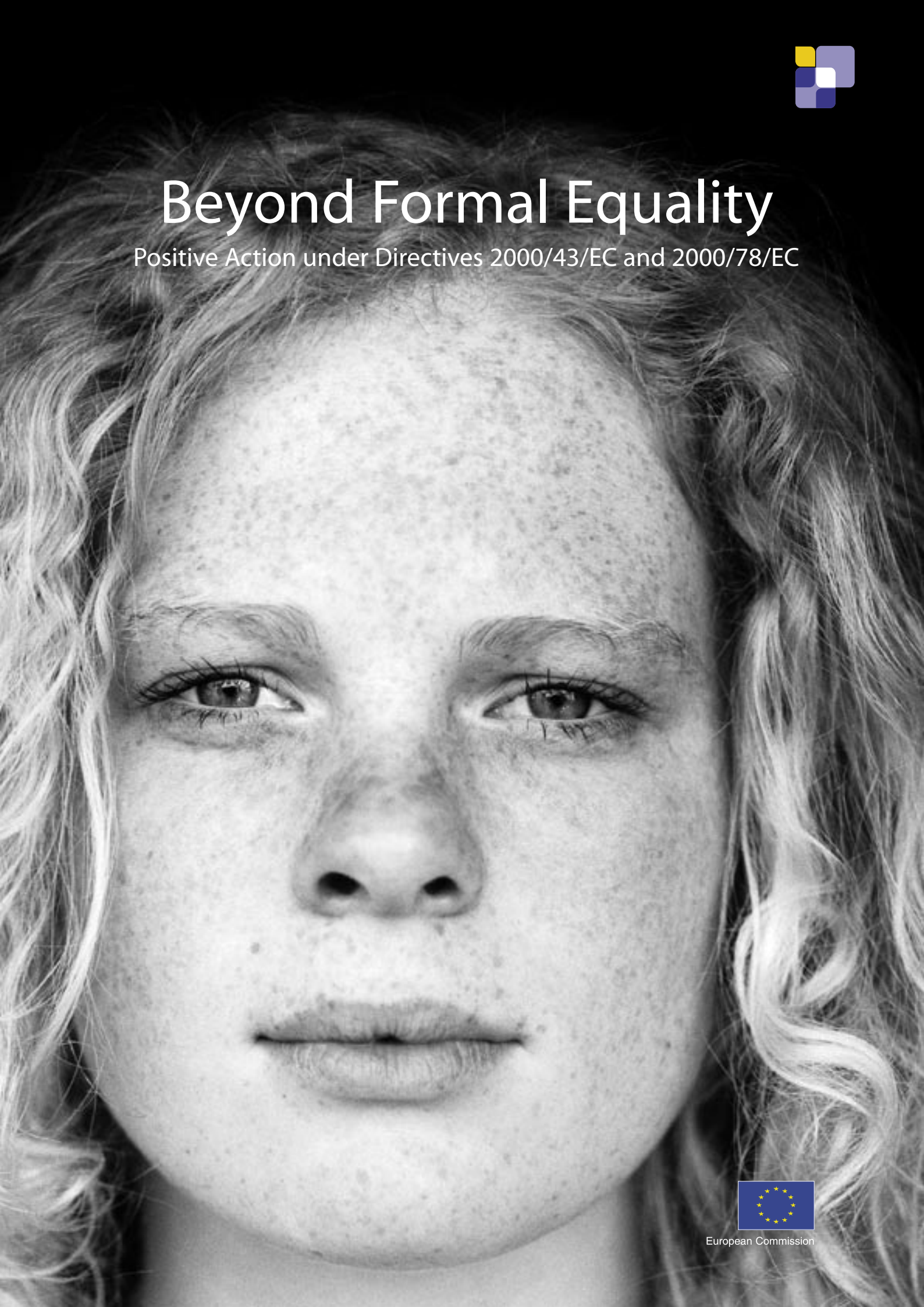




# Beyond Formal Equality

Positive Action under Directives 2000/43/EC and 2000/78/EC



European Commission



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The Action Programme has three main objectives. These are:

1. To improve the understanding of issues related to discrimination
2. To develop the capacity to tackle discrimination effectively
3. To promote the values underlying the fight against discrimination

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Helen | 1989

# Executive Summary

This study focuses on positive action in the Race and Ethnic Origin Directive 2000/43 and in the Framework Directive 2000/78. It seeks to establish its relationship with the general Community equality law and with the positive action *acquis* in the field of gender, while integrating the international human rights dimension and selective comparative law. Several relevant conclusions are drawn.

**Terminological confusion.** The variety of possible measures is not reflected in the single denomination of “positive action”. There is an unhelpful tendency to reduce “positive action” to controversial or downright discriminatory processes. There is plenty of room for *real and effective positive action that does not collide with formal equality and non-discrimination*. In that respect, positive action really need not necessarily be the divisive and political issue it has become. This report essentially deals with the tip of the iceberg: the borderline issues between formal equality, non-discrimination and positive action.

**Development towards a common standard of scrutiny.** Under EC-law positive action that amounts to discrimination remains an exception to the principle of formal equality. Notwithstanding minor textual differences between the respective sources, the delineation of this exception is increasingly done through the common prism of *proportionality*. Under proportionality, “positive discrimination” can be acceptable if it serves a legitimate aim and remains within the limits of what is appropriate and necessary in order to achieve that aim, *reconciling the principle of equal treatment as far as possible with the requirements of the aim pursued*. This proportionality test is part of the Community’s *acquis* in gender and has been maintained by the 2000 Directives. However, the scope of the latter may yet push the boundaries of positive action in different directions, given the intrinsic flexibility of “legitimacy” and “proportionality” as overarching standards.

**The law of disability discrimination is a class in itself.** The Framework Directive allows *special provisions* for the disabled that may include formal quota. *Reasonable accommodation* imposes individualized positive action in employment and thus deviates from the otherwise optional and collective nature of positive action in EC law. While many Member States provide quota systems for the disabled, their internal flexibility often renders their practical impact limited, especially in the private sector.

**Human rights offer more policy guidance than legal perspectives.** The *European Convention on Human Rights*, its Protocol n° 12, and the *European Social Charter* conditionally tolerate rather than require positive action in the substantive application of non-discrimination clauses which do not explicitly mention positive action measures. As such, their framework of reference is remarkably similar to that of the European Community. The *Social Charter’s* focus on effective non-discrimination essentially derives from a prohibition of indirect discrimination which is equally present in EC law. *International human rights standards*, however, in varying degrees see positive action in the form “temporary special measures” as an integral part of a concept of substantive equality. This may implicitly and occasionally even explicitly result in compulsory positive action that goes beyond the Community’s optional standard.

**Different laws of positive action.** The national legal framework for positive action combines elements of both international and European human rights law, of European Community law, and of national law, often including national constitutional law. Legal complexity is further compounded by the variety of measures which can be labelled as “positive action”. As a mixture of all these components, the reality of equality therefore means different things in the different Member States of the European Union.



Abramo | 1985



# Part I Introduction and Structure<sup>1</sup>

1. “Positive action”, particularly in the field of gender, has been a problematic issue for decades. On the societal and political level it has strongly divided opponents and proponents who both claim to defend a truly equal society. From a legal perspective, the European Community’s experience with positive action has been at times fitful and always controversial, especially through see-sawing visions at the European Court of Justice.

The proliferation of equality provisions through the Race and Ethnic Origin Directive 2000/43 and of the Framework Directive 2000/78 coincides with a demographic evolution across the EU towards inter-cultural and multi-ethnic societies. This double evolution has accelerated the debate and emphasized the need for a clear legal framework on positive action.

2. The primary purpose of this thematic study is to explore the interaction between the Community’s non-discrimination law and the 2000 Directives’ permission for positive action. For that purpose it starts with a conceptual introduction to positive action, equality and discrimination in EC law (part II). The position of positive action in gender is then analysed with the aim of giving a clear understanding of the *acquis* prior to the adoption of the 2000 Directives (part III). This serves as a stepping stone for a detailed analysis of the 2000 Directives themselves (part IV). The upper layer of EC Law is complemented with a selective overview of Member State experience in positive action (part V), followed by the international dimension of positive action in human rights instruments (part VI). A contrasting look across the Atlantic to American and Canadian experiences in positive action concludes the study (part VII).

<sup>1</sup> I am indebted to Mr. Sébastien Thomas (College of Europe and associate at Ashurst, Brussels) and to Mr. Filip Van Overmeiren (Ghent University) for their preparatory research, to Mr. Geert Goedertier and Yves Haeck for their comments on the human rights section, and to Christopher McCrudden (Oxford University), Lisa Waddington (Maastricht University), Álvaro Oliveira and Fiona Kinsman (European Commission) for their constructive remarks in finalizing this study. Opinions and errors are mine alone.

Lydia | 1987

## Part II

# Positive Action, Equality, and Discrimination in EC Law

## 2.1. On Equality

3. The story of the European Community's equality and non-discrimination law is essentially one of step-by-step organic development through an ever expanding array of case-law and secondary legislation without an overarching conceptual framework. Over several decades various authors have tried to fill this theoretical void and developed a suitable equality model by tapping into international or historical examples or by falling back to alternative disciplines such as ethics, philosophy, and sociology. None of these scholastic attempts has ever fully succeeded. Indeed such an exercise is effectively impossible, given the chaotic variety and the dynamics of the subject and given the perennial societal and scientific debate over what constitutes "justice" and "equality".

With a large degree of simplification, two major models of equality and its legal protection can be discerned. On the one hand there is a "formal", "liberal" or "symmetrical" approach that is based on "individual justice" and "the merit principle". This model focuses on equality for individuals, formal neutrality, and procedural justice. On the other hand there is the "substantive", "asymmetrical" or "group justice" approach. This model in varying degrees focuses on group characteristics and (dis)advantages, group impact, actual results, material equality and desired outcome. Somewhere in between those two poles lies the middle ground of "equality of opportunities" which combines elements of both.<sup>2</sup>

4. The European Community's equality and non-discrimination law cannot be squarely placed into any one camp. This is partly due to the varying role of equality in different areas of EC law (de Burca, 13 *et seq.*; McCrudden 2003, 3-6). This variety notwithstanding, the European Court of Justice (hereinafter: ECJ) for over forty years has consistently defined discrimination as the "*application of different rules to comparable situations or the application of the same rule to different situations*".<sup>3</sup> This definition is seen as a manifestation of a formal, procedural approach to equality, in line with the European Union's core economic principles (Barnard, 333; de Burca, 24-29). The first tenet of the definition indeed promotes formally equal treatment in comparable situations, irrespective of outcome. From that perspective, the primary emphasis of EC equality law lies on *formal equality* (Tobler, 26-28; Wentholt, 53-55). The second tenet of the quoted definition questions formally equal rules for different groups and therefore connects to a more substantive approach that integrates the outcome of rules for a disadvantaged group.

There are three main weaknesses to formal equality: it requires comparison with a comparator in order to establish discrimination, it is essentially passive and static and does not assure any particular outcome, and it disregards the inherent collective dimensions of inequality such as group membership, entrenched inequality or societal realities (comp. Barnard, 334-335; Wentholt, 56-58). Substantive equality addresses many of these weaknesses: it does not require a comparator, it focuses on outcome and addresses group dimensions. A pure substantive approach

<sup>2</sup> For a general overview and discussion see, inter alia, Barret G., "Re-examining the Concept and Principle of Equality in EC Law", in P. Eeckhout and T. Tridimas (eds.), *Yearbook of European Law 2003*, Oxford University Press, Oxford, 2004, 117-153; Bell M. and Waddington L., "Reflecting on inequalities in European equality law", (2003) 28 ELR 349-369; Fredman S., *Discrimination Law*, Oxford University Press, Oxford, 2002, 1-26; Fullinwider R., *The Reverse Discrimination Controversy*, Rowan and Littlefield, 1980.

<sup>3</sup> See, e.g., *Government of the Italian Republic v. Commission of the European Economic Community*, C 13/63, [1963] ECR 165; *Racke v. Hauptzollamt Mainz*, C 283/83, [1984] ECR 3791; *Finanzamt Köln-Alstadt v. Roland Schumacker*, C-279/93, [1995] ECR I-225, 259; *A v. Commission*, Case T-10/93, [1994] ECR II-179; *Milk Marque and National Farmers' Union*, C-137/00, [2003] ECR I-7975; *Spain v Commission*, C-304/01, [2004] ECR I-7655.

however runs the risk of interchanging quality for quantity while reinforcing divisions or reintroducing individual inequality through the backdoor. It is a testimony to the ECJ's intellectual creativity and to the EC's flexibility that Community law has been able to address formal equality's shortcomings without abandoning it and the individual justice it stands for:

- The comparator has all but disappeared with the prohibition of potential discrimination.
- Outcome and collective dimensions have come into the frame with the prohibition of indirect discrimination and a strategy commonly known as "*positive action*".

Positive action, therefore, is associated with a more substantive, result-based notion of equality. Since EC law at the same time integrates formal equality in its core definition of discrimination, the resulting combination is indeed a balancing act. This blend of form and substance lands the EC's equality concept in the middle ground of "equality of opportunity", a grey zone with few conceptual bearings where positive action is seen to contribute to *effective equality of opportunity for individuals and groups alike* (Barnard, 338; Strauss, 51-64; Tobler, 31-34).

While the distinction between formal and substantive equality is conceptually important for the purposes of this study and will be maintained hereinafter, it is therefore essentially a scientific construction upon a body of Community law that defies black and white classification. Community law combines and balances both formal and substantive elements. The story of this report is *drawing the legal line* that balances formal equality and individual justice on the one hand with substantive equality and group justice through positive action on the other hand.

## 2.2. On Positive Action

5. For the purpose of this study, positive action is thus *a process to introduce a dynamic, result oriented approach that internalizes group dimensions into an equally static and individual formal equality model*.

