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Report: Exploring positive action as a means to fight structural discrimination in Europe



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Approach PA

The symmetric approach: positive action should be considered as a breach of equality.

The derogation approach: positive action is perceived as an exception to equality.

The substantive approach: defends that positive action is a way to achieving equality.

Definition PA I

- Broad term
- Different types of special measures with the aim of promoting or ensuring equal treatment in practice (also called substantive equality or *de facto* equality).
- Not compulsory on EU- level , but an explicit possibility

Definition PA II

- PA vs quota
- PA vs equality duty
- PA vs genuine occupational requirement
- PA vs reasonable accomodation
- PA vs. unjust preferential treatment

Legal framework I

UN level

United Nation conventions and recommendations of human rights treaty bodies.
E.g. : CEDAW and its communication:

“ Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) establishes (Article 4, paragraph one) that “adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women, shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved”.

Legal framework II

European Union: the directives and the jurisprudence of the CJEU.

- Majority cases about gender
- Conditions for PA:
 - there must be a clear inequality, for example on the basis of statistics of business sectors or labour market statistics;
 - the elimination of that inequality must be an objective to be promoted;
 - the positive action measure must be temporary and must be withdrawn when the objective pursued has been achieved;
 - Proportionality: the positive action measure must not unnecessarily restrict the rights of others

Overview of the grounds and fields in which positive action is being implemented

- Mostly in employment and education in favour of women, persons with disabilities and members of ethnic minorities
- Examples:
 - Quota for persons with disability in employment and education.
 - Training program for recognized refugees to become a healthcare professional.
 - Quota system for gender balance in participation of candidates standing for local or national elections.
 - Financial support (public or private) for Roma students in the field of education, as well as a national Strategy for Roma Integration.
 - ...

Debates about positive action measures and their effectiveness

- Difficulty of measuring the effectiveness because of the lack of targets or indicators.
- Some countries have specific targets, or a clear monitor obligation, but not a general obligation.
- Debates about positive action in the context of legislative initiatives.
- Overview of arguments contra PA and how to respond.

Understanding the nature of positive action in Europe I

- Our approach to categorisation
- General analysis of common features within the legal definitions
- 9 key questions relating to national definitions – the “checklist”

Understanding the nature of positive action in Europe II

1. Terminology e.g. '**positive measures**, special measures and affirmative action.'
2. Voluntary in nature, e.g. '**measures taken in favour of a person/group,**'
3. Permissible differential treatment as an exception to non-discrimination principles, e.g. '**measures that shall not be regarded as discrimination,**'
4. Specified scope/ sector- e.g. '**public authorities or legal entities under private law.**'

Understanding the nature of positive action in Europe III

5. Scope/ protected group: e.g. **‘category of people who are either in a position of inequality in relation to the majority of citizens due to identity differences from the majority or face a behaviour of rejection and marginalization’.**

6. Aim e.g. **‘aiming to ensure their natural development and the effective achievement of their right to equal opportunities,’:**

7. Proportionality

8. Time-limited: In some national definitions, there is express reference to the temporary nature of positive action measures.

9. Either reactive or prospective/ preventative, e.g. **‘prevention of acts of discrimination.’**

The Role of Equality Bodies regarding positive action measures

- Evidence of a wide range of tools being effectively used by Equality Bodies in order to promote and adjudicate lawful positive action
- Surprisingly little litigation involving Equality Bodies
- The Equality Bodies most active in this area had either:
 - Quasi-judicial powers,
 - Could issue non-binding opinions, or
 - Focussed on promotional activities and research

Equality bodies and promoters and educators I

Promoting positive action: e.g. The Finnish Non-Discrimination Ombudsman published a guidebook on positive action.

Administering a grants scheme: e.g. The Irish Human Rights and Equality Commission provides funding to civil society organisations.

Website dedicated to positive action: e.g. The Netherlands Institute for Human Rights has a specific website that sets out the legal conditions for positive action.

Equality bodies and promoters and educators II

Hosting awards for positive work in this field: e.g. the Office of the Ombudsman of Latvia has hosted awards regarding the inclusion or support of people with disabilities. Categories included:

- Employer promoter
- Voice of social networks
- Dare to do
- Educator
- Inspiration for children and young people
- Assistant of the year
- Accessibility initiatives
- Ambassador of culture



Equality Bodies as advisers and leaders on good practice

Non-binding decisions: e.g The Equality Ombudsman of Sweden issued a non-binding opinion against an employer

Research with recommendations: e.g. Czech Public Defender of Rights report on segregation of Roma pupils and reservation of Council housing for people with protected characteristics.

Equality bodies bringing case studies to life:

Extract from the Irish Human Rights and Equality Commission website:

Positive Action for Traveller Employment offers the reader an insight into ten different and innovative approaches to employment creation in the Traveller community. The case studies highlight valuable commitment and creativity from government departments, local authorities, Traveller organisations and Travellers in seeking to respond to low levels of employment for Travellers in the mainstream labour market.

The Employment Equality Acts make generous provision for positive action by employers. Employers can take steps with a view to ensuring full equality in practice between employees on all of the nine discriminatory grounds. Positive action has a key contribution to make in addressing the significant labour market inequalities experienced by Travelers



Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
Irish Human Rights and Equality Commission

Equality Bodies litigating I

- Amicus curiae interventions
- Funding cases



GB Equality and Human Rights Commission: New legal fund to tackle race discrimination

We have launched a landmark fund to tackle race discrimination and help victims seek justice.

The Race Legal Support Fund sees the regulator dedicate one of its biggest ever funds to legal work to fight race discrimination. Open for a minimum of two years, the fund will see up to £250,000 allocated this year to tackling race discrimination, harassment, and victimisation, with more available in future years.

Equality Bodies litigating II

- Own-name litigation: e.g. Serbian Commissioner for Protection of Equality v Pizza Chain 'C'

"Do you want to become part of the "C." team? We need girls to work at the counter."



Equality Bodies adjudicating

Quasi-judicial powers of the Romanian National Council for Combating

Discrimination: Alleged discrimination against non-Roma pupils in two cases regarding allocation of school places for Roma students.



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