



TERMS OF REFERENCE

Making Europe More Equal: a Positive Duty?

An Equinet Paper

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EQUINET

Equinet is the European Network of Equality Bodies, a membership organisation bringing together 45 equality bodies from 33 European countries including all EU Member States.

National equality bodies are public institutions established by law to promote equality and combat discrimination, on grounds including gender and gender identity, racial or ethnic origin, disability, age, sexual orientation, religion or belief and other grounds.

Equinet promotes equality in Europe through supporting and enabling the work of national equality bodies. It supports equality bodies to be independent and effective as valuable catalysts for more equal societies.

More information about Equinet and equality bodies is available [on the Equinet website](#).

OBJECTIVES

The Equinet Work Programme 2016 commits to commissioning ‘a study on the use of positive duties and equality duties in promoting equality.

The use of positive duties (such as compulsory pay audits or equality plans) and equality duties (such as a duty on all public sector organisations to have due regard to equality in all their functions) has gained prominence in recent years. They offer a novel approach to securing more equal societies by going beyond the reactive anti-discrimination model, yet introducing binding requirements on duty bearers.

The Equinet study will build on existing research on the topic and it will examine the advantages, challenges and possible shortcomings of positive duties and equality duties. This will be complemented by an analysis of good practices and comparisons between the different existing systems.

The study will conclude with recommendations offering ideas for equality bodies to use and spread the use of these tools.’

Accordingly, the contractor will be expected to produce an Equinet paper. The purpose of the paper is to:



- Review relevant literature on positive duties and equality duties in Europe, analyzing the need for such duties and making a conceptual distinction between positive/equality duties and positive action measures¹
- Map out the positive/equality duties in existence in Europe today, providing an overview with case studies from member states
- Examine the advantages, challenges and possible shortcomings of positive/equality duties through practical examples
- Examine the role of equality bodies in implementing and monitoring positive/equality duties.
- Provide recommendations on how equality bodies can contribute to work on positive/equality duties and how they can promote increased use of such tools.

BACKGROUND & CONTEXT

Positive action is defined in the EU Equal Treatment Directives² as specific measures to prevent or compensate for disadvantages linked to specified personal characteristics, with a view to ensuring full equality in practice. Under EU law, positive action has traditionally been seen as an exception to the principle of non-discrimination with the aim to achieve substantive equality through measures designed with the purpose to provide equal opportunities.

The Directives stipulate positive action as an approach to promoting equality. Positive duties may be regarded as a different approach, reaching out to the most vulnerable groups by making mainstream society responsible for actively promoting diversity and equality. Positive duties can thus be seen as building on positive action, by making the latter compulsory and a part of the equality principle, rather than an exception to it.³

Anti-discrimination laws struggle to eradicate systemic discrimination, especially when the discrimination goes undetected, being embedded in the practices of public institutions. Laws that simply prohibit discrimination may not be sufficient to solve the problem. When positive duties are put in place, they oblige public authorities not only to respect the relevant laws, but most important, to detect the potential discriminatory impact of their policies, advance equal treatment and encourage good relations between different social groups in all spheres of life where they exercise their functions.⁴

Some of the most mainstreamed positive duties are enshrined in the UK's Equality Act (2010). The UK Government explained the purpose of the Act as "to harmonise discrimination law, and to strengthen the law to support progress on equality."

¹ Positive Action Measures were addressed in an Equinet Paper (2015)

http://equineteurope.org/IMG/pdf/positive_action_measures_final_with_cover.pdf

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

³ European Network of Legal Experts in Gender Equality and Non-Discrimination. DISCUSSION PAPER POSITIVE ACTIONS/POSITIVE DUTIES (2008). <file:///K:/Activities/2016/Positive%20Duties/DP-Positive%20action%20-%20positive%20duties.%20Network%20of%20legal%20experts.pdf>

⁴ Ibid.

Section 75 of the Northern Ireland Act 1998 places public authorities under a duty to have due regard to the need to promote equality of opportunity. More recently, Ireland enacted a similar duty by adopting the Irish Human Rights and Equality Commission Act (2014), which gives the Human Rights and Equality Commission a particular role in enforcing the public sector equality duty. There are also positive duties on several public and private sector actors in other European countries, targeting specific groups and with varying control/enforcement mechanisms. Such positive duties were introduced piecemeal, and are thus lacking a harmonized framework.