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

- Consciously examining, identifying and *eradicating any discriminatory or distorting practices*. This might be labelled "positive fairness" and can result in systematic *mainstreaming*.
- *Facially neutral target policies* that seek to increase the proportion of members of the underrepresented group by using criteria that do not overtly discriminate, e.g. focusing on a geographical area or on the unemployed.
- *Outreach programmes* that do use group affiliation and seek to accelerate the inclusion of the underrepresented group, either through targeted *support* (information, training, education, advertising, the creation of lobby groups etc.), or through targeted *sensitisation*. This might be labelled "positive mobilisation".
- *Facially biased diversity policies* that seek to increase the proportion of members of underrepresented groups through soft targets that do not resort to actual preferential treatment.

- *Accommodation programmes* which seek to reduce barriers by offering *personal* accommodation for members of certain *groups* and which therefore combine both group consideration and personal merit.
- *Actual preferential treatment* through reverse discrimination: favouring members of the underrepresented group over members of the dominating group.
- *Redefinition of “merit”* by making group affiliation a relevant job qualification. This is in fact a rather theoretical proposition.<sup>4</sup>

Irrespective of its substance, the *author or origin* of positive action may also differ. Positive action may be organized or supported by the state or a governmental authority, it may be voluntarily decided by public actors or private actors such as companies, or it may be imposed as remedial action by courts in certain jurisdictions. And while the *purpose* of positive action may vary infinitely it is important to distinguish between *backward-looking positive action* that seeks to compensate for past discrimination and pro-active, *forward-looking positive action* that aims at redistributive justice.

6. The typology above should not in any way be interpreted formalistically. What matters is to appreciate the immense diversity of “positive action” processes. That diversity yields two conclusions which are important for this report.

The first conclusion is *terminological confusion*. The variety of possible measures is not reflected in the single denomination of “positive action”. There is an unhelpful tendency to reduce “positive action” to controversial or downright discriminatory processes. Nor should one simply identify European “positive action” with the American and Canadian “affirmative action” or with the human rights concept of “temporary special measures”. These concepts are certainly broadly similar and therefore potentially useful, but they all stem from their own legal and societal backgrounds.

The second conclusion is that there is plenty of room for *real and effective positive action that does not collide with formal equality and non-discrimination*. In that respect, positive action really need not necessarily be the divisive and political issue it has become. This report deals with the tip of the iceberg: the borderline issues between formal equality, non-discrimination and positive action.

## 2.3. Positive Discrimination and Justifiable Discrimination

7. Under the EC’s formal equality approach, discrimination turns on a differential treatment, in a comparable situation, that is causally linked with a prohibited ground. Positive action measures that do institute such differential treatment thus constitute discrimination and become *positive discrimination*. Positive discrimination is sometimes referred to as “benign” or “reverse” discrimination in the sense that its positive focus on substantive equality renders it benign or tries to reverse a historically entrenched situation.

However, a “negative” motive or intention is no prerequisite for discrimination in a formal equality concept that favours neutrality and therefore defines discrimination through *objective comparisons* and an *objective causal* link between the contested treatment and the protected characteristic (Bayart, 281-284; Ellis 2005, 103). No matter how “positive” or “benign”, discrimination therefore remains discrimination under EC law as a matter of principle. The question, then, becomes to what extent EC law is prepared to condone “positive” discrimination *by way of exception*.

<sup>4</sup> It boils down to plain preferential treatment unless group affiliation constitutes a genuine occupational requirement, in which case its deliberate introduction for equality reasons is theoretical.

As discrimination in need of justification, positive discrimination has a position similar to other forms discrimination that are potentially justifiable by way of exception under EC-law. This is particularly the case with the justification of differences of treatment on ground of age in article 6 of the Framework Directive 2000/43. The interpretation of the latter, as initiated in the recent *Mangold*-case, may shed light on the limits of positive discrimination but cannot as such determine them. Positive action is a category in itself with a specific background and a specific textual basis that requires independent scrutiny. The results of that scrutiny may be similar or not to those for another justifiable discrimination, but they will remain positive action results.

In the same vein, the limits of positive action itself would not be effaced by the eventuality of a general and open principle of non-discrimination that some commentators see implied in the ECJ's reasoning in *Mangold*.<sup>5</sup> The recognition of such a general and open principle would certainly constitute a complementary possibility for justifiable discrimination as an exception to the principle to formal equality, and one that could potentially serve in cases of positive action (comp. par. 62), but the limits of positive action as a specific concept would still require specific analysis.

8. Positive "discrimination" in need of justification, of course, cannot be deduced from mere differential treatment alone. Under EC-law any claim that deduces discrimination from differential treatment presupposes that the purported victim is in a *sufficiently comparable* situation as the beneficiary. A claim of discrimination under the Community's formal equality model indeed requires a *comparator*, either real or potential (Fredman 2002, 95 and 109; Barnard, 334). Therefore, there can be no conflict with equality law where a contested positive action measure in fact lacks the requisite comparator.

This self-evident principle was illustrated in the *Abdoulaye* case. The ECJ was asked whether the principle of equal pay in what is now Article 141 TEC precludes the making of a *lump-sum payment exclusively to female employees who take maternity leave*. The Court recognized that the prohibition of pay discrimination does not preclude such a payment if male and female workers are indeed in different situations because of the concrete occupational disadvantages inherent in maternity leave, which the payment is designed to offset. As always, it is for the national court to determine whether this is the case.<sup>6</sup> *Abdoulaye* illustrates that a formal approach to equality is not without its substantive merits either.

<sup>5</sup> Case C-144/04, *Mangold* [2005] ECR I-9981,75. For analysis see, inter alia, E. Muir, "Enhancing the effects of Community law on national employment policies: the Mangold case", (2006) 31 E.L.Rev. 879; D. Schiek, "The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Legislation", (2006) 35 ILJ 329.

<sup>6</sup> Case C-218/98 *Abdoulaye* [1999] ECR I-5723, 16-20.



## 2.4. Positive Action and Indirect Discrimination

9. Indirect discrimination deduces discrimination against an individual from the *factual impact* (actual or potential) of a contested criterion, provision or practice on the *group* of which the individual is a member.<sup>7</sup> In that respect positive action and the prohibition of indirect discrimination share a common focus on substance rather than form, and on the group rather than the individual (Fredman 2002, 115; Tobler, 25). Besides this conceptual resemblance, the relationship between indirect discrimination and positive action is essentially twofold.

10. *First*, the Community's prohibition of indirect discrimination does *not* entail a blanket obligation of positive action to avoid the disproportionate impact of on their face neutral criteria, provisions or practices. This was emphatically underscored by the ECJ in *Bilka*. The ECJ faced the question whether the then article 119 TEC on pay discrimination (now article 141) *obliges* the employer to take into account the impact of family responsibilities on female workers. The Court summarily discarded compulsory positive action:

“an obligation such as that (...) goes beyond the scope of article 119 and has no other basis in community law as it now stands”<sup>8</sup>

The Court's off-hand rejection is understandable. It is of the essence of indirect discrimination that impact as such only raises a presumption of discrimination, which can then be countered by offering an objective justification that meets the requirements of proportionality. Any assumption of compulsory, impact aimed positive action through the prohibition of indirect discrimination therefore clearly goes beyond the scope of that prohibition.

However, to the extent that Community law *prohibits unjustifiable indirect discrimination* it effectively demands the avoidance of such discrimination. A limited duty of positive action is therefore implicit in any prohibition of indirect discrimination. In any event, it is clear that the mere existence of the prohibition of indirect discrimination is likely to induce awareness and hence proactive positive action from actors who will be naturally keen to avoid the risk of indirect discrimination through impact in their organization. That is why economists often equate the prohibition of indirect discrimination with silent or implicit quotas (Fryer and Lorry, 3-4).

11. *Second*, a positive action measure which for the non-promoted group entails the disproportionate impact characteristic of indirect discrimination, will itself presumptively constitute a case of indirect discrimination. One is then in the presence of reverse *indirect* positive discrimination, the justification of which – as for any case of indirect discrimination – depends on the traditional test of legitimate aim and proportionality.

That is the lesson of *Schnorbus*, where the ECJ had to judge a national provision giving priority for admission to the civil service to persons who have completed compulsory or civilian service. The Court quickly established that this positive action measure constituted indirect sex discrimination since, under the relevant national legislation, women are not required to do military or civilian service. It went on to scrutinize and accept the preferential treatment, stressing both its limited duration and its aim to counterbalance the effects of the delay experienced in the progress of their education by applicants who have been required to do military or civilian service.<sup>9</sup>

<sup>7</sup> The deduction operates as a *presumption of discrimination* that can be justified.

<sup>8</sup> Case C-170/84 *Bilka* [1986] ECR 1607.

<sup>9</sup> Case C-79/99, *Schnorbus* [2000] ECR I-10997.

Similarly, in *Badeck* and *Abrahamsson*, the ECJ acknowledged that positive action may be organized by filtering selection criteria in such a way that, although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women. In the final analysis the contested positive action was rejected because its criteria were not clearly tailored to prevent or compensate for the occupational difficulties of the promoted group (see par. 17).<sup>10</sup>

While the outcome of these cases was different, they all show the ECJ's willingness to entertain the purpose of a Member State's positive action scheme as a possible justification for its indirect discrimination. From this perspective, the "positive" nature of the discrimination, while it cannot exclude the qualification as discrimination, may yet help in justifying it. It should be noted that all three cases deal with indirect discrimination through state systems.

<sup>10</sup> Case C-158/97, *Badeck* [1999] ECR I-1875; Case C-407/98, *Abrahamsson* [2000] ECR I-5539.

Peter | 1962

## Part III

# Positive Action and Gender Discrimination

### 3.1. Article 2(4) of the Original Equal Treatment Directive

12. 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)” (emphases added).*

### 3.2. Positive Action and Positive Discrimination

13. From its earliest case-law the ECJ has recognized that Article 2(4) could potentially serve as a basis, not only for mere positive action measures that do not amount to preferential treatment that interferes with formal equality (see par. 5), but also for apparently discriminatory measures. In *Commission v. France* the ECJ stated that:

*“the exception provided for in Article 2 (4) is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life”.*<sup>11</sup>

In its later case-law, the Court has continued to contrast positive discrimination with formal equality, seeing the potential authorisation of the former as part of a partially “restricted concept” of the latter. The aim of Article 2(4) is:

*“(...) to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society”.*<sup>12</sup>

The ECJ therefore squarely sticks to formal equality as the mother principle of EC discrimination law, allowing reverse discrimination only as its exception under the contrasting concept of substantive equality (see par. 4 and 7). The story of the case-law is the gradual discovery of the limits of this exception.

### 3.3. Optional Nature, Objective Contents and Purpose

14. Article 2(4) of the original Equal Treatment Directives declared itself “without prejudice to measures to promote equal opportunities”. This clearly did not *impose* positive action, as the ECJ pointed it out in *Bilka*. Asked whether article 119 TEC on pay discrimination (now article 141) *obliges* the employer to take into account the impact of family responsibilities on female workers, the Court summarily discarded any notion of **compulsory positive action** throughout community law, adamantly stating that:

*“an obligation such as that (...) goes beyond the scope of article 119 and has no other basis in community law as it now stands”*<sup>13</sup> (emphasis added).

<sup>11</sup> Case C-312/86 *Commission v. France* [1988] ECR 6315, par. 15, emphases added.

<sup>12</sup> Case C-407/98 *Abrahamsson* [2000] ECR I-5539, 48; Case C-319/03, *Briheche* [2004] ECR I-8807, 25, emphasis added.

<sup>13</sup> Case C-170/84 *Bilka* [1986] ECR 1607.

15. The ECJ has also been careful to scrutinize the **objective contents and purpose** of measures that want to pass as positive action under Article 2(4) of the Equal Treatment Directive. In *Commission v. France* the ECJ ruled out a French legislation that generally authorized the preservation of special rights for women in collective bargaining. The Court stressed that Article 2(4) only allows for measures which are “intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life”.<sup>14</sup> A generalized preservation of special rights for women, as in the French legislation in question, is therefore overbroad and fails as a matter of principle.

*Griesmar* allowed the ECJ to clarify the objective contents of positive action measures. The Court was called to evaluate a service credit provided to female civil servants in respect of each of their children for the purposes of calculating a pension. This credit was not provided to male civil servants. It appeared that the grant of the credit was unrelated to maternity leave or to the disadvantages which a female civil servant incurs in her career as a result of being absent from work during the period following the birth of a child. It was merely a standard monetary advantage at the time of retirement and did not *objectively address occupational difficulties that women encounter during their careers*. As such, the resulting discrimination against male workers in the comparable situation of having assumed child rearing responsibilities could not be justified as a positive action measure.<sup>15</sup>

The need for positive action measures to objectively address the career difficulties of the promoted group was further emphasized in *Abrahamsson*, where the Court was called upon to judge a Swedish scheme aimed at promoting university positions for female candidates over male candidates. The ECJ rejected the scheme, inter alia because the preferential treatment of female candidates was not based on “clear and unambiguous criteria such as to prevent or compensate for disadvantages in the professional career of members of the under-represented sex”.<sup>16</sup>

For a measure to be acceptable as “positive action” for women in employment and occupation it must therefore *at least objectively, be based on clear and unambiguous criteria, address specific career inequalities and help women to conduct their professional life on a more equal footing with men*. It now remains to be seen what restrictions the Court imposes on measures that do meet this objective standard.

### 3.4. The Evolution towards a Proportionality Test

16. The **substantive limits** of the original Equal Treatment Directive’s positive action provision were developed in a series of cases. In *Commission v. France* the ECJ opted both for an extensive and a restrictive approach, stating that:

“the exception provided for in Article 2 (4) is *specifically and exclusively designed* to allow measures which, *although discriminatory in appearance*, are in fact *intended to eliminate or reduce actual instances of inequality* which may exist in the reality of social life”.<sup>17</sup>

<sup>14</sup> Case C-312/86 *Commission v. France* [1988] ECR 6315, par. 15, emphasis added.

<sup>15</sup> Case C-366/99 *Griesmar* [2001] ECR I-9383.

