legal service. With this in mind, we have developed diversity training that tackles all legal issues and informs all employees of relevant legal requirements. Other themes in the training include diversity management, the diversity 'state of play' in Belgium and concrete tools that can be used to promote diversity.



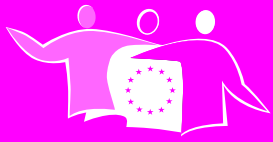
*Vincent Van Malderen:  
"Our diversity policy aims to reach in particular job candidates from ethnic minorities, candidates with disabilities and women applying for posts in management."*

One of Selor's projects is called 'Proactive diversity screening'. Our recruitment process includes testing. Whenever we upgrade the testing we use, we create a screening panel consisting of experts in product development, user-friendliness, information and communication technology and diversity. We make it compulsory for a contractor that develops new test procedures for us to take diversity into account. If the company cannot supply us with sufficient statistical data related to diversity, we commit to working together with it to carry out statistical research in future development projects. This year, we are conducting tests with volunteers to see how ethnic background can be a factor in a selection process.

A further project to ensure non-discrimination is to ensure that 'reasonable accommodation' is made in the selection procedures we coordinate, so that all candidates for a post who have a disability can take part in a selection process that caters for their specific needs. Selor has gained considerable expertise with this project. To date, just over 1000 candidates with a disability are in our database.

### ***Promoting equal opportunities***

Promoting and communicating our projects to target groups and the wider public is a second step. We have set up expert networks on the issues of 'disability' and 'ethnic minorities' to analyse



and validate current and future projects. We also have a diversity stand that we use at job fairs and seminars.

Selor also organises its own events, such as the biannual 'Talent@Public', which attracts around 10 000 visitors. The last fair included two diversity seminars, where experts illustrated best practice to the general public. Another biannual event we host is our open day, which typically attracts 5 000 visitors. This is another platform for us to highlight the importance of equal opportunities in our work.

We share our expertise with other organisations by making presentations on our projects and activities. Part of this work has been to create a film called 'Selection and Diversity', which has the twin aims of demystifying the selection procedure and attracting more ethnic minorities to apply for selection.

We have also created two 'diversity channels' to highlight and publicise a number of vacancies for which we manage the selection procedure. The target groups of these special channels are people from ethnic minority backgrounds and people with disabilities.

### ***Increasing diversity***

Our diversity policy aims to reach in particular job candidates from ethnic minorities, candidates with disabilities and women applying for posts in management. Our projects can increase the number of candidates, and as a result, also increase the successful recruitment and representation of these groups.

Two other measures are in place to help achieve this. Any candidate with a certified disability can be included on a specific reserve list for disabled candidates. Candidates on this reserve list can be prioritised – i.e. considered before those on the regular list. Secondly, in order to encourage more women to apply for management positions available through our selection procedures, we sponsor women's networking events. Other positive steps include selecting more women to serve on our recruitment panels.

### ***For further information***

Selor: [www.selor.be](http://www.selor.be)

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## **Positive action for Roma in law enforcement**

***Captain György Makula, secretary-general of Fraternal Association of European Roma Law Enforcement Officers***

The Roma population in Hungary is estimated to be between 550 000 and 600 000, which corresponds to 5.5–6% of the whole population. Hungary has the fourth largest Roma community in the European Union after Romania, Bulgaria and Spain. If Roma people are to be fully integrated into wider society, they must be represented

in key areas such as state administration, law enforcement organisations and the media.

Cooperation between police, non-governmental Roma organisations and Roma autonomous governments started in 1994. Between 1996 and 1997 the Hungarian Ministry of the Interior



carried out a survey on attitudes within the police force towards Roma people. Following this, agreements were signed between Roma minority governments and law enforcement authorities. Police scholarships for Roma secondary school students were also introduced. Summer camps are now organised for young Roma people, with the aim of promoting careers in the police force. The main goal of all these measures is to increase the number of Roma people in law enforcement.

The Fraternal Association of European Roma Law Enforcement Officers was launched in Budapest in November 2006. Hungary led the initiative, bringing together partners from Bulgaria, the Czech Republic, Romania and Slovakia. The establishment of the association was initiated by Hungarian police officers of both Roma and non-Roma origin, and actively supported by partner organisations within Hungary and abroad. Senior officials from the Hungarian Ministry of Justice and Law Enforcement and other law enforcement agencies showed strong commitment to cooperating on this issue right from the start.