Several Equinet publications have highlighted the positive impact of equality duties in areas as diverse as social and economic rights⁵, religion and belief⁶, gender equality⁷, gender-based harassment⁸, disability⁹, and LGBTI¹⁰ issues. In its conclusion, the *Equinet Paper on Positive Action Measures* relies on the experience of equality bodies in claiming that “obligations imposed by the state to take action can be effective”. The current research will collect this wide-ranging experience and evaluate the range and effectiveness of existing positive/equality duties.

EXPECTED APPROACH

During the process, the contractor will be expected to:

- Conduct a review of relevant literature
- Conduct a review of EU and national level positive duties
- Conduct a survey of Equinet members to collect their inputs, perspective and information on the topic
- Interview selected duty bearers responsible for implementing positive equality duties
- Conduct interviews with selected equality bodies (at least 6 interviews, observing a geographical balance and a balance in the mandate and competences of the equality bodies) that
 - Have a direct role in enforcing positive duties vis-à-vis the duty bearers, or
 - Have an indirect role in enforcing positive duties by litigating once a failure to fulfil the positive duty is identified
- Engage with key stakeholders, including the European Commission (the Commission is subject to positive duties under Articles 8 and 10 of the TFEU).
- Engage with the Equinet Board, Secretariat and Working Groups as appropriate

⁵ http://equineteurope.org/IMG/pdf/economic_and_social_rights_electronic-3.pdf

⁶ http://equineteurope.org/IMG/pdf/perspective_final_web-2.pdf

⁷ http://equineteurope.org/IMG/pdf/gender_strategy_perspective_-_eng_-_electronic_version.pdf

⁸ http://equineteurope.org/IMG/pdf/report_on_harassment_and_sexual_harassment-final_with_cover-2.pdf

⁹ “Legal duties on the public sector to have due regard to equality in carrying out their functions have been found to be useful in some Member States.”

(http://equineteurope.org/IMG/pdf/disability_perspective_with_cover.pdf)

¹⁰ http://equineteurope.org/IMG/pdf/lgbti_perspective_english_.pdf

EXPECTED OUTPUT

The paper (to be produced in English) is expected to:

- Provide an overview of the rationale behind introducing positive duties
- Provide an overview of relevant European and national legal sources and frameworks enabling and enacting positive duties
- Examine the advantages, challenges and possible shortcomings of positive/equality duties through practical examples
- Provide a typology of positive duties enacted, broken down by field of activity where the duty applies (i.e. employment, goods and services, public services, etc.)
- Analyse differences between positive duties by legal framework (general positive duties covering all grounds of discrimination versus positive duties limited to a single ground of discrimination)
- Analyze existing enforcement mechanisms for positive duties
- Evaluate the effectiveness of positive duties in achieving their stated aims, examining possible correlations with enforcement mechanisms
- Examine in particular the role of equality bodies in monitoring, enforcing, and/or securing effective compliance with positive duties.
- Provide ideas and proposals (including legal as well as policy tools) to increase the use of positive duties, with particular attention to the potential contribution of equality bodies.

EXPERTISE REQUIREMENT

The selected expert(s) or team to be commissioned for this report/paper is expected to demonstrate:

- A track record of research work in the field of equality and human rights
- Publication(s) in the field of EU equality policies and/or legislation
- Good knowledge of the work of national equality bodies and their diversity
- Excellent drafting skills in English

SELECTION PROCESS

The Equinet Secretariat and Board will select the winning tender.

In the selection process the following criteria will be taken into account:

- Price
- Demonstrated expertise in the field
- Quality and content of the proposal

The proposal offering the best value for money will be selected.

TIMEFRAME

The indicative timeframe for the commissioned paper is as follows:

- Result of the selection process: 30 April



- Start of the work in May 2016
- Present interim results to Equinet by July 2016 based on survey results and interviews conducted by that stage
- Draft paper presented to the Equinet Secretariat and Board by early September 2016
- Completion of the work by the end of September 2016
- The contractor might be invited to present the findings of the paper at the Equinet Annual General Meeting in Brussels in October

BUDGET

The maximum budget for the commissioning of this paper is **14.000 EUR** (VAT included).

Costs for travel (if and as necessary) or relating to presentation/discussion of the paper will be covered by Equinet separately (if and as necessary).

SUBMISSION OF PROPOSALS

A detailed proposal of the suggested approach, methodology and timeline as well as proposed budget and expert CV needs to be submitted by **Sunday 10 April 2016** to the attention of: Anne Gaspard, Equinet Executive Director: anne.gaspard@equineteurope.org

CONTACT PERSON FOR QUERIES

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