<sup>16</sup> Case C-407/98 *Abrahamsson* [2000] ECR I-5539, 49-50.

<sup>17</sup> Case C-312/86 *Commission v. France* [1988] ECR 6315, par. 15, emphasis added.

Article 2(4) is branded as an exception to the non-discrimination principle, ostensibly permitting preferential unequal treatment of women. However, this liberal reading is immediately restricted to measures which are “specifically and exclusively designed” to eliminate or reduce actual inequalities. As we have seen, a generalized preservation of special rights for women, which the French legislation authorized in collective bargaining, fails to meet this standard.

17. *Commission v. France* clearly demanded positive action measures that amounted to positive discrimination to be *narrowly tailored to the accepted goal of eliminating or reducing actual inequality*.

This approach was further pursued and refined in *Kalanke*, where the Court confronted a German quota system which automatically favoured women if the candidates for a particular official post were in a tie-break situation and thus equally qualified. An automatic preference for women is detached from demonstrable inequality. This was the linchpin which brought AG Tesouro to reject what he labelled reverse discrimination designed to confer results rather than removing obstacles. The Court duly followed, explicitly favouring equality of opportunities over equality of results and stressing the necessary strict interpretation of Article 2(4) as a derogation from the neutrality principle in non-discrimination.<sup>18</sup>

*Kalanke* exemplified a formal and individualistic approach to non-discrimination in which the room for positive discrimination becomes critically confined. The Court’s logic appeared to require actual inequality *in the particular case* for positive discrimination to become acceptable. This approach effectively closed the door for group based positive discrimination and generated upheaval among experts and lobby groups. It was, albeit obliquely, partly abandoned in the subsequent cases *Marschall*<sup>19</sup> and *Badeck*<sup>20</sup>. The Court now allowed a national rule favouring equally qualified female candidates for promotion over male candidates in sectors where females are under-represented:

“if such a rule *may counteract the prejudicial effects on female candidates* of the attitudes and behaviour and *thus reduce actual instances of inequality which may exist in the real world*” (emphases added).

The Court exchanges a purely individualistic approach for a balanced group approach that *allows individual decisions of positive discrimination to be justified on the basis of group inequality*. It formally distinguishes its new line from the one adopted in *Kalanke* by focusing on the *conditional nature* of the positive discrimination at hand:

“a measure which is intended to give priority in promotion to women in sectors of the public service where they are under-represented must be regarded as compatible with Community law if *it does not automatically and unconditionally give priority to women* when women and men are equally qualified, and the *candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates*”.<sup>21</sup>

<sup>18</sup> Case C-450/93 *Kalanke* [1995] ECR I-3051.

<sup>19</sup> Case C-409/95 *Marschall* [1997] ECR I-6363.

<sup>20</sup> Case C-158/97 *Badeck* [1999] ECR I-1875.

<sup>21</sup> Case C-158/97 *Badeck* [1999] ECR I-1875, par. 23, emphasis added.



The requirement of an objective assessment comparing the intended individual beneficiary and the victim of a collective positive action measure was further expanded by the Court in the already mentioned *Abrahamsson* case. There the ECJ had to consider a Swedish regulation on universities which enabled preference to a candidate of the under-represented sex who, although sufficiently qualified, did *not* possess qualifications equal to those of other candidates of the opposite sex. The absence of equal qualification implied a greater deviation from the individual merit principle and one which the Court was unwilling to swallow in the absence of objective criteria clearly tailored to prevent or compensate for the occupational difficulties of the promoted group. Moreover, the scheme lacked an objective assessment taking into account the specific personal situations of all the candidates, which made it a priori unacceptable.<sup>22</sup>

18. *Abrahamsson* could be formally distinguished from *Marschall* and *Badeck* in its preferential treatment, without objectively tailored criteria, of less qualified female candidates, just as *Marschall* and *Badeck* could be formally distinguished from *Kalanke* in their use of a savings clause that made the positive discrimination conditional. It is clear, however, that the Court sooner or later would have to abandon its case-by-case balancing act for a more comprehensive test. It admitted as much when it considered the *Abrahamsson* scheme “in any view, to be disproportionate to the aim pursued” and squarely attempted an overall proportionality test in *Lommers*. The ECJ returns to its premise, initially espoused in *Commission v. France*, which sees positive discrimination as an exception to the non-discrimination principle and states:

“(...) according to settled case-law, in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations *must remain within the limits of what is appropriate and necessary in order to achieve the aim in view* and that the *principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued*.”<sup>23</sup>

Applying this traditional proportionality logic to the facts at hand, the Court validates a scheme set up by a Ministry to tackle proven extensive under-representation of women within it under which, in a context of proven insufficiency of proper, affordable care facilities, a limited number of nursery places made available to its staff is reserved for female officials alone while male officials still have access to them (i) in cases of emergency and (ii) on the same conditions as female officials if they take care of their children by themselves.

19. It is important to note that the explicit development of the proportionality test in *Lommers* does not turn back the clock for the previous rulings. On the contrary, the analyses developed in earlier cases such as *Marschall* and *Badeck* should be seen as an *illustration of the proportionality test*. The Court was quick to point this out in its latest *Briheche* case and continues to reject positive discrimination that gives automatic and unconditional priority to certain categories of women.<sup>24</sup>

<sup>22</sup> Case C-407/98 *Abrahamsson* [2000] ECR I-5539.

<sup>23</sup> Case C-476/99 *Lommers* [2002] ECR I-2891, par. 39, emphasis added.

<sup>24</sup> Case C-319/03 *Briheche* [2004] ECR I-8807, par. 24 *et seq.*

### 3.5. Article 141(4) TEC

#### 3.5.1. Textual Observations

20. The Treaty of Amsterdam has made the elimination of gender inequality and the promotion of gender equality both a central Community goal and a Member State obligation. This renewed active approach to gender equality also transpires in the modified Article 141 on pay discrimination, whose fourth section now holds that:

*“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 underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers” (emphases added).*

Article 141(4) is still the only TEC provision that explicitly refers to positive action, although gender is now only one of the many outlawed grounds for discrimination. Its emphasized wording potentially puts Article 141(4) ahead of the old Article 2(4) of the Equal Treatment Directive in several ways.

21. The reference to *“ensuring full equality in practice”* owes more to a substantive equality model than to a formal one. The concept of *“equal opportunities”*, central to the original article 2(4) of the Equal Treatment Directive and to the findings in *Kalanke* and *Marschall*, is not used. At the least equal opportunity is recognized as necessary to the achievement of *“full equality in practice”*. It is however unclear whether positive action should still be treated as an exception to the principle of equal treatment or as an independent element on the path towards the achievement of real equality of opportunity (Barnard, 425). The *“shall not prevent”* passage is indicative of the former rather than of the latter.

The authorization of *“specific advantages”* does seem to indicate new direct avenues for positive action. On the other hand this term was already used by the ECJ in its seminal cases on the original Article 2(4) of the Equal Treatment Directive (Ellis 2005, 310). Finally, by admitting positive measures that both *“prevent or compensate”* the TEC combines a compensatory and a proactive approach beyond the initial Equal Treatment Directive’s emphasis on merely *“removing existing inequalities”*.

While the text of Article 141(4) TEC thus appeared to widen the scope of positive action in comparison to the initial Equal Treatment Directive, it now remained to be seen how the ECJ would handle the new framework. In this respect, the Court’s approach should logically also apply to the Consolidated Equal Treatment Directive whose positive action provision has been deliberately modified to assure uniformity with the TEC.<sup>25</sup>

#### 3.5.2. ECJ Case-Law

22. To this day, the ECJ has only had to deal with cases that initially arose under Article 2(4) of the original Equal Treatment Directive. As a result, the Court has only addressed the new phraseology of Article 141(4) TEC indirectly and as *obiter dictum*. This has precluded the Court from adopting a clear and unambiguous position.

<sup>25</sup> Art. 3. Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

The Court has not been without stimulus from Advocates General to use Article 141(4) TEC to expand the scope of authorized positive action. Both AG Saggio in *Badeck* and AG Poiares Maduro in *Briheche* advocated that the new Article 141(4) TEC should imply broader discretion to adopt positive action measures, either independently or through a harmonized reading of Article 2(4) of the original Equal Treatment Directive. It is revealing that the ECJ has so far refused to erect a different level of scrutiny through 141(4) and has merely, albeit cursorily, integrated 141(4) in a natural and harmonious development of its scrutiny through the original Equal Treatment Directive.

23. In the *Abrahamsson* case mentioned above, the ECJ capped its rejection of the contested scheme under Article 2(4) of the Equal Treatment Directive with the off-hand remark that:

“even though Article 141(4) TEC allows the Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, it cannot be inferred from this that it allows a selection method of the kind at issue in the main proceedings which appears, on any view, to be disproportionate to the aim pursued”.

As we have seen, this proportionality test was later confirmed and developed in *Lommers* for the sole purpose of Article 2(4) of the original Equal Treatment Directive. Both Article 2(4) and 141(4) are therefore approached through the prism of proportionality. There is no indication of an increase in the legitimate scope for positive action (Waddington and Bell, 601). The Court appears to envelop both positive action provisions in the same approach without recognizing any significant difference in substantive scope.

This line was continued in *Briheche*, where the Court again stopped short of following a separate Article 141(4) track with the statement that it cannot allow measures “which prove in any event to be disproportionate to the aim pursued”. In the same case the Court reiterates its traditional view of positive action as a *limited derogation to formal equality*.<sup>26</sup> This is again noteworthy since Article 141(4) TEC was claimed by some to mark the advent of a substantive approach to equality in EC law. The Court apparently remains to be convinced, confirming instead uniformity in that the derogatory Article 2(4) of the original Equal Treatment Directive aims:

“(...) in accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of the persons concerned”.<sup>27</sup>

24. In short, whereas the current case-law from the ECJ certainly recognizes the separate co-existence of Article 2(4) of the original Equal Treatment Directive and of Article 141(4) TEC, it has so far failed to indicate, let alone decide, that different articles also imply different levels of scrutiny. On the contrary, all indications tend towards a uniform approach of “proportionality” that does not significantly depart from the earliest cases. If anything, the impact of Article 141(4) has been to clarify the necessary aim of authorized positive action measures in the sense that these measures must, “in any event, contribute to helping women conduct their professional life on an equal footing with men”.<sup>28</sup>

<sup>26</sup> Case C-319/03, *Briheche* [2004] ECR I-8807, par. 25 and 31.

<sup>27</sup> Case C-319/03, *Briheche* [2004] ECR I-8807, par. 25.

<sup>28</sup> Case C-366/99 *Griesmar* [2001] ECR I-9383, par. 64.

### 3.6. The *Acquis* Prior to the Directives 2000/43 and 2000/78

25. Given the wide variety of positive action measures, as seen above, it should be stressed that the existing case-law only deals with a small fraction of the spectrum. This is of course entirely normal, since only those positive action measures that entail some form of actual discrimination are potentially problematic.

Secondly, it is equally telling for the reality of positive action in the EC that the Court so far has not had the opportunity to develop doctrine in the field of *private sector* positive action. All but one irrelevant case concerned public employers<sup>29</sup> which in almost all of the cases applied positive action measures embedded in national legislation. Only in *Lommers* did the ECJ address a case of positive action that originated from within the public sector.

26. With these caveats in mind, the *acquis* of positive action case-law can be summarized as follows.

First and foremost, the ECJ sticks to a restrictive approach in which group based positive action, especially positive discrimination, is seen as an *exception to be narrowly tailored to its justification* (*Commission v. France, Abrahamsson, Briheche*).

Second, although all the current case-law deals with facts that arose under the original Equal Treatment Directive, the ECJ in several occasions has shown manifest hesitation to adopt a wider scope of positive action under Article 141(4) TEC. Whereas the ECJ certainly recognizes the difference in wording between the two provisions, it has so far indicated an *integrated approach under a proportionality test that does not appear to contain any significant difference* (*Abrahamsson, Lommers, Briheche*).

The concept of “proportionality” traditionally entails three separate tests: *legitimacy*, *effectiveness*, and *necessity*. The existing case-law is centred on legitimacy while stating but barely scratching the surface of the other two criteria.

Legitimacy is accepted where measures that result in individual positive discrimination are aimed at remedying a *proven imbalance* between the sexes. The ECJ seems not particularly concerned with the origin of the imbalance, loosely admitting positive action in response to the “prejudicial effects on women in employment which arise from *social attitudes, behaviour and structures*” (*Kalanke, Marschall*). Positive action therefore should not necessarily seek to compensate for past discrimination as such. The required imbalance should not necessarily have adversely affected the beneficiary of the positive measures.

What *level of imbalance* is required for positive discrimination to be legitimate has never been squarely asked to the ECJ. The Court has dealt with a variety of imbalances without ever having to judge their merits directly. However, it is clear that the aim of positive action measures should be to *eliminate and correct the causes of reduced opportunities of access to employment and careers* and to improve the ability of the underrepresented sex to compete on the labour market and pursue a career on an equal footing (*Commission v. France, Griesmar, Lommers*). Moreover, such positive discrimination measures should *objectively serve the stated aim and rely on objective and transparent criteria* (*Commission v. France, Abrahamsson, Griesmar*).

<sup>29</sup> The irrelevant case being Case C-79/99, *Schnorbus* [2000] ECR I-10997, which was solved as a case of indirect discrimination.

Furthermore, any positive discrimination should, in accordance with the principle of *proportionality*, remain within the limits of what is appropriate and necessary in order to achieve the aim in view, *reconciling the principle of equal treatment as far as possible with the requirements of the aim thus pursued* (Abrahamsson, Lommers, Briheche). The emphasis on “appropriateness” and “necessity” is likely to generate crucial discussions about *effectiveness* and *cost/benefit analysis* in positive action, none of which has so far reached the ECJ.