### ***Aims of the association***

The Fraternal Association of European Roma Law Enforcement Officers aims to implement national and European-level objectives including promotion of equal opportunities in the law enforcement agencies of Hungary and other EU Member States, reduction of mutual prejudices between the law enforcement agencies and Roma communities, increasing the number of staff of Roma origin at the law enforcement agencies, and improvement of the life and service conditions of the current Roma staff members.

The following objectives carry equal weight for the association: provision of assistance in overcoming the identity problems of Roma staff members;

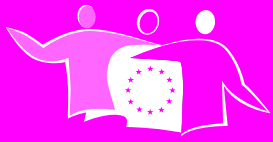


*Capt. György Makula:  
"The main goal of the measures  
is to increase the number of  
Roma people in law  
enforcement."*

mediation in Roma–police conflicts; reduction of prejudice against the Roma in majority societies, and thereby fostering the national and European integration of the Roma minority; supporting the participation of Roma in national and international law enforcement training courses; and cooperation with national and international partner organisations.

The association's scope of activities is not limited to Roma relations and representation and the issue of discrimination. It also addresses concerns such as improving the education, employment and housing situation of Roma. Supporting recruitment of Roma to the police brings social and economic benefits. Experience has shown that for young people – who would otherwise be unable to study because of the bad financial standing of their families – law enforcement professions provide an excellent opportunity to break out of deprivation, improve living standards and build a career.

There are still very few initiatives at European level to promote cooperation between the police and Roma communities or to help recruit and support law enforcement professionals of Roma origin. This, combined with the fact that Roma make up the largest ethnic minority in Europe, gives this initiative particular importance. It is expected that the network will expand to include member organisations in other European countries, which will help address the issue across a wider area.



## Stimulating leadership to promote positive action

*Paul Lappalainen, senior legal expert, Swedish Integration Authority*

For a long time, well-meaning whites went to the segregated areas of the USA. They wanted to help with the 'black' or 'coloured' problem. The turning point came during the 1960s. With an increasingly clear voice it was pointed out that 'We do not have a black problem, we have a white problem.' The key issue was the lack of equal rights and opportunities – the failure to deal with the racism and discrimination by those with power.

Up until that time policy makers assumed that you could not wipe out racial discrimination by law, only through changing hearts and minds. But as pointed out by Earl Warren, the chief justice at the time, 'This is a false credo. True, prejudice cannot be wiped out, but infliction of it upon others can.'

Laws, rules and policies can affect behaviour if there is a cost attached to that behaviour, often regardless of personal attitudes. Public pressure brought about anti-discrimination laws and tools to complement the laws, such as anti-discrimination clauses in public contracts.

The risk of losing public contracts stimulated leadership to at least avoid discrimination. Beyond this, contract compliance led to positive action, not in terms of quotas or positive discrimination but in regard to a serious re-examination of the way many employers recruited and promoted their employees. Many have moved from looking at the mechanisms for exclusion to looking at the mechanisms for inclusion.

In *The Blue and Yellow Glass House: Structural Discrimination in Sweden*, a Swedish government inquiry completed in 2005, one of the reforms I proposed was the use of anti-discrimination clauses in all national contracts. The government regulation proposed is based on the clause adopted by Stockholm City Council in January 2005.

Through this contract clause the supplier agrees to abide by the applicable anti-discrimination laws in regard to its activities in Sweden, apply the same duty to sub-contractors and report in writing, upon request, to the contracting entity concerning the compliance measures undertaken. The supplier also acknowledges that a violation of the clause constitutes a significant breach of contract, and that the contracting entity retains the right to cancel the contract.

The use of such clauses has been the subject of debate for almost 10 years in Sweden. Experts in the field of public procurement have expressed doubts as to the legality of such a clause, though Commission pronounce-



*Paul Lappalainen:  
"Laws, rules and policies can affect behaviour if there is a cost attached."*



ments, court case law and changes in procurement directives have so far proved otherwise. These amendments specify that special conditions are permissible, and may concern social and environmental considerations.

### **Democracy and quality**

It is important to point out that there are both democracy aspects and quality issues that support the introduction of such clauses. From a democracy point of view, it is important that residents can have some confidence that the public sector is not providing their tax funds to companies that are willing to discriminate. This could lead to a decreased interest in paying taxes among some parts of the population.