In sum, whereas the conceptual bearings of the Court’s scrutiny seem clear, the relative dearth of case-law still leaves much room for concrete development of the proportionality test. We do know, however, that *proportionality in selection is not fulfilled when the preferential treatment is automatic and unconditional* and does not include an objective assessment of all personal circumstances of all the candidates, allowing for gender neutrality to prevail if the circumstances so demand (Kalanke, Marshall, Badeck, Briheche). Hard selection quotas are therefore in principle suspect and the ECJ has so far only conditionally admitted soft quota in a tie break situation.

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## Part IV

### Positive Action and the Directives 2000/43 and 2000/78



## 4.1. General Analysis

27. Both the Race and Ethnic Origin Directive 2000 and the Framework Directive 2000/78 contain a separate general provision on positive action. Article 5 of the Race Directive states:

*“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 racial or ethnic origin”* (emphases added).

The Framework Directive contains an identical provision in its Article 7(1):

*“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 any of the grounds referred to in Article 1”* (emphases added).

Any attentive reader cannot help being struck by the manifest similarity of these provisions with Article 141(4) TEC, which predates the 2000 Directives and holds that:

*“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 underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers”* (emphases added).

Whether this manifest textual similarity in fact implies similar interpretations has been subject of debate in the legal literature. The value of the 2000 Directives has brought many authors to explore their texts under the microscope.

28. Both directives recognize positive action “with a view to ensuring full equality in practice”. This indicates the *purpose* of positive action but does not render it compulsory. On the contrary, both directives state that the principle of equal treatment “*shall not prevent*” positive action measures, which is clearly indicative of the *optional nature* which the ECJ itself has recognized since *Bilka* (Fredman 2002, 167; Jones, 516). The positive action provisions *as such* therefore do not make positive action compulsory. Any obligation for positive action would have to come from other sources.<sup>30</sup>

Furthermore, it seems clear that the explicit authorization of measures that “*prevent or compensate*” for group disadvantages allows for both *pro-active* and *corrective policies* with no need for direct disadvantage for the individual beneficiary of the positive action, as long as these policies pursue the *aim* for which positive action is recognized (McInerney, 320). In both these dimensions the 2000 Directives confirm the positive action *acquis* in gender.

<sup>30</sup> Such as the provision on reasonable accommodation for the disabled, binding international human rights instruments, a general principle of equality outside and beyond the 2000 Directives, or a national law provision.

29. The first real bone of contention is the explicit reference to the *Member States* as the source of positive action. To the extent that a positive action measure actually derogates from non-discrimination and therefore requires a *specific authorization* in Community law, the question arises whether the said reference limits the Member States to maintaining or adopting measures that actually originate from the “State” as such (Bayart, 272-275). In the field of gender the ECJ has admitted positive discrimination by a Member State both as a regulator and as an employer.<sup>31</sup> However, it did so in the context of the original Equal Treatment Directive whose positive action provision declared the directive to be generally “without prejudice to *measures to promote equal opportunities* for men and women”. In contrast to the 2000 Directives, the original Equal Treatment Directive thus contained no reference to, and hence no possible limitation of the potential author(s) of positive action.

The Commission does not seem to oppose positive action through collective bargaining,<sup>32</sup> but that may relate to the collective bargaining agreement’s role as an alternative for legislation in implementing directives. From a teleological point of view, there is little to suggest that the possibility for “Member States” to maintain or adopt “specific measures to prevent or compensate for disadvantages” should be limited to measures from the state itself. By organizing positive action in the private sector a Member State would surely be preventing or compensating for disadvantages and promoting substantive equality. However, it remains to be seen whether such a pragmatic reading will also be adopted at the ECJ, given its prevalent view of positive action as a narrowly constructed exception to formal equality.

## 4.2. The Relationship with the *Acquis* in Gender

30. The debate whether reverse discrimination constitutes a state monopoly is a minor one compared with the fundamental issue whether the positive action provisions in the 2000 Directives confirm the current scope for positive action in gender or establish instead a separate framework for positive action.

In a strictly literal analysis, the respective texts contain arguments in different directions. All three provisions allow for positive action “with a view to *ensuring full equality in practice*”. The 2000 Directives’ emphasis on full equality in practice for some suggests a wide scope that may include both procedural and result-oriented means (Schiek 2002, 299). It should be recalled, however, that the most recent case-law in gender continues to read positive action as a narrowly constructed exception to formal equality, notwithstanding the identical textual reference to full equality in practice (see par. 22-24). In that perspective the reference to “full equality in practice” merely defines the nature of positive action without establishing it as a separate rule on a par with formal equality as such.

Whereas Article 141(4) TEC allows for “specific advantages”, both the Race and Framework Directive admit “specific measures”. The concept of direct “*advantages*” may appear to be more purposeful and to allow more immediate results than mere “*measures*”, hence suggesting a more limited scope for positive action in the 2000 Directives. In the same vein, the Race and Framework Directive both fail to mention *pursuance of vocational activity* as an authorized goal of positive action (Waddington and Bell, 602). On the other hand Article 141(4) appears to be more restrictive when it focuses on prevention or compensation “for disadvantages in professional careers”, since the 2000 Directives allow prevention or compensation for all “disadvantages linked to” the protected characteristics.

<sup>31</sup> Case C-476/99 *Lommers* [2002] ECR I-2891, 39.

<sup>32</sup> COM(1999) 565 final, *Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation*, 12; cf. the Commission’s stance in *Abdoulaye*, C-218/98.

31. A pure textual analysis therefore suggests at the same time a more restrictive and more extensive scope for positive action under the 2000 Directives as compared to Article 141(4) TEC (Ellis 2005, 312-313). Textual analysis, however, is only the beginning. It needs to be remembered that Article 141(4) deals exclusively with *pay discrimination in employment*. The Race Directive goes beyond pay and beyond employment to other fields such as social protection, education, and the public supply of goods and services. The Framework Directive encompasses the entire field of employment and occupation. This wider material scope may come a long way in explaining the textual differences in the positive action provisions, such as the absence of explicit referral to “vocational activity” and the loose identification of all “disadvantages linked to” the protected characteristics.

In other words, the textual differences between the respective positive action provisions may simply be the natural consequence of the directives’ different overall scope, rather than the illustration of a different concept of “positive action” as such. The drafting history of the 2000 Directives strongly suggests this. In both cases, the text of the eventual positive action provision was deliberately altered to reflect that of article 141(4) TEC.<sup>33</sup> Similarly, in its proposal for the Framework Directive, the Commission stressed the exceptional nature of positive action as a derogation from the principle of equality, referring to the case-law in the field of gender.<sup>34</sup>

32. The development of positive action provisions in EC law *after* the 2000 Directives equally underscores a drive towards identical concepts of positive action. In the 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 the TEC. A new Article 2(8), now Article 3 of the Recast Directive, provides 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 Directive therefore simply extends Article 141(4) TEC beyond its original scope. In its proposal for the Directive, the Commission tellingly did not suggest that the reference to Article 141(4) was intended to tilt the directive’s positive action beyond its original scope. It simply provided a “*tour d’horizon*” of the limits of positive action in gender discrimination case-law.<sup>35</sup>

This umbrella approach was continued and intensified in the most recent legislation on sex discrimination. Preparatory documents to the Recast Equal Treatment Directive show the Commission’s policy to apply uniform concepts of equality and positive action. The Commission plainly refers to the necessity of identical concepts in different pieces of EC non-discrimination legislation:

“legislation ensuring equal treatment between men and women in the area of employment and occupation adopted under and/or covered by Article 141(4) EC should, *for all areas covered, use the same concepts as those used in the legislation adopted recently* such as Directive 2002/73/EC amending Directive 76/207/EEC, *as well as in similar legislation adopted under Article 13 EC, to combat discrimination on grounds other than sex, insofar as the latter also concerns the area of employment*, in order to ensure legal and political coherence between pieces of legislation, which have similar objectives”<sup>36</sup> (emphases added).

<sup>33</sup> European Parliament, *Report on the proposal for a Council directive on implementing the principle of equal treatment between persons*, A5-0136/2000, Brussels, 16 May 2000; European Parliament, *Report on the proposal for a Council directive establishing a general framework for equal treatment in employment and occupation*, A5-0264/2000, Brussels, 21 September 2000.

<sup>34</sup> COM(1999) 565 final.

<sup>35</sup> COM(2000) 334 final.

<sup>36</sup> COM(2004) 279 final.

33. In sum, both the preparation of the 2000 Directives and the general evolution of EC equality law point towards a uniform understanding of positive action through the prism of Article 141(4) TEC. Given the manifest textual similarities, details notwithstanding, it is therefore highly likely that the *acquis* on positive action in the field of gender will shape the interpretation of the positive action provisions in the Race and Framework Directives (Bennet, 230; Schiek 2000, 270; Skidmore, 131; Waddington and Bell, 602).

The state of the law delineating the scope for positive action in gender can and should therefore serve as the point of departure for interpreting the positive action provisions in the Race and Framework Directive. The principles analyzed and summarized above in gender, also play in the context of these 2000 Directives (see par. 26):

- Positive action amounting to *discrimination* is an exception to be narrowly tailored to its justification.
- Any positive discrimination should, in accordance with the *principle of proportionality*, serve a legitimate aim and remain within the limits of what is appropriate and necessary in order to achieve that aim, *reconciling the principle of equal treatment as far as possible with the requirements of the aim pursued*.
- As far as *legitimacy* is concerned, *group characteristics* may justify some measures that result in individual positive discrimination, if they have the correct aim, making a requirement for *individual harm* redundant.
- Positive discrimination measures should *objectively serve the stated aim and rely on objective and transparent criteria*.
- *Proportionality in selection* is not fulfilled when the preferential treatment is automatic and unconditional and does not include an objective assessment of all personal circumstances of all the candidates. Automatic quotas are therefore unacceptable.

34. However, point of departure does not necessarily mean point of arrival. What remains is a difference in *overall scope* of the 2000 Directives as compared to an Article 141(4) that is confined to gender and to pay discrimination in employment. It is logical and therefore likely that this broadening in scope will eventually transpire into case-law and modify the application of the principles stated above.

Under Article 141(4), for instance, the *aim of positive action measures* is restricted to eliminating and correcting causes of reduced opportunities of access to employment and careers and to improving the ability of the underrepresented sex to compete on the labour market and pursue a career on an equal footing, thus remedying a proven imbalance between the sexes (see par. 15, 24, and 26). This restriction simply cannot be applicable where the 2000 Directives allow positive action beyond the scope of employment.<sup>37</sup>

It also remains to be seen whether the proliferation of new protected grounds will inspire the ECJ to *tailor its level of scrutiny of positive action to the group concerned*. One should not forget that positive action in the final analysis reflects a deliberate attempt of social engineering towards underrepresented interest groups. Different societal or historical realities for different groups may yet yield different standards. The Framework Directive explicitly recognizes this by allowing a second level of positive action for the disabled (see par. 36). Such differentiation may yet transpire implicitly, through accommodating case-law by the ECJ.

<sup>37</sup> Cf. the authorization of discrimination to compensate for religious imbalance in Northern Ireland, in article 15 of the Directive 2000/78.

Recognizing the inspirational role of Article 141(4) TEC therefore does not necessarily have to limit the 2000 Directives to the existing case-law on gender. There is room for specific development that addresses the specific scope and nature of these Directives. A test of “proportionality” and “legitimacy” after all is a flexible instrument and is intrinsically adaptable to circumstances. Moreover, the limits of proportionality in the context of gender based positive action are still largely undefined (see par. 26). Further case-law is required to determine how flexible the ECJ is willing to be.

### 4.3. Provisions for Disabled Persons

35. Besides its standard positive action clause, article 7 of the Framework Directive also contains a clause specifically addressed to disabled persons:

“With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt *provisions on the protection of health and safety at work* or to *measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment*” (art. 7(2)).

The drafting history of this clause is vague. It appeared in the last phase before the adoption of the Directive, apparently at the behest of a Dutch government concerned with the fate of its national provisions protecting and promoting the employment of the disabled.<sup>38</sup> In the absence of clear guidance from the preparatory phase, a textual analysis of the cited provision yields two further exceptions to the principle of equal treatment, on top of the general positive action provision discussed above.

36. *First*, Member States are allowed to maintain or adopt “provisions on the protection of health and safety at work” with regard to disabled persons. This was presumably included to encourage Member States to take account of disabled persons when adopting health and safety legislation (Waddington and Bell, 603). However, it could also work to the detriment of persons with disabilities, if Member States maintain or adopt health and safety measures that restrict the *occupational opportunities of the disabled* (Skidmore, 131). The situation is not so dissimilar from the well known health and safety derogation from equal treatment in the context of maternity.

*Second*, and more relevant to our inquiry, the Framework Directive explicitly shields from equal treatment intrusion the “*provisions or facilities for safeguarding or promoting (...) integration into the working environment*” of disabled persons. It can be argued, especially given the aforementioned impetus which generated this exemption, that these shielded provisions include quotas or other employment goals which Member States might develop to ensure labour market participation of the disabled and which might otherwise falter on the strict scrutiny which the ECJ traditionally applies to such positive discrimination (Bell and Waddington, 355). In other words: article 7(2) is designed to force the ECJ to adopt a different level of scrutiny when faced with positive action measures in the field of disability (Whittle, 319).

<sup>38</sup> Council of the European Union, *Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation – political agreement*, 12269/00, Brussels, 11 October 2000.

## 4.4. Positive Action and “Reasonable Accommodation”

37. Article 5 of the Framework Directive establishes a duty of reasonable accommodation for disabled workers:

“In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer”.

38. It is rare but not unique for EC law to impose specific accommodation for a group that is protected against discrimination. Accommodation duties are also imposed for the benefit of *pregnant workers and workers who have recently given birth* (Directive 92/85) and of *young workers* (Directive 94/33). One can theorize at length about the general conceptual interaction between antidiscrimination and accommodation (see Jolls, 642-699). Within the confines of the Framework Directive, the relationship between reasonable accommodation (art. 5) and positive action (art. 7) is clear and relatively simple even beyond the self-evident restriction of the former to disability and the general personal scope of the latter.

As is evident from the cited text of Article 5, reasonable accommodation is imposed “*in order to guarantee compliance with the principle of equal treatment* in relation to persons with disabilities”. Therefore, although both accommodation and positive discrimination imply a different treatment for the beneficiary, only the latter will do so as an exception to the principle of equality. Specific accommodation of a disabled person in employment is an *illustration* of, rather than an *exception* to formal equality, as it manifests the formal obligation to treat different situations differently (see par. 4). The prohibition of discrimination against the disabled not only implies a duty of equal treatment, when the disabled person is comparable notwithstanding the disability. It also implies a duty of unequal treatment, codified as reasonable accommodation, when the disabled is incomparable because of the disability but still competent to perform the job or to participate in training.

In the same vein, reasonable accommodation is different from reverse, positive discrimination in the sense that it is *not* designed to favour the disabled over the non-disabled. The purpose is not to provide special measures to people with disabilities, but instead to remove barriers to their participation where it is equitable to do so. As such, the employer can still determine the job qualifications and require that the disabled individual is indeed qualified for the job if accommodated (Brems, 45; Whittle, 311-315). This is also underscored by the fact that only “reasonable” accommodation is required.

Reasonable accommodation equally differs from positive discrimination through its focus on the *individual* rather than the *group*. Reasonable accommodation is prescribed “where needed in a particular case” and will be tailored according to the needs and means of both the beneficiary and the employer.

39. Whereas reasonable accommodation therefore is clearly not positive discrimination, it is certainly part of the wide and varied family of positive measures aimed at achieving results through equality law. It can be seen as a separate form of positive action that does not amount to reverse discrimination (see par. 5). Whereas positive action in general is optional and primarily targeted at Member States (see par. 14 and 28), reasonable accommodation is compulsory and aimed directly at the individual employer. Thanks to its individualized character it is not susceptible to the problems of under-inclusiveness and over-inclusiveness which can dog classical positive action measures (Waddington and Hendriks, 409-410). By focusing on personal accommodation it seeks to compensate for disadvantages at the personal level whereas traditional positive action is driven by group disadvantages, even irrespectively of the personal position of its beneficiary.

## 4.5. Positive Action and “Genuine Occupational Requirements”

40. Both the Race and Framework Directive allow Member States to provide that a difference in treatment which is based on an otherwise protected characteristic:

“(...) shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate” (art. 4 Race Directive; art. 4(1) Framework Directive).

Article 4(2) of the Framework Directive extends and specifies this provision for religion and belief, in the context of occupational activities where a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos.

41. Genuine occupational requirements (GOR) that may authorize the use of a protected characteristic in what would normally constitute direct discrimination have always been distinguished from positive action provisions in Community law. The original Equal Treatment Directive allowed Member States to admit the use of sex where it constitutes a “determining factor” (art. 2(2)) while at the same time providing a separate platform for positive action (art. 2(4)). The Consolidated Equal Treatment Directive maintains this distinction along the same lines as the 2000 Directives, while formally restricting it to access to employment (art. 14(2)).

The distinction between GOR and positive action in Community law has conceptual logic. GORs essentially allow the use of an otherwise prohibited distinction where otherwise this would compromise the exercise of a legitimate occupational activity. The reference to GOR is aimed to solve *individual cases of pure occupational necessity*, striking a balance between the normally required neutrality and the necessity to maintain job requirements that are not neutral but still justifiable in the particular case (comp. Ellis 2005, 273). Positive action on the other hand, manifests a *societal agenda* and is based on a managerial *group approach*. It does not cater for specific occupational needs but has a *general policy aim* of complementing equal treatment provisions to ensure effective equality in practice for a previously underrepresented group.



These fundamental conceptual differences of course do not exclude that positive action, like the use of GOR, can result in otherwise prohibited discrimination. In that case both categories act as genuine derogations to non-discrimination and both will be subjected to a strict scrutiny that implies a proportionality test. However, as we have seen, such discrimination only represents the ultimate range of positive action measures whereas the GOR derogation by definition implies otherwise unlawful differences of treatment.

Moreover, while the GOR derogation may incidentally serve a historically disadvantaged group, it does not necessarily possess this “positive” dimension inherent in positive action that amounts to discrimination. As well as being supportive of the goal of actual equality, GOR can also allow corrections that maintain old stratifications.

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# Part V

## Member State Practice in Positive Action

42. The Community's positive action provisions provide Member States with a policy option which, within the general limits discussed above, is essentially used at their discretion. What follows is a brief survey of existing law and practice on positive action in different Member States based on available country reports drafted by national experts. The survey is highly selective and by no means representative of the full picture.<sup>39</sup> It gives a flavour of the diversity of approaches and some of the problems that arise in national jurisdictions.

## 5.1. Selective Overview of Constitutional and Legal Provisions

43. The legal framework for positive action in *Belgium* has been scrutinized by the Belgian Constitutional Court. Article 4 of the Federal Law of 25 February 2003, implementing the Directives, permits the adoption or maintenance of measures which seek to prevent or compensate certain disadvantages in order to ensure full equality in practice. According to a Constitutional Court judgment of 6 October 2004,<sup>40</sup> such measures will have to conform to strict conditions if they amount to positive discrimination. *First*, positive discrimination must be in response to situations of manifest inequality, i.e. a demonstration that a clear imbalance between the groups will remain in the absence of such action. *Second*, the legislator must have identified the need to remedy such an imbalance. In other words, positive discrimination must be based on a legislative mandate. *Third*, the "corrective measures" must be of a temporary nature and must be abandoned as soon as their objective is attained. *Fourth*, these corrective measures must not reach further than is required.

44. In *Cyprus*, all three laws enacted for transposing the 2000 Directives contain positive action provisions. The provisions render differential treatment lawful under certain circumstances but fall short from putting forward any concrete positive action measures or from creating a mandatory regime. In 2002 the Supreme Court of Cyprus had declared unconstitutional a set of legal provisions granting priority to employment in the public sector to persons with disabilities and to persons related to the dead and the missing from the 1974 war or with war-related disabilities, on the basis of a quota system.<sup>41</sup> The Court's reasoning was based on an interpretation of the Constitution that such priority discriminates against other candidates eligible for appointment in the public service. In 2005, a new law came into force, wherein the quota system was restored only for the relatives of the missing and dead and for persons with war-related disabilities.

45. The *Finnish* Constitution in general neither prohibits nor prescribes positive action. However, positive action is not allowed at all in the recruitment of civil servants, as the recruitment criteria have been laid down exhaustively in the Constitution and do not include positive action. At the same time, the Constitution requires all authorities to guarantee the observance of basic rights and liberties and human rights. This obliges the legislator and the judiciary to actively secure the *de facto* realization of rights.

The Finnish Non-Discrimination Act explicitly allows specific measures aimed at the achievement of genuine equality in order to prevent or reduce the disadvantages caused by discrimination. Positive action must be proportionate to its objective. It obliges all authorities to take steps to foster equality and thus goes beyond the minimum requirements laid down in the 2000 Directives. In everything they do, the authorities shall seek purposefully and methodically to

<sup>39</sup> For more information, see European Network of Legal Experts in Non-Discrimination, Compilation of the information included in the country reports regarding positive action, Brussels, Human Consultancy, 2006.

<sup>40</sup> Judgment n° 157/2004 of the Belgian Constitutional Court, delivered on 6 October 2004, see <http://www.arbitrage.be/public/f/2004/2004-157f.pdf>

<sup>41</sup> Supreme Court, *Republic of Cyprus through the Civil Service Commission v. Eleni Constantinou*, Appeal Case No. 3385, 26.09.2002.

foster equality and consolidate administrative and operational practices that will ensure the fostering of equality in preparatory work and decision-making. In particular, the authorities shall alter any circumstances that prevent the realization of equality. On the other hand, the Finnish legislator traditionally has a wide margin of appreciation in determining what kind of measures are necessary in a given situation, especially if the draft legislation intends to improve the situation of socially disadvantaged groups or individuals.

46. In *Greece*, adoption of positive measures for promoting equality is an obligation *imposed* upon the State, by virtue of the revised Constitution. The provision is understood as guaranteeing the principle of proportional equality and assisting to the elimination of factual inequalities. Even though the main preoccupation of the 2001 Greek Constitution was women's rights, the wording is all-inclusive, laying down a state obligation to act through positive measures for the elimination of all kinds of "inequalities". Greek case law has accepted and established the legitimacy of legislative or administrative measures of positive action aimed at the advancement of gender equality in Greece. The Council of State has authorized state "affirmative action" which is appropriate and necessary, for a certain period of time, until an existing situation of inequality has ceased.

47. *Hungarian* national law does not differentiate between protected grounds, nor is it limited to employment, when providing for preferential treatment. Pursuant to Article 11(1) of the Equal Treatment Act (ETA) a "measure aimed at the elimination of inequality of opportunities based on an objective assessment of an expressly identified social group is not considered a breach of the principle of equal treatment if it is based on an Act, on a government decree based on an Act or on a collective agreement, effective for a definite term or until a specific condition is met". Article 11(2) should bring positive action in line with relevant ECJ case law, when it provides that a measure aimed at evening out a disadvantage shall not violate any basic rights, shall not provide unconditional advantage, and shall not exclude the consideration of individual circumstances. Certain provisions of domestic law *expressis verbis* allow for positive action. However, positive action being a relatively new institution, no case law has evolved in this regard.

48. In *The Netherlands*, the General Equal Treatment Act (GETA) imposes clear conditions on positive action measures and policies. The initiative must be a specific measure. It must be aimed at the conferral of a preferential position for women or for people belonging to ethnic minorities. It should also be aimed at the removal or the reduction of factual inequalities and there must be a proportionate relationship between the measure and the objective pursued. The Dutch definition is alleged to leave less scope for positive action policies and programmes than the Directives allow, since it does not permit measures which aim at preventing, in addition to removing or reducing disadvantages.

49. In the *Slovak Republic*, the constitutionality of positive action has been a burning issue for the delicate position of racial and ethnic minorities. The Constitution of the Slovak Republic contains articles that explicitly derogate from the rule of rigid equality, permitting measures of positive action for women, pregnant women, juveniles and disabled persons. These categories of persons enjoy more extensive health protection and special working conditions. The adoption of positive action measures has nonetheless been contested with regard to other discrimination grounds. In 2005 the Court was petitioned by the Slovak Government to decide on the constitutionality of a general positive action provision in relation to *racial and ethnic minorities* in the new Anti-discrimination Act. The Constitutional Court decided in October 2005 that the relevant section of the Anti-discrimination Act is not in compliance with several constitutional provisions.<sup>42</sup> A divided Constitutional Court however did not reject the application of positive action in principle. It stated that taking such action must have a constitutional basis, which in the Slovak Republic was not the case for racial and ethnic origin.

<sup>42</sup> Decision of the Constitutional Court, PL. ÚS 8/04, see [http://www.concourt.sk/S/s\\_index.htm](http://www.concourt.sk/S/s_index.htm)

50. In *Slovenia*, the “Implementation of the Principle of Equal Treatment Act” states that positive action consists of temporary measures, defined by law, designed to prevent a less favourable position for persons with a particular personal circumstance or to compensate for a less favourable position. The Slovenian Constitution moreover stipulates expressly, with regard to equal treatment of Roma people, that “the status and special rights of the Roma living in Slovenia are regulated by law”. The constitutional authorisation makes it possible to grant special (additional) protection to the Roma community and its members.

51. The principle of “positive action” is rooted into the *Spanish* Constitution, which *requires* the public authorities to promote “the conditions to ensure that the freedom and equality of individuals and of the groups that they form are real and effective”. The required positive action should not be regarded only as a “legitimate exception” but as a guarantee that the principle of equality is effective. In this connection, the Constitutional Court has repeatedly held that affirmative action measures are not to be seen as discriminatory. Rather, the Court has interpreted that actions by public authorities to remedy the employment disadvantage of certain socially marginalised groups is actually required by a commitment to equality properly understood. Positive action has been present in labour, educational and other provisions since the Spanish constitution was adopted in 1978 and is manifest in legislation. In the Law of 2003 that transposes the Directives, there are three articles that develop positive action. One relates to the field of employment and occupation on all grounds of Directives. The other provides that “collective agreements may include measures aimed at combating every form of employment discrimination, to encourage equality of opportunities and to prevent harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation”. A third one refers to the various spheres of employment and involves racial or ethnic origin. The 2007 Organic Law for Effective Equality Between Women and Men provides that, “in order to ensure the effectiveness of the constitutional right to equality, public authorities will adopt specific measures favouring women to correct situations of obvious *de facto* inequality with respect to men. Such measures, which will be applicable while the situation subsists, must be reasonable and proportional to the objective pursued in each case” (art. 11.1).

52. The 1999 Acts prohibiting discrimination in working life on the grounds of ethnicity, religion or other belief, sexual orientation and disability in *Sweden*, respectively, do not expressly provide for positive action in the form of preferential treatment. As regards sex discrimination, however, there is an express provision for positive action in Swedish domestic law. The prohibition on direct discrimination does not apply if the treatment promotes effective equality in working life and it does not involve the application of pay or other terms of employment for work which is regarded as equal or of equal value. The 1999 Ethnic Discrimination Act also contains rules on ‘active measures’. From a Community law perspective its measures are within the realm of positive action in a more general meaning. The Act requires that the employers carry out a goal-oriented work to actively promote ethnic diversity in working life. The domains in which these measures are to be taken concern employment conditions and recruitment of employees, for instance in advertising. Finally the 2003 Prohibition of Discrimination Act occasionally allows preferential treatment. The provisions banning discrimination in labour market activities specifically state that the discrimination ban does not apply to the application of measures that are intended to promote equal opportunities regardless of ethnicity.