Concerning quality, the main thrust of anti-discrimination laws is toward ensuring that employers do not discriminate against the most qualified applicants or employees because of irrelevant factors like gender, ethnicity, religion or other belief, disability or sexual orientation. If an employer accepts such less qualified personnel there is an increased risk that the goods produced or services provided will not be of the highest quality.

Contract compliance has had a positive effect concerning the employment of women and minorities in the USA and Canada. It is also worthwhile to note that these effects have been achieved even though very few contracts have been cancelled. The main effect seems to have been preventive as well as promoting equality. Positive actions undertaken by employers have involved ensuring that their employment processes do not discriminate, and consciously encouraging an increased number of qualified women and minorities to apply for vacancies.

Public procurement in Sweden at national and local levels is worth around €40 billion annually. Given the amounts involved it seems highly likely that, at a minimum, the introduction of such clauses will lead to much greater interest in compliance with Sweden's anti-discrimination laws. Beyond that some companies will be interested in demonstrating leadership in terms of positive actions to attract the most qualified employees.

Naturally, for this to take place, policy makers must first demonstrate their ability to show leadership. It is also up to those who are discriminated against to demand such leadership.

### **For further information**

*Det blågula glashuset - strukturell diskriminering i Sverige* (The Blue and Yellow Glass House: Structural Discrimination in Sweden):  
[www.regeringen.se/sb/dD/5073/a/46188](http://www.regeringen.se/sb/dD/5073/a/46188)  
(in Swedish, but including a 20-page English summary)



## PART 3

# POSITIVE ACTION IN NON-EMPLOYMENT CONTEXTS

## Introduction

Employment is often the focus of anti-discrimination efforts, and it is an area well addressed by existing anti-discrimination legislation. However, the broader picture of society calls for wider action – access to goods and services, and equal rights and equality of opportunity in key areas outside the workplace. This section considers how positive action can play a role in the fields of education, healthcare and politics.

Professor Kathleen Lynch, chair of Equality Studies at University College Dublin, notes that positive action in the field of education can make a welcome impact in the short and medium term. It can, for example, guarantee places in higher education for groups that have suffered prior discrimination. She emphasises, however, that access must be backed up with support, and that a qualification is no guarantee of a job for groups that experience discrimination. She calls for an ‘equality of condition’ approach that recognises the wider economic, political and cultural influences at play.

Trish Pashley, from the Equality and Diversity programme at the Healthcare Commission in the UK, gives an overview of the regulator’s approach to equality. In its role as assessor and regulator, it is paramount that the Commission leads the way with its internal policies – and as an employer, that it aims to better reflect the society it serves.

The Healthcare Commission has now introduced a disability equality scheme to add to its race equality initiative. Disabled people are involved in not only developing the scheme but also delivering the actions. The scheme is part of the Commission’s wider approach to monitoring and scrutinising processes within the organisation from an equality perspective, while working closely with partner organisations and authorities that are dedicated to equality issues.

Politicians are our elected representatives and make key decisions on our behalf. It is essential that this group reflects the society it serves. Raül Romeva, vice-chair of the Committee on Women’s Rights and Gender Equality at the European Parliament, highlights the poor representation of women in decision-making posts and calls for positive action to also play a role in addressing wider issues of gender inequality.



## The scope of positive action and the need for equality of condition

*Professor Kathleen Lynch, Equality Studies Centre, University College Dublin, Ireland*

Most EU policies are concerned with prohibiting discrimination – promoting ‘formal equality of opportunity’ rather than ‘fair equality of opportunity’ or ‘equality of condition’. While fair equality of opportunity, in the sense of promoting positive action, is a welcome advance on formal equality of opportunity, and has the capacity to overcome the impact of prior discriminations in the short to medium term, it is constrained in the longer term. Only policies promoting equality of condition can ensure substantive equality between social groups over time.<sup>1</sup>

Positive action – if taken in the stronger rather than the weaker sense – provides a welcome guarantee of education places for those who cannot compete for advantage because of prior discrimination. It supersedes formal equality of opportunity as a policy objective as it recognises that getting educational credentials involves competition, and those who are under-resourced are unable to compete on equal terms.

However, any policy that guarantees access to advantaged places will only work if it also ensures that those who are granted places (e.g. in higher education) are sufficiently supported to perform successfully at that level. In addition, the nature of the positive action to be taken needs to be determined in each specific case, because the generative cause of past discriminations varies for each group.