53. The most important measures to secure positive action towards equality in the *United Kingdom* are embodied in the recent legislation imposing duties to promote equality on public authorities. The most comprehensive are the provisions in the Northern Ireland Act 1998 (NIA) which require public authorities of particular descriptions in carrying out their functions to have due regard to the need to promote equality of opportunity on nine separate grounds. Northern Ireland has also seen far reaching positive action on ground of religion (see par. 56). Furthermore, the British Race Relations Act 2000 imposes a statutory duty on several public authorities in carrying out their functions to have due regard to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups. The Disability Discrimination Act 2005 has imposed, with effect from December 2006, a comparable duty on public authorities to promote disability

equality, and the government has introduced a similar duty in relation to sex equality in the Equality Act. The Disability Discrimination (Northern Ireland) Order 2006 requires public authorities in Northern Ireland to have due regard to the need to promote positive attitudes towards disabled persons and encourage participation of disabled persons in public life.

## 5.2. Examples of General Positive Action Measures from all Member States

### 5.2.1. Race and Ethnic Origin, Including Roma and Other National Minorities

54. In *Austria*, protection of recognized national minorities is provided according to the State Treaties of 1919 and 1955. Their legal status and rights are guaranteed by various constitutional provisions and partly implemented by the National Minorities Act.

In *Cyprus*, some legal provisions relate to education of Turkish-speaking Roma children, mainly consisting in a small subsidy for school uniforms, the provision of meals at school and the supply of language classes. However the aforesaid are not provided to this group in their capacity as Roma but in their capacity as ‘Turkish speaking’ people.

An ethnic origin-based *Czech* positive measure is the system supporting Roma students in higher education through special state financial subsidies. Positive action programmes for Roma have no basis in legislation and are usually established by governmental decrees or resolutions.

The general presumption in *Danish* public law is against positive measures giving preferential treatment to persons due to race or ethnic origin in relation to the labour market. But this does not prevent measures from being taken with a view to improving employment opportunities, inter alia for persons of a specific race, skin colour or ethnic origin, by virtue of other legislation, rules with a different legal basis or other public measures. This right to take special measures does not apply to a private employer.

*Estonia* tries to overcome disparities between ethnic communities by promoting Estonian language training among ethnic non-Estonians.

In *Finland*, each public authority must draw up a plan for fostering ethnic equality, which must be as extensive as required by the nature of the work of the authority.

The *German* legislation contains provisions on positive action, including institutional arrangements for autochthonous minorities, the promotion of their language, the protection of their territory, preferential rules for political representation and so on. They are constitutionally supported by basic policy clauses of the constitutions of the Länder.

The *Greek* state has followed the practice of positive action in favour of the “Muslim minority” (mainly of Turkish origin) in Thrace whose status is regulated by the 1923 Lausanne Peace Treaty. Despite the reference to a religious characteristic, the above treaty provides in fact for the protection of ethnic groups, that is, of ethnic Greeks in Turkey and of ethnic Turks in Greece, mainly in the field of education and religion.

In *Hungary*, there are numerous programmes financed by the Ministry of Labour with the aim of enhancing the entry and re-entry of Roma employees into the labour market. Types of these programs include vocational training and re-training, support for starting an enterprise, inclusion of Roma employees in public labour schemes, wage and social security contribution support to employers employing Roma employees, etc.

In *Lithuania*, the Shortened Strategic Plan of Activities of the Department of National Minorities and Lithuanians Living Abroad was adopted in 2005. The document aims to develop the integration of the Roma into Lithuanian society.

On the political level, a preference is granted in *Poland* to national minorities in that their electoral committees are exempted from the requirement to obtain at least 5 % of votes cast in order to be taken into account for the distribution of seats in Parliament. In the field of education and culture, schools of national minorities receive an extra 20 % subsidy in comparison to other schools, the Ministry of Culture subsidises minority press and other publications and sponsors cultural events organised by national and ethnic minorities. A government programme for Roma in the years 2004-2013 aims at providing assistance to Roma living in the whole country.

In *Portugal*, cultural mediators have been introduced, recruited from among the Roma community, to establish bridges between children, families and schools. The functions of cultural mediators are to promote social dialogue, to help the inclusion of ethnic minorities, to intervene when necessary in social and educational procedures and to assist individuals in their contacts with public or private services.

Despite the above mentioned constitutional issues, there are some legal provisions in *Slovak* law, specifically in the field of education, which have the characteristics of positive action linked to the Roma community, although there is no direct reference in law to the Roma or any other ethnic minority. The other main areas supported by the Government through different projects are health care, housing and the development of Roma settlements and social work.

*Slovenia* pays attention to improving the situation of the Roma community, as the Constitution already refers to its status and special rights in the Slovenian state. Several laws grant the Roma political participation in public and private affairs and offer a legal basis for solving problems related to their social exclusion (poor living conditions, a high rate of unemployment and lack of access to education). Various other measures regarding regional development or financing of education are related to positive action for the Roma community. Other special measures concern the Italian and Hungarian national minorities.

Next to the above mentioned constitutional and legal provisions with regard to, amongst others, racial or ethnical positive action, *Spain* implements national action plans. The 3rd "National Action Plan for Social Integration in the Kingdom of Spain" (2005-2006) includes special measures to support those who are most vulnerable. The measures cover many spheres of activity of the public authorities: education, housing, health, training, employment and social services. One of the groups given special attention is the Roma people.

In the *United Kingdom*, the Race Relations Act and the Race Relations Order permit positive action in allowing persons of a particular racial group access to facilities to meet their special needs in relation to their education, training and welfare. They also permit the provision of training or encouragement for persons of a particular racial group in respect of work where members of that racial group are underrepresented.



## 5.2.2. Disability

55. In *Austria*, positive action measures relating to disability are contained in social security law, compensation law, insurance law, public assistance law and labour law. In the social security field, pension services are authorised to provide, *inter alia*, vocational rehabilitation. As to the field of labour law, employment agencies are explicitly required by law to pay special attention to people with disabilities when rendering their services. They may also grant payments with a view to overcoming the costs for taking up employment, promoting training or re-training, or integrating people in the labour market.

A *Cypriot* law of 2004 purporting to transpose Directive 2000/78/EC did not introduce the wide scope of Article 7 of the Framework Directive with regard to positive measures. The Public Service Law 1/1990 provides that, in filling vacant posts in the Public Service, priority should be given to disabled candidates who fulfil the schemes of service. Also, the Law on Persons with Disabilities stipulates measures for the creation of employment opportunities with employment schemes for persons with a disability. A number of other measures include job reinstatement of a person with a disability in the same enterprises where the disability occurred during their employment, and special protection against dismissal.

*Czech* employers have a duty to report job vacancies appropriate for disabled persons to employment offices. The State pays allowances to employers who employ more than 50 % disabled employees. People recognised by the state social security service as disabled have the right to vocational counselling, selection of appropriate employment or self-employment, theoretical and practical preparation for employment or occupation or for changing employment or occupation.

In *Denmark*, private employers have the possibility to apply positive action and may choose the disabled over the non-disabled from the perspective of the former's under-representation on the Danish labour market. An Act of 2001 seeks to enhance the integration of persons with disabilities in the labour force by means of positive action and various other compensatory measures. The main elements are priority in relation to certain jobs (primarily in the public sector), personal assistance, technical aids, adaptation of the workplace, wage subsidy and a mentor scheme.

The *Dutch* government started a trajectory called 'inclusive policy' in 2004. This forms a kind of mainstreaming of specific (permanent) social policies aimed at disabled people. Submitted proposals cover a wide range of measures, from making electronic voting machines that can be handled by blind persons, to adaptation of houses to the needs of old people and people with wheelchairs.

*Estonia* promotes the employment of disabled people by paying social tax for a worker whose loss of capacity for work is 40 % or more and who is working in a company, non-profit association or foundation which is included in a list established by the Minister of Social Affairs.

The *Finnish* labour administration provides occupational rehabilitation services through 120 employment offices all over the country. People with disabilities have access to vocational guidance and guidance relating to job placement and training, employment counselling, employment-promoting training and work and training try-outs at workplaces and vocational education institutions. There are also avenues for wage subsidies.

In *France*, disabled persons can work in a mainstream environment or a sheltered environment, including work aid centres (CAT), sheltered workshops and outwork distribution centres. Disabled employees have a right to request flexible working hours in order to facilitate their professional integration or their continued employment. They have a specific status with special protection in the event of dismissal and can take early retirement on advantageous terms.

*German* social security law grants state funding to help disabled people participate in working life in areas such as training and education, equipment and transport and gives financial assistance to the employer for costs for training and education, equipment and costs relating to integration. A disabled person can uphold his/her right against the employer to suitable working conditions. The disabled person can claim preferential treatment regarding promotion and training. Several other special rights for disabled persons have been incorporated in German law, such as a special procedure involving public authorities in the case of an ordinary dismissal of a disabled person.

The *Greek* Manpower Organisation programme (OAED), based on a ministerial decision, offers wage subsidies to employers hiring registered disabled people over a maximum period of three years.

In relation to the grounds covered by the Directives, *Italian* positive action strictly speaking does apply only to disabled persons, on the basis of a complex set of rules. The interventions concern different forms of personal assistance, service of personal help, services of accommodation in emergency and partial refund of expenses for assistance. In the field of employment, another act establishes a set of policies for people with severe disabilities.

*Latvia's* positive action provisions essentially only cover the field of disability, with a reduction of social tax and a pilot project run by the Employment State Service aimed at the creation of subsidised work placements for persons with disabilities.

The *Luxembourg* Disabled Workers Law gives special status to some disabled persons on the labour market. When their capacity as a disabled worker is recognised, the Vocational Guidance Commission will recommend employment, training or vocational retraining measures, introductory courses or traineeships, as applicable, to the appropriate Department. The Department concerned may grant a State contribution (40 to 60 %) to wages, a contribution to training costs, a premium, adaptation of the workplace or accesses, the supply of appropriate equipment, etc.

The *Maltese* 'Business Promotion Regulations 2001' provide incentives to those enterprises that create jobs for registered unemployed persons who are disabled.

The *Polish* Act on Vocational and Social Rehabilitation and Employment of Disabled Persons contains a system of incentives for employers in support of the employment of disabled persons.

The Labour Code rules on tele-working is considered as positive action in *Portugal*. This new method of working may benefit citizens with a disability.

According to the *Slovak* Labour Code, employees with disabilities are ensured working conditions that enable them to apply and develop their working skills, taking account of their health condition. The Act on Employment Services guarantees the right to special working conditions, advisory services, vocational training and guidance, existence of sheltered workplaces eligible for state aid, financial support for creating a work place for disabled people, financial support for a work assistant etc. Persons with disabilities enjoy special protection against dismissal: they can only be given notice after prior endorsement by the National Labour Office.

In *Slovenia*, disabled persons enjoy special rights according to regulations concerning the training and employment of the disabled. Those who are still able to perform some kind of work shall be granted another appropriate job, a part-time job, vocational rehabilitation, compensation for loss of earnings, and protection from redundancy, unless there is no other appropriate job or part-time job. The Association of the Employed Disabled Persons of Slovenia and the Chamber of Commerce signed an agreement on guidelines on disability in employment. It specifically obliges employers to take special care to ensure equal opportunities for the disabled in the workplace.

The *Spanish* Law on equality of opportunities, non-discrimination and universal accessibility for the disabled provides a series of positive action measures to combat the discrimination suffered by disabled people. These measures may consist of additional support (e.g. financial support, technical support, personal assistance), but also rules, criteria or more favourable practices. The Law anticipates promotional measures of equality, together with measures of positive action, that have as an aim a policy of encouragement. Among those are awareness training, measures of innovation and technical development or plans and programmes for accessibility and non-discrimination. Other measures provide incentives for the engagement of disabled persons on a permanent or temporary basis, special employment centres, occupational centres or national accessibility plans.

In *Sweden*, the law allows for positive action measures on behalf of the disabled. A number of special measures are available as regards working life. Their purpose is to directly or indirectly compensate for disadvantages linked to disability. In some cases, for example, wage subsidies are available. An individual may also have a right to certain support measures in order to regain or retain his/her work capacity.

In the *United Kingdom*, the Disability Discrimination Act (DDA) permits discrimination in favour of a disabled person on grounds of their disability in employment, in further and higher education and in access to goods, facilities and services. The DDA may require public authorities to take certain forms of positive action where necessary. In addition, the Department for Work and Pensions, through its Jobcentre Plus (combined job centre and social security office) supports a number of positive measures to assist disabled people enter employment, which are intended to prevent or compensate for disadvantages related to disability.

### 5.3. Positive Action Measures on Ground of Religion in Northern Ireland

56. Northern Ireland has used positive action to overcome and/or compensate for the historical discrimination against either Roman Catholics or Protestants, in particular through the *Fair Employment and Treatment Order* (FETO). The FETO requires registration of all employers with 10 or more employees and requires all registered employers to monitor the composition of their workforce for persons belonging to either the Roman Catholic or Protestant communities and for gender. Acts by employers, employment agencies or vocational organisations in pursuance of positive action are explicitly labelled as lawful. The Equality Commission for Northern Ireland (ECNI) has powers of enquiry, investigation, etc., accompanied by powers to recommend or require employers to take certain 'affirmative action' in a specified period. With ECNI's approval, it will not be unlawful for an employer or a training agency to provide training to persons of a particular religious belief in relation to employment at a particular establishment in Northern Ireland where such persons are underrepresented. As the scope of 'affirmative action' in the FETO applies only in relation to Protestants and Roman Catholics and as the training clause applies only in relation to a particular establishment, this package of measures probably does not go as far as is permitted under Article 7 Employment Framework Directive.

The *Employment Framework Directive* provides a specific exception permitting positive action in recruitment into the police service of Northern Ireland. The 2000 Police Act requires that 50 % of persons recruited as police trainees or support staff are to be Roman Catholics whereas 50% have to be of another persuasion. These measures are intended to overcome the historical under-representation of Roman Catholics.

## 5.4. Quotas for Persons with Disabilities

57. *Austria* requires both public and private sector employers to employ disabled people in a quota system of at least 1 person with disabilities for each group of 25 employees. The disabled workers must be Austrian nationals or nationals of one of the Member States of the EEA. Third country nationals only qualify if they were granted asylum. Furthermore, the degree of disability of the workers concerned must reach at least 50 %. Employers can opt to pay a fee in lieu of employment and many do use this exception.

*Belgium* has no quota system for employment of disabled people in the private sector. Some federal and regional provisions provide for disability quotas in the recruitment in the public sector. In the Federal Administration 2.5 % of the posts should be reserved for disabled people. Similar provisions have been adopted by the different Belgian communities and regions. These provisions are typically accompanied by diversity measures promoting the recognition of the disabled as a subgroup. At the federal level, persons recognised as disabled may be put on reserve lists for access to jobs in the public administration for an unlimited period of time. During selection procedures, disabled people will be put on separate list, which should allow the selection bureau for the public administration to facilitate compliance with regard to quotas.

*Cyprus* has introduced a quota for the employment of persons with disabilities in the educational sector, a scheme for preferential parking, a system for rendering temporary or hourly-based disabled civil servants permanent, a quota system for the employment of blind telephonists in the public sector and a quota for employment in the private sector where the number of employees exceed ten. However, the effective operation of quotas in employment has been retarded because of constitutional concerns.

*Czech* employers with more than 25 employees must apply one of three measures: employing a percentage of disabled employees (4 %), commissioning goods or working programmes from employers who employ more than 50 % disabled employees or payments to the state budget. Employers often prefer payments over employment.

*Denmark* has never had a quota scheme for employment of disabled persons on the labour market.

The *Dutch* Act on the Reintegration of Disabled People in Employment (REA) enshrines the possibility for prescribing quota. However, this possibility has not yet been applied. The primary focus is lifting prejudices to the employment of disabled persons.

In *France* any employer with over 20 employees should theoretically employ at least 6% disabled workers. However, employers can opt to make a financial contribution to a fund that finances the integration of disabled workers.

The *German* Social Code establishes the duty of any employer employing more than 20 employees to employ at least 5 % severely disabled persons. It is only a general duty whose violation does not necessarily imply unlawful discrimination.

In *Greece*, employers with 50 workers or more are obliged to take on disabled workers placed by a public authority. The law gives disabled people first priority over all other protected special groups in the public sector and second priority in the private sector. As demand exceeds the number of vacancies, specific tests are applied for selection and recruitment.

The attainment of a 3 % quota for the employment of people with disabilities has been an *Irish* government policy in respect of both the civil and public service.

*Italy* has established an obligation to hire people with disabilities for public and private enterprises for 7 % of the total working force if the private enterprise has more than 50 employees. An employer who proves not to be in a position to hire disabled persons will pay a financial contribution to the Regional Fund for the Employment.

In *Latvia* there are no quotas for the access of disabled persons to the labour market.

*Lithuania* has established employment quotas for disabled persons. Additional guarantees are provided by the Law on the Social Integration of the Disabled, which equally puts in place a system of mandatory quotas in employment and provides incentives for employers to comply.

The *Maltese* Persons with a Disability Employment Act provides for the compulsory engagement, on a percentage basis, of disabled persons registering for employment. The system applies to employers with no less than twenty workers. The competent government minister shall by order specify a standard percentage. A “special percentage” may be decided for types of employment with distinctive characteristics as regards their suitability for persons with a disability.

In *Portugal*, quotas are established for the employment of persons with disabilities of up to 2 % for private enterprises and up to 5 % for the public sector, but these have never been implemented.

Any *Slovak* employer that employs at least 20 employees is obliged to employ disabled persons if the local Labour Office has a specific percentage of disabled job seekers on its register. An employer who fails to meet this obligation is obliged to pay to the Labour Office three minimum wages for each person whom he failed to employ.

In *Slovenia*, employers with at least 20 employees are obliged to employ between 2% and 6 % disabled persons, depending on the nature of their activity. Companies that do not meet the goal must pay contributions to the Fund for Promoting the Employment of Disabled Persons equivalent to 70 % of the minimum wage for each disabled person that the employer should have hired.

The *Spanish* Law on the Integration of the Disabled obliges public and private companies of more than 50 workers to employ 2 % disabled workers. Two types of substitute measures have been added: contracts for supplies and services with Special Work Centres or donations in cash to foundations and public associations that promote the professional integration of disabled people. In order to attain the required 2%, offers of public employment apply a quota of not less than five percent of vacancies to be filled by persons with a disability whose degree of disability is equal to or exceeds 33 percent.

Neither *Sweden* nor the *United Kingdom* provide for a quota system for the disabled in their national law.

58. The overview above demonstrates a remarkable difference between theory and practice. While many Member States in theory possess a quota system for employment of the disabled, its practical impact is often reduced either because it has not been implemented, because it is limited in scope and often restricted to public sector employment, or because it allows for opt outs or compensatory payment, whether as a formal sanction or as an alternative for employment.

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# Part VI

## International Human Rights Benchmarks

## 6.1. Human Rights, Community Law, and the 2000 Directives

59. The European Community typically is not a signatory party to the international instruments aimed at protecting the fundamental rights of its citizens. However, all the Member States of the European Community are, and this common denominator also transpires at the Community level in a variety of ways. The ECJ has long recognized that “respect for fundamental rights forms an integral part of the general principles of Community law.”<sup>43</sup> The Court has also been prepared to assess the compatibility of Member States’ laws with fundamental rights, insofar as these laws lay within the scope of Community law, particularly when Member States are applying provisions of Community law which are based on the protection for human rights (see Craig and de Burca, 337-349).

The Community role of human rights is further emphasized by recent developments in *primary European law*, such as Article 6 of the Treaty of the European Union and the Charter of Fundamental Rights. In the context of discrimination law, the introduction of Article 13 TEC by the Amsterdam Treaty reflects a connection with a human rights agenda (Ellis 2002, 293-294). This connection has already helped the Court in determining the interpretation of the Framework Directive in the *Mangold* case.<sup>44</sup>

60. The link between EC discrimination law and human rights law, as well as the existence of non-discrimination provisions in European and international human rights law thus makes an excursion into human rights law both potentially important and useful for the development of the 2000 Directives. Important, because any divergence in standards might complicate matters either at Community level or at state level. Useful, because the human rights experience may prove helpful given the current immature state of the Directives’ positive action provisions.

The following paragraphs offer an introductory overview of antidiscrimination provisions and their positive dimension in various human rights sources. *They do not analyse the legal force of these provisions.*

## 6.2. Positive Action in European Human Rights Law

### 6.2.1. Article 14 European Convention on Human Rights

61. The ECHR contains a non-discrimination clause with no reference to positive action:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without any discrimination on any ground such as sex, race, colour, language, religion or other opinion, national or social origin, association with a national minority, birth or other status” (Article 14).

Whether Article 14 serves as an independent provision or only as an accessory to the rights and freedoms explicitly protected in the ECHR is subject of debate. Irrespective of its status, the notion of “discrimination” under Article 14 has generally been understood by the European Court of Human Rights (hereinafter: ECtHR) in a *formal sense* as requiring proof of unequal treatment, without objective or reasonable justification, of two comparable situations. Similarly, the ECtHR also requires unequal situations to be treated unequally.<sup>45</sup> The apparent emphasis on formal equality has led some authors to conclude that the ECHR is unable to recognize “the extent to which neutral rules entrench the values of dominant groups in society” (Fredman 2001, 34).

<sup>43</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, par. 4.

<sup>44</sup> Case C-144/04, *Mangold* [2005] ECR I-9981.

<sup>45</sup> Case *Thlimmenos v. Greece*, Application n° 34369/97, judgment of 6 April 2000.



62. The ECtHR has not yet had to judge directly upon the validity of positive action measures taken by a contracting State. A rigorous application of a formal equality principle could spell similar difficulties as under EC law. However, the open-ended nature typical of the fundamental rights protected through the ECHR provides an escape valve under the general rubric of “*objective and reasonable justification*”. From that perspective, positive action that amounts to discrimination can be squared with Article 14 if there is an objective and reasonable justification for the unequal treatment (Goedertier, 84). Corrective “positive discrimination” for a pre-existing situation of discrimination may thus constitute a legitimate objective of unequal treatment under Article 14 (Tsatsa–Nikolovska, 31). For example, the then European Commission of Human Rights recognized that a tax advantage to married women can have the objective and reasonable justification of providing positive discrimination to encourage married women back to work<sup>46</sup> (see also Flauss, 420).

63. Whereas Article 14 ECHR therefore can *accept* forms of positive action including discrimination, it remains doubtful whether it can actually *require* states to take positive action. In *Thlimmenos* the Court answered in the affirmative, stating that Article 14 would be violated “when States without objective and reasonable justification fail to treat differently persons whose situations are significantly different.”<sup>47</sup> This seemed to herald some positive State duty to take action, “the need, at least in certain circumstances, to make special arrangements for persons in special categories” (Wildhaber, 81). However, the ECtHR seems to have backtracked from *Thlimmenos* in a set of subsequent cases where gypsies sued for special treatment of their caravan sites<sup>48</sup>, apparently taken aback by “substantial problems” that would reach far into general social policy (Akandji-Kombé, 58).

## 6.2.2. Protocol n° 12

64. Given the debate on the independent or accessory value of Article 14 ECHR, the 2000 Protocol n° 12 was added, establishing an independent and general right to be free from discrimination:

“1. The enjoyment of *any right set forth by law* shall be secured without any discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority *on any ground* such as those mentioned in paragraph 1” (art. 1, emphases added).

Protocol n° 12 is deliberately silent on the positive dimension of its general right to non-discrimination. The Explanatory Report emphasizes that:

“the wording of Article 1 reflects a balanced approach to possible positive obligations of the Parties under this provision. (...) The same question arises as regards measures to remedy instances of discrimination. While such positive measures cannot be excluded altogether, the prime objective of Article 1 is to embody a negative obligation for the Parties: the obligation not to discriminate against individuals” (par. 24).

<sup>46</sup> *Lindsay v. United Kingdom* (1986) 49 DR 181, EComm HR, cited in Clayton, Tomlinson and George, 1238.

<sup>47</sup> Case *Thlimmenos*, Application n° 34369/97, judgment of 6 April 2000.

<sup>48</sup> Cases *Beard v. U.K.*, *Chapman v. U.K.*, *Coster v. U.K.*, *Jane Smith v. U.K.* and *Lee v. U.K.*, Application n° 24882/94, 27238/95, 24876/94, 25154/94, 25289/94, judgment of 18 January 2001.

65. Protocol n° 12 therefore does not want to commit itself in any direction, not opting for positive obligations but not excluding them either (Wildhaber, 82). In essence, the Protocol sticks to the status quo ante under Article 14 ECHR, as its preamble suggests: the possibility but not the obligation for the States to take positive measures promoting full and effective equality, provided that these are *objectively and reasonably justified*. This leaves the compatibility of positive action measures with the principle of non-discrimination essentially uncertain (O'Hare, 137).

Moreover, as a human rights instrument, it is clear that the Protocol targets discrimination by a "public authority". As such, it is not intended to impose a general positive obligation on states to prevent or remedy every form of discrimination by *private parties*. The Explanatory Report notes that "such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justiciable" (see par. 16; Arnadottir, 113).

Even without a general positive obligation towards discrimination, Protocol n° 12 may still require *specific positive obligations* from States. States have the specific obligation to bring their legislation in line with the protection against discrimination. However, a positive obligation regarding relations between *private persons* can only exceptionally be deduced if they concern relations in the public sphere and for which states have a certain responsibility (Goedertier, 83).

### 6.2.3. The European Social Charter

66. The ECHR is essentially a first generation human rights instrument that requires the Contracting Parties not to interfere with the enjoyment of personal rights and freedoms within their jurisdiction. The European Social Charter is of a different nature. It contains a catalogue of social and economic rights whose realization requires an active and promotional policy agenda from the Contracting Parties. Part I of the Social Charter opens as follows:

"The Parties accept as the aim of their policy, *to be pursued by all appropriate means* both national and international in character, *the attainment of conditions* in which the following *rights and principles may be effectively realised*" (emphases added).

This emphatic policy commitment towards effective realisation, which is detailed in the individual provisions of Part II, is really *one big overarching positive action duty*. It applies to such provisions as:

- The right for *children and young persons* to a special protection against physical and moral hazards the right to appropriate social, legal and economic protection (art. 7 and 17)
- The right to a special protection for *employed women, in case of maternity* (art. 8)
- The right for *disabled persons* to independence, social integration and participation in the life of the community (art. 15)
- The right for *the nationals of any one of the Parties* to engage in any gainful occupation on a footing of equality in the territory of any one of the others (art. 18)
- The right for *migrant workers who are nationals of a Party and their families*, to protection and assistance in the territory of any other Party (art. 19)
- Equal opportunities and equal treatment in matters of employment and occupation *without discrimination on the grounds of sex* (art. 20)
- The right to social protection for every *elderly person* (art. 23)
- The right for *persons with family responsibilities* to work without discrimination and without conflict between their employment and family responsibilities (art. 27)
- The right for *workers' representatives* to protection against acts prejudicial to them (art. 28)

*Irrespective of the question of discrimination* therefore, Contracting Parties that have implemented these articles have a policy duty to actively pursue the desired substantive protection of the identified groups.<sup>49</sup> The Committee of Independent Experts (now the European Committee on Social Rights – ECSR) has repeatedly emphasized that the implementation of the Charter requires not merely legal action but also practical action to give full effect to the rights concerned.<sup>50</sup> These positive policy duties may go well beyond any positive action that is to be deduced from a mere prohibition of discrimination for the same groups.

67. The Social Charter's focus on active policy and results also transpires in the application of its non-discrimination provisions. Article 1(2) of the 1961 European Social Charter requires State parties to undertake to:

*"protect effectively the right of the worker to earn his living in an occupation freely entered upon"* (emphasis added).

The ECSR has interpreted this article both as *prohibiting* all forms of formal discrimination in employment and as *allowing* stronger protection in respect of certain grounds, such as gender or membership of a race or ethnic group.<sup>51</sup> The emphasis on *effective protection* goes beyond the legal framework to the *results* which are achieved in the integration of target groups traditionally excluded from the labour market (De Schutter, 32).