### **Limitations and drawbacks**

In a society where significant inequalities persist and are re-enacted in each generation, positive action can change the lives of sections of targeted groups, but it cannot alter the opportunities of the many who are disadvantaged. A number of problems arise. By virtue of selecting a targeted percentage, the policy will tend to work most effectively for those who are most advantaged within a marginalised group.

Positive action policies also implicitly lend credibility to systems that remain structurally biased against those who are marginalised. This is very evident in the area of gender, where women have been incorporated into male-dominated disciplines or fields, but on traditional male terms. Women remain subordinated in higher education because the deeply patriarchal structures of its operation have not changed.

A further on-going dilemma that positive action faces in education is that it is perceived as creating unfair advantage, even though it may only be compensating for past discrimination. This leads, in turn, to a backlash against the supported groups and undermines the purpose of promoting equality for the group in the first instance.

Also, because marginalisation from education is integrally bound up with unequal access to wealth

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<sup>1</sup> Baker, J. Lynch, K., Cantillon, S. and Walsh, J. (2004) *Equality: From Theory to Action*. London: Palgrave Macmillan.



*Prof Kathleen Lynch: "Positive action can change the lives of sections of targeted groups, but it cannot alter the opportunities of the many who are disadvantaged."*

and incomes in most Western countries, positive action policies do not address the structural economic relations generated in a capitalist system, which undermine the ability of all marginalised groups to benefit from education.

### ***Equalising participation and outcomes***

In many positive action policies, the focus of the action is on access to a hitherto exclusionary education system; far less attention is given to equalising participation and outcomes in terms of job opportunities after education for those who have experienced prior discrimination. The assumption that one has benefited from positive action by merely entering education ignores the role that cultural and social capital – such as networks of class, gender, ethnicity and privilege – play in enabling people to benefit from education.

Research from a number of countries shows how getting a qualification does not guarantee good jobs for previously excluded groups. Other social policies (such as child care in the case of women, or culturally biased expectations incorporated into social policy) also play a role in determining the outcomes of education.

Education has the explicit purpose of developing the individual. It also serves a (by no means complementary) purpose as the primary institution of selection for the labour market and distribution of

privilege on the basis of educational credentials. The problem here is that educators often fail to own the reality of the second purpose. Schools and education actually promote inequality through social selection and stratification, and internal mechanisms of selection and ranking. Any positive action plan must take account of this.

An 'equality of condition' perspective requires us to take a holistic approach to educational policy, one that recognises in particular the integrated links that exist between economic, cultural and political inequalities and educational inequality. There is now a large body of evidence showing that the greater the economic inequality in a society, the greater the educational inequality, and vice versa.

Having positive action plans can modify this outcome but it cannot alter it in any substantive sense, a major reason being that powerful and privileged groups will use their excess resources to undermine positive actions, either through legal challenges through the courts (as is happening in the USA) or by creating alternative privileged institutions, such as elite schools.

If Europe is to have a more egalitarian educational system it must have a more egalitarian society; it must create equal conditions of living for its citizens, not just equal opportunities to become unequal.

### ***For further information***

Equality Studies Centre, University College Dublin: [www.ucd.ie/esc/](http://www.ucd.ie/esc/)

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## **Positive action in healthcare: ensuring equality of outcome**

*Trish Pashley, Equality and Diversity programme, Healthcare Commission, UK*

The Healthcare Commission is the health watchdog in England, and driving improvement

is central to everything it says and does. Since this regulator is determined to improve healthcare



provision for everyone, it is perhaps not surprising to find that equality, positive action and inclusion permeate the organisation at every level.

The Healthcare Commission considers the impact of equality, diversity and human rights on all those organisations it regulates. It also believes in practising what it preaches, applying the same standards to the treatment of its own people.

Of course, the Healthcare Commission has to comply with legislation but its commitment goes beyond this. It takes every opportunity to ensure equality of outcome – through its policies, through its assessment work across both the National Health Service and the independent healthcare sector, and through its investigations of serious service failure. To make sure that its commitment is truly effective, it is using its equality impact assessment toolkit for all existing and new work.

The Healthcare Commission has already met its legal duties regarding race and disability. It will also be publishing a scheme and action plan for the forthcoming Gender Equality Duty legislation, and will do so well within the legal deadline. The Commission will also seek to bring the full equality agenda of race, disability, gender, age and sexual orientation together under one roof during 2007.