The focus on results was expanded with the adoption of the 1996 Revised Social Charter which includes a *general non-discrimination clause* for the enjoyment of the rights set forth in the Charter (Article E). The ECSR has quickly implied a *degree of positive duty* into Article E. For the Committee, the prohibition of discrimination aims to ensure real and effective equality. It therefore not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take *"due and positive account of all relevant differences or by failing to take adequate steps to ensure that rights and collective advantages that are open to all are genuinely accessible by and to all"*.<sup>52</sup>

## 6.2.4. Conclusions

68. Neither Article 14 ECHR nor Protocol n° 12 formally impose or imply any *positive action duty* on the contracting States beyond the obligation to bring its legal framework in line with formal equality. The open ended nature of non-discrimination as a human right certainly allows for *elective positive measures* towards effective equality. It may even justify positive discrimination in violation of formal equality if the unequal treatment is objectively and reasonably justified. Everything rests on the interpretation of these requirements by the ECtHR and on the amount of discretion the Court is willing to leave at state level. The limited case-law points towards acceptance of positive discrimination that aims to correct a pre-existing situation of formal discrimination. Whether mere diversity would be able to justify similar measures is unclear although some authors deduce supportive arguments from the Court's traditional view of a democratic society as one which is based on values of diversity and tolerance (De Schutter, 20).

<sup>49</sup> For an introductory overview, see Council of Europe, *European Social Charter Short Guide*, 2005 (3rd edition).

<sup>50</sup> See, e.g., *International Commission of Jurists v. Portugal*, 9 September 1999, § 32; *Autism Europe v. France*, 4 November 2003, § 53.

<sup>51</sup> See notably Concl. 2002, p. 22-28 (France) and Concl. XVI-1, vol. 2 (Luxemburg), p. 377-380.

<sup>52</sup> *Autism Europe v. France*, 4 November 2003, § 52; *ERRC v. Italy*, 7 December 2005, § 20; *ERRC v. Bulgaria*, 18 October 2006, § 26. It should be noted that the ECSR refers to *Thlimmenos* ruling of the ECHR to justify its position, a case which has now all but been abandoned (see par. 62).

From the perspective of the Community law on positive action, the value of the ECHR and its Protocol n° 12 therefore lies not so much in its understanding of positive action but in the complementary material and personal scope of its non-discrimination principle (Bell, 69).

69. A similar conclusion can be reached for the European Social Charter. Its broad catalogue of rights requires an active social policy agenda *besides and well beyond the field of equality*. The Charter and the Community's equality instruments may cross paths when both cater for the same disadvantaged groups. Mutual reinforcement is then the likely outcome, although collision cannot be ruled out. While it cannot be excluded that the Charter's impetus for an active integration policy may raise questions under equality law vis-à-vis the non-disadvantaged groups, it should also be remembered that formal equality only kicks in when members of the different groups find themselves in comparable situations.

As far as positive action and discrimination law is concerned, the European Union's framework is the more intricate. Under the Charter some degree of positive duty is only deduced from extending its prohibition of discrimination to indirect discrimination. A similar positive duty implicitly results from the prohibition of indirect discrimination in Community law, although the ECJ has difficulty in recognizing this reality (see par. 10). Only the European Union possesses positive action provisions additional to the prohibition of discrimination as such.

### 6.3. Positive Action or "Temporary Special Measures" in International Human Rights Law

70. Human rights conventions as a rule promote the effective realisation and protection of *fundamental rights* in the legal order of the contracting parties. As such they naturally entail positive and result oriented policy obligations for those parties. In what follows however, the focus lies exclusively on *non-discrimination provisions as such* and on the derivative positive action, generally known as "temporary special measures". No analysis is made of the legal force of these provisions in the legal orders of contracting states.

#### 6.3.1. The International Covenant on Civil and Political Rights (ICCPR)

71. Besides some accessory prohibitions of discrimination, the ICCPR contains a general prohibition of discrimination in its Article 26:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and *guarantee to all persons equal and effective protection against discrimination* on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (emphasis added).

Article 26 clearly adopts an active approach suggestive of positive action. This reading has been endorsed by the Human Rights Committee (HRC). On several occasions the HRC has expressed its opinion that positive measures to assist a disadvantaged group are not only permitted but sometimes even required under the Covenant (Choudhury, 46-47). According to the HRC, "the principle of equality *sometimes requires* States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. (...) as long as such action is needed to correct discrimination in fact, it is a case of

legitimate differentiation under the Covenant”.<sup>53</sup> The prevention of discrimination “requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights”.<sup>54</sup> In particular States should take “all steps necessary to end discriminatory action in the public and the private sector which impairs the equal enjoyment of rights between men and women”.<sup>55</sup>

The endorsement of compulsory positive action through Article 26 is also relevant because of the purported autonomous nature that carries the provision beyond the civil and political rights protected in the ICCPR. Again according to the HRC, Article 26 “prohibits discrimination in law or in fact *in any field regulated and protected by public authorities*”.<sup>56</sup>

72. Positive action amounting to *unequal treatment* has to be *objectively and reasonably justified*, and *proportional to the aim pursued*. This scrutiny needs to be conducted on a case by case basis. In *Jacobs v. Belgium*, the HRC went so far as to accept a firm quota system for the appointment of non-justices to Belgium’s High Council of Justice, an official body with an advisory and research role. Given the particulars of the case, the quota did not amount to a disproportionate restriction of the right of access to public office (Vandenhoe, 222-223).

### 6.3.2. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

73. The ICESCR does not contain a general equality provision but does require the States Parties:

“to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (art. 2(2) and art. 3).

In furtherance of this provision, the ICESCR Committee has stressed the importance of *substantive, factual* equality on top of formal equality (see Vandenhoe, 239). The Committee has declared that “the adoption of temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education”. The same goes for persons with disabilities, “because appropriate measures need to be taken to undo existing discrimination and to establish equitable opportunities for persons with disabilities”.<sup>57</sup>

While elective positive action has thus generally been favoured, the ICESCR does not appear to impose a *general obligation* for States to adopt such measures and the Committee has barely suggested it for *specific cases* (Koukoulis-Spiliotopoulos, 530; Vandenhoe, 239). With regard to gender, the application of the principle of equality “will *sometimes require* that States Parties take measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination”.<sup>58</sup>

<sup>53</sup> General Comment n° 18, available at [www.ohchr.org](http://www.ohchr.org)

<sup>54</sup> General Comment n° 4, available at [www.ohchr.org](http://www.ohchr.org)

<sup>55</sup> General Comment n° 28, available at [www.ohchr.org](http://www.ohchr.org)

<sup>56</sup> See footnote 53

<sup>57</sup> General Comment n° 5 and n° 16, available at [www.ohchr.org](http://www.ohchr.org)

<sup>58</sup> General Comment n° 16, available at [www.ohchr.org](http://www.ohchr.org)

74. The room for full *reverse discrimination* under the ICESCR is more restricted than under the ICCPR. The ICESCR Committee appears to favour positive action that is “based on the principle of equality” and does “not lead to the maintenance of unequal or separate standards for different groups”. In the case of gender, where the Committee has been the most lenient, measures favouring women are accepted if they “are necessary to redress de facto discrimination and are terminated when de facto equality is achieved”. However, even then the requirement of proportionality imposes neutrality when reasons specific to an individual candidate may tilt the balance in his favour.<sup>59</sup> The analogy with the ECJ’s case-law is hard to miss.

### 6.3.3. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

75. The CEDAW is very explicit in its promotion of substantive equality through positive action measures. Its prohibition of discrimination against women directly demands policy action “without delay” by the States Parties (art. 2(e)) and is aimed at achieving “full realisation” (art. 24). It even explicitly authorizes positive action in Article 4:

- “1. 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.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory”.

Article 4 distinguishes clearly between *protective measures* taken in favour of women (par. 2) and *temporary special measures* aimed at achieving *de facto* equality (par. 1).

76. Temporary special measures are thus not considered discriminatory provided they (i) accelerate *de facto* equality between men and women, (ii) do not entail the maintenance of unequal or separate standards, and (iii) be discontinued when the objectives of equality of opportunity and treatment between the sexes have been achieved.

To *accelerate de facto equality* means that States should not only eliminate their own discriminatory practices, but also those of private individuals and institutions in all spheres and that they are also required to accommodate for differences in ways that respect those differences. States are also required to remedy discriminatory effects of laws that are equal on their face but disproportionately affect women (Cook, 123-124).

The *prohibition of maintaining unequal or separate standards* forbids States to depart completely from the meritocratic principle by taking measures which would simply aim at equality of results in a reversed discriminatory way. Quotas are thus only allowed for *equally qualified* members of a historically disadvantaged group (Cook, 125).

The requirement that temporary measures be *discontinued when the objectives of equality of opportunity and treatment have been achieved* only means what it says. States should withdraw these measures once their objectives are obtained. Sunset clauses or short term measures are not compulsory (Freeman, 100-103). Duration should be determined by the functional result in response to the problem and not by a predetermined passage of time.<sup>60</sup> Temporary special measures may therefore stretch over quite a long time but should be narrowly justified and regularly evaluated (Holtmaat, 225-226).

<sup>59</sup> General Comment n° 16, available at [www.ohchr.org](http://www.ohchr.org)

<sup>60</sup> General Recommendation n° 25 on Article 4(1), par. 20, available at [www.un.org](http://www.un.org)

77. Article 4(1) CEDAW authorizes temporary special measures without imposing them. However, the CEDAW Committee has deduced obligation from the purpose and structure of the CEDAW. States Parties are obliged to adopt and implement temporary special measures if such measures can be shown to be necessary and appropriate in order to accelerate the achievement of the overall or specific goal of women's de facto or substantive equality.<sup>61</sup>

#### 6.3.4. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

78. The ICERD mirrors the CEDAW in its explicit focus on substantive equality and its recognition of special measures for that purpose:

*"Special measures taken for the sole purpose of securing adequate advancement of certain special racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved"* (Article 1(4), emphases added).

The ICERD even goes further by making special measures mandatory:

*"States parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different groups after the objectives for which they were taken have been achieved"* (Article 2(2), emphases added).

The combination of both provisions is not without textual difficulty. Article 1(4) endorses special measures that do not maintain separate rights for different racial groups. Article 2(2) imposes special measures as long as separate rights for different groups are abolished after the objectives have been achieved. The first article therefore does not support reverse discrimination while the second appears to impose it where needed.

However, it is generally understood that special measures should be taken for all on an equal basis, are to be necessary in a democratic society, should respect the principle of fairness, and be grounded in a realistic appraisal of the situation. They should cover all relevant areas, including private employment and vocational training (Vandenhoe, 207-210). In that respect the ICERD requires States Parties to give a horizontal effect to its provisions.

#### 6.3.5. Other International Conventions

79. Other international conventions contain explicit prohibitions of discrimination, such as the ILO Convention Concerning Discrimination in Respect of Employment and Occupation (n° 111), the UNESCO Convention Against Discrimination in Education, Article 1(3) of the UN Charter, the UN Convention on the Rights of the Child (CRC),

<sup>61</sup> General Recommendation n° 25 on Article 4(1), par. 24, available at [www.un.org](http://www.un.org)

the Framework Convention for the Protection of National Minorities, and the UN Convention of the Rights of Persons with Disabilities. Some of these instruments encourage States parties to take positive action measures when it is warranted to achieve substantive equality. This is the case for article 4 of the Framework Convention for the Protection of National Minorities. The CRC Committee has also emphasized that “the application of the non-discrimination principle of equal access to rights does not mean identical treatment”<sup>62</sup> and has encouraged States parties to develop positive action programmes based on the needs and rights of the children, rather than based on specific grounds of discrimination (Vandenhoe, 285). Article 5 of the 2006 UN Convention of the Rights of Persons with Disabilities contains a duty for reasonable accommodation and labels as non-discriminatory “measures which are necessary to accelerate or achieve de facto equality of persons with disabilities”.

### 6.3.6. Conclusions

80. Given the variety, indeed the inflation of instruments combating discrimination, it is very difficult to draw a single and uniform picture of the relationship between non-discrimination and positive action or “temporary and special measures” in international human rights. However, common strands are indeed discernable and relevant from the perspective of Community law.

All of the international human rights instruments discussed above, in varying degree focus on *substantive equality without forfeiting the merits of formal equality*. In so doing they differ not only from EC-law but also from the ECHR and the European Social Charter. These European instruments *focus on formal equality without forfeiting the merits of substantive equality*. The international choice for substantive equality means that positive action through “temporary and special measures” is not only accepted but naturally expected and, on occasion, conditionally required either through an explicit provision and/or through interpretation by the competent committee. The extent to which positive action is integrated into compulsory substantive equality, however, varies with the source. Reverse discrimination in particular is not equally endorsed or imposed among the different conventions and covenants. Restrictions on formal equality for the purpose of substantive results will moreover be subjected to scrutiny based on their nature, purpose and duration. While positive action therefore is not seen as an exception to equality but as part of it, it will still meet some degree of limitation. Formal equality remains the essential fallback position where positive action stops.

81. Where does that leave the application of Community law on positive action in EC Member States that are equally parties to the international human rights instruments?

*First* and foremost the human rights dimension at Member State level can serve as a useful compulsory complement to the essentially optional framework for positive action in EC law. The cursory overview of Member State experience elsewhere in this study has shown how several states have indeed moved beyond the Community’s timid framework.

*Second*, given the importance attributed to common human rights standards in the development of EC law, particularly in the case-law of the ECJ, arguments could be made for a more flexible, human rights oriented approach as the doctrine of positive action is further developed at EC level. However, such arguments necessarily will have to be confronted with the relatively strict formal approach to equality in the primary *European* human rights instruments.

<sup>62</sup> General Comment n° 5, par. 12, available at [www.ohchr.org](http://www.ohchr.org)



*Third*, for the time being, it is not to be excluded that the voluntarism exuded by international human rights instruments may push their required or desired positive action beyond the realm of what is currently acceptable, either under the ECJ's scrutiny or under the ECHR