### ***Starting from the inside***

The Healthcare Commission has successfully used its equality schemes as a diagnostic tool internally to audit current practice, and will continue to do so. It also tries to use its action plans as learning opportunities for its staff. This offers multifaceted opportunities, as there are usually a number of levels of activity behind any measure. The Commission is also seeking to set up diversity networks to address workforce issues.

The Commission also recognises that in order to fulfil its key influencing role in the organisations it regulates, it needs to improve the knowledge, skills and confidence of its field-based assessment managers. In part it has addressed this through training and increased familiarisation with the inspection guides and engagement forms used.

It still has work to do, not least in clarifying its role and responsibilities as a regulator. Importantly, it has developed internal implementation groups, with strong leadership, governance and reporting mechanisms. At the same time, the executive team has made it its business to scrutinise and monitor progress around the positive action plans.

It is also committed to aligning the internal and external agendas, because it believes that if the Commission is to meet its diversity objectives and goals, everyone within the organisation needs to understand the importance of equality and embed it in their work, whatever they do and wherever they do it. This is outlined in the various equality schemes.

### ***Sharing information, working with others***

The Healthcare Commission will continue to work with the Commission for Racial Equality (CRE), the Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC) through memorandums of understanding (MOUs), enabling the Commission and these partners to share information within an agreed and recognised framework.

The Healthcare Commission is also the lead body for the Concordat, a voluntary agreement between organisations that regulate, audit, inspect or review elements of health and healthcare in England. One of the areas that the Commission is pursuing with its Concordat partners involves





ethnicity monitoring. It has undertaken extensive

research, and lobbying. As a result, it is now much nearer to a national standard and accepted practice across healthcare provision.

The Commission is relentless in its pursuit of more creative methods of achieving equality. It is also vocal in its development of the inclusion agenda. And it has been active in publishing numerous high-profile reports addressing equality issues in healthcare provision, including the *Count Me In* census on mental health, *Safeguarding Children* (with the Commission for Social Care Inspection) and *Living Well in Later Life*.

The Commission's chairman, Professor Sir Ian Kennedy, and Anna Walker, its chief executive, constantly seek out opportunities to spread the word for equality and diversity. They are also adamant that when it comes to these issues, the Commission itself must set the standards for others to follow. And that actions count more than rhetoric when it comes to making a difference.

### **For further information**

Healthcare Commission disability equality scheme and positive action plan:  
[www.healthcarecommission.org.uk/\\_db/\\_documents/disability\\_equality\\_scheme\\_and\\_positive\\_action\\_plan.pdf](http://www.healthcarecommission.org.uk/_db/_documents/disability_equality_scheme_and_positive_action_plan.pdf)

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## **Positive action and politics: interview with Raül Romeva MEP**

*Raül Romeva is vice-chair of the Committee on Women's Rights and Gender Equality at the European Parliament.*

### **The Committee on Women's Rights and Gender Equality**

I will not hide the fact that the committee is not a priority for all of its members, but I consider it important and very positive. It is a space where you can look at all EU policies from a gender perspective. I would like that approach to be implicit in every speech and every resolution at the European Parliament – in all of the committees. Currently this is not the case.

I accept there are limitations on what the Committee on Women's Rights and Gender can do, but it is important to recognise that it has a very positive role. It tackles the issue of gender equality on a daily basis, and that is what we need across the board.

Some people see it as bizarre for a man to be vice-chair of this committee. For me, it is vital that both men and women are involved. The debate should not be led only by women because it is the task of all of society, not just women and minorities, to work towards equal opportunities.

### **Representation of women in key roles**

You can see a clear inequality in the gender balance if you look at parliaments, delegations and even heads of state in the European Union. That is a fact, not an opinion.

In the world, only 16% of parliamentarians are women. In Scandinavian countries it is 40% but if you take a look at European countries that are members of the Organization for Security and





Cooperation in Europe (OSCE) – excluding those in Scandinavia – the figure is barely higher than the global average.

It is a fact that the enlargement of the European Union has reduced the percentage of women in the European Parliament. Less than 1 in 3 MEPs is a woman. There are also too few women in EU delegations across the world. Only 7 of the 107 heads of delegations are women.

### **Positive action for gender balance**

The situation is clear – we need more women in decisive posts. I know that positive action is a controversial issue. It is easy to respond that we should always choose the best candidate for a post. I agree with that but it is also true that more often than not, there are a high number of equally well-qualified candidates. In these cases I think it is right to sometimes choose a woman to redress the gender imbalance.

Of course, there will occasionally be mistakes – sometimes the wrong candidate will be chosen. I strongly feel however that this is not a reason to blame positive action. There is always a risk that

the best candidate is not chosen in any selection procedure.

In cases where there are no women qualified for the post, we have to ask why that is so. Positive action can be a useful tool to make sure that women receive the



preparation they need to compete on an even playing field with men.

### **Positive action to achieve standards**

If we truly believe – as is written in the EC Treaty – that there can be no discrimination on grounds of gender, we have to guarantee it. I believe that positive action is necessary to guarantee certain standards.

Currently women are paid on average 15% less than men to do the same job. This situation is unacceptable. I also think it is important to address the balance between family and working life. To promote sharing of responsibilities there needs to be reform in the systems of maternity and paternity leave in many countries.

Some Scandinavian countries fear harmonisation of standards in case it means harmonising downwards. Positive action should help harmonise to the highest standard, not the bare minimum.

The European Union is at the forefront of equality measures compared with the rest of the world. However, we are far from being a perfect example to follow. Positive action is a good step. It is a tool, not a goal. If this helps to better balance gender representation in institutions then I am for it. I hope that soon it will no longer be necessary, but until that time it can certainly help us.

### **For further information**

European Parliament Committee on Women's Rights and Gender Equality:  
[www.europarl.europa.eu/committees/femm\\_home.htm](http://www.europarl.europa.eu/committees/femm_home.htm)

*Raül Romeva MEP: "Positive action is a tool, not a goal."*



## PART 4



# THE FUTURE OF POSITIVE ACTION

## Five components for effective positive action measures

*Robin Allen QC, Head of Cloisters Chambers*

There are five key components for effective positive action measures if they are to address deep rooted problems of inequality. Each is necessary. They are:

- an adequate analytical framework within which issues of substantive equality can be identified
- the supply of sufficient data or other material appropriate to be analysed within that framework
- the necessary political will to drive forward a programme to address substantive equality
- a public communications programme to explain the purpose and need for the action
- a legal and regulatory framework which will both understand the need for this kind of action and also ensure that the limits within which such action is to be taken are recognised and enforced without undue restriction.

The analytical framework needs to address the concept of full equality in practice which appears in the European Treaty and which underpins all this work. It needs to be able to distinguish between formal rules to secure equality of opportunity and those disadvantages that must be addressed to secure social inclusion and solidarity within the Union. This implies that some disadvantages are more significant than others. In particular it must be able to identify multiple causes of disadvantage, such as for instance a combination of gender, long-term ethnic stigma and poor education provision.

While the difficulties associated with data collection are fully recognised, there are now very good systems for anonymising such data. However there must be a strong regulatory control over its collection (a) to ensure that it is not abused, (b) to ensure that it is of appropriate



*Robin Allen QC: "Those who will not benefit from positive action cannot be expected to accept it without being informed about the wider social gains."*



quality and (c) to instil confidence that failures in either (a) and (b) can be addressed. If there are no or inadequate data sets then it will be necessary to have a systemised approach to secondary material such as research and journalistic reports.

As positive action is a means to address a lack of substantive equality, it is almost always confronted by those who are seeking to defend entrenched positions. There is no system of approach to positive action that is likely to be free of antagonism from someone. This means that the personnel who are responsible for such action need to be fully committed to it.

That commitment must be closely aligned with a commitment to explain the social purposes of the action. Those who will not benefit from positive action cannot be expected to accept it without being informed about the wider social gains that are expected.

Finally, associated with regulatory control, it is necessary that there is effective legal control. In each case it is necessary to address the question whether what is intended to secure legitimate positive action is disproportionate to the aim pursued, is in fact not effective or is wholly inconsistent with the concept of equality of opportunity that it is intended to secure. The European Court of Justice (ECJ) and the Council of the European Union both have a role here. It is the Council's role to improve the legislation that permits such positive action and the ECJ's role to ensure that it takes into account the purposes of the legislation.

### ***For further information***

Cloisters Chambers: [www.cloisters.com](http://www.cloisters.com)



## Statistics for positive action: more than a tool, a duty

*Patrick Simon, French National Institute of Demographic Studies (INED)*

Through the concept of ‘indirect discrimination’, the Racial Equality and Employment Equality Directives (EC/2000/43 and EC/2000/78) made an important step for positive action. The objectives of anti-discrimination laws and policies can now go beyond discrimination and re-examine all apparently neutral regulations, procedures and practices in order to identify their disparate impact on individuals or groups on grounds of their ethnic or racial origin, gender, religion, disability or age. The duty of non-discrimination leads from a reactive strategy to a proactive approach and positive action.

The main question is how to implement positive action when discrimination can be invisible. How to deal with a society where there are more prejudices than persecutors, and where victims are often unaware that their social difficulties are the result of their ethnic or racial backgrounds, their gender or their religion? The first step is to make the invisible visible, i.e. to find indicators that will reveal the discriminatory processes without passively waiting for potential victims to react. For this matter, statistics are a crucial, if not indispensable, tool.

By its very nature, indirect discrimination calls upon statistical reasoning. Implicit bias or apparently neutral procedures are revealed to be discriminatory only by their impact on groups. Statistics on processes, selections and trials make it possible for a third party to monitor the outcomes. Disparate impact is regarded as discriminatory only if it is significant, i.e. cannot be explained by

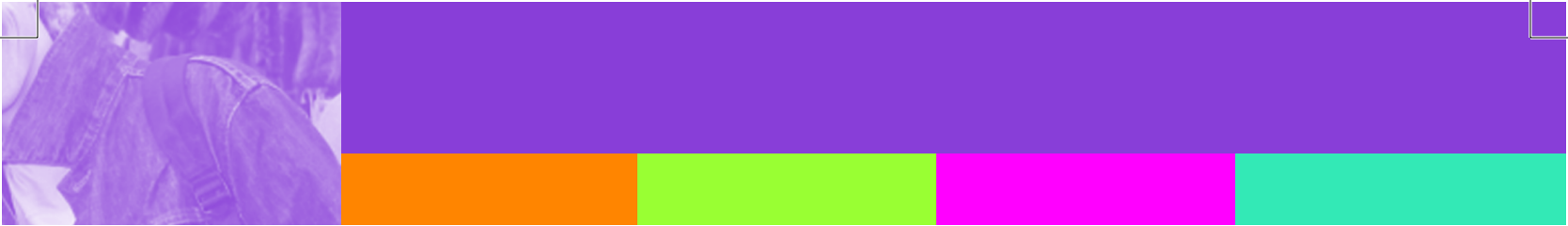
normal variations or justified by relevant criteria. If we develop indicators this allows the significance of the statistics to be assessed.

The role of statistics in anti-discrimination policy is central. In employment, for instance, scoreboards examine recruitment, promotion, access to training, salaries, dismissals, positions held and exposure to dangerous or unpleasant work. The same data can be collected for education or access to housing. Relevant indicators can flag where there is different treatment of different groups. Measuring discrimination goes beyond mere counting of discriminatory acts or quantitative assessment of unfair treatment – it covers a range of uses of statistics in equal treatment strategies.

### ***Uses of statistics for equality***

Statistics can raise awareness among the public and policy makers of the extent of discrimination in different domains of social life. They can back up victims’ testimonies. The need for positive action is clearly supported by crude statistical facts. For example, someone with ethnic minority background A might have double the risk of being unemployed of someone with ethnic majority background B – even if the individuals have the same age, social situation and so on.

Statistical evidence can play a key role in establishing the existence of systemic or indirect discrimination. Social science research and analysis of discrimination cases build a body of knowledge – highlighting differentials in surveys



*Patrick Simon: "Without a mandatory monitoring system positive action is like a car without petrol."*

and census data – that demonstrates the structural nature of discrimination.

A further role is to assess procedures and practices applied by bodies involved with equality policy. Statistical monitoring subjects systems to continuous inspection of their effects. Scoreboards make it possible to identify suspect differentials and to undertake appropriate, targeted and in-depth inspection.

Data can help assess results and set goals. When equality programmes set quantitative targets – for example for the representation of a certain group over a number of years – statistics make it possible to measure progress.

Hard data constitutes valuable legal evidence. Case law shows that recourse to statistics is useful at two levels in lawsuits: to frame a sociological context for the court to assess the credibility of the plaintiff's case, and to prove the occurrence of discrimination.

Statistics are extensively produced for gender mainstreaming but are scarce and considered controversial by some for ethnic and racial monitoring. For different reasons many EU Member States are reluctant to collect ethnic and racial statistics. The main objections are political and legal. The political aspect is that

statistics might reinforce the 'racialisation' of European societies. The legal consideration is that data protection laws can consider ethnic and racial data as sensitive.

The Racial Equality and the Employment Equality Directives do not include an obligation to collect data for positive action, so there is no Europe-wide legal incentive for a mandatory monitoring system. Without this, positive action is like a car without petrol.

### ***For further information***

French National Institute of Demographic Studies: [www.ined.fr](http://www.ined.fr)





## Duties to promote equality: a new horizon for positive action?

*Professor Mark Bell, Centre for European Law and Integration, University of Leicester, UK*

One of the clear lessons from over 30 years of EU gender equality law is that individual litigation is not a sufficient mechanism to bring about full equality in practice. Naturally, any anti-discrimination legal framework will need to include the right of an individual to challenge unlawful discrimination. This has been the starting point of EU legislation, and it is important not to underestimate the wide-ranging and long-term impacts that individual cases can have.

Nevertheless, individuals typically face barriers such as lack of evidence and financial or emotional costs which deter litigation. As a consequence, anti-discrimination law has sought complementary mechanisms for achieving equality. One response has been to tackle the legacy of inequality through positive action. Yet where such initiatives have taken the form of preferential treatment schemes, they have often become mired in legal controversy. Another criticism has been that such schemes risk benefiting a small number of individuals without addressing the underlying (and on-going) causes of inequality.

In recent years, it is possible to identify the emergence of a new direction in the law's search for ways to advance equality beyond individual litigation. Specifically, several states, such as the UK and Finland, have introduced legal provisions that create duties to promote equality. This idea is not entirely new – other examples include the Spanish Constitution and the 1999 Swedish Ethnic Discrimination Act.


### ***A UK perspective***

The UK turn towards the 'positive duties' model stems from the Northern Ireland Act 1998. This imposed a duty on all public authorities to have "due regard" to promoting equality of opportunity between persons according to a long list of grounds, including sex, race, religion, disability, age and sexual orientation (section 75). This initiative was subsequently imported into Great Britain, first through amendments to the Race Relations Act in 2000 which imposed a duty on public authorities "to promote equality of opportunity and good relations between persons of different racial groups" (section 71(1)(b)).

Similar duties to promote disability equality and gender equality have been adopted since 2005. The distinctive feature of these duties is that they go beyond vague aspirations. Alongside the general equality duty, a set of specific duties has been created. The legislation typically requires three core actions by public authorities. First, most public bodies are required to publish equality 'schemes'. These documents should describe the processes that the organisation has established in order to ensure that it fulfils the duty to promote equality.

Secondly (and more concretely), most public authorities are under a duty to collect data. For example, universities are required to monitor (by reference to ethnic origin) the admission and progress of students and the recruitment and career progress of staff.





Thirdly, public authorities must conduct *impact assessments* of all new and existing policies in order to identify their effects on equality. Therefore, if a decision was being taken on whether to close a hospital in a particular district of a city, it would be necessary to consider the ethnic origin of the staff and patients using that hospital and whether its closure would impact more negatively on particular ethnic groups.

### ***An active approach to promoting equality***

Legal duties to promote equality offer a new and promising dimension to positive action. They require organisations to take a planned and systematic approach to promoting equality, rather than a reactive or defensive approach which can sometimes arise in response to individual litigation. The UK duties place considerable emphasis on the *participation* of affected communities in preparing equality schemes and conducting impact assessments. Therefore, disability equality schemes are required to state how disabled people were involved in their preparation.

Despite the considerable potential of these duties, it is already clear from UK experience that they are not a panacea for all problems. Monitoring the implementation of such duties is a huge challenge; for example, the race equality duty applies to more than 43 000 public bodies. Whilst the Commission for Racial Equality has legal enforcement powers, it is evident that even well-resourced equality bodies have limits to their supervisory capacity.

Analysis by the British Audit Commission has also suggested that organisations become too focused on process rather than *outcome*;

bureaucracies can view the publishing of the equality scheme as the completion of the legal requirement rather than the starting point for effecting real change in everyday practice. Fundamentally, the duties are seeking to change organisational culture in order to weave equality into the heart of the organisation's ethos. Whether the duties can truly deliver such a transformation in terms of priorities, resources and decision-making styles will only become evident with much longer experience of their implementation.

### ***For further information***

European network of legal experts in the non-discrimination field:  
[http://ec.europa.eu/employment\\_social/fundamental\\_rights/policy/aneval/legnet\\_en.htm](http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm)

European Commission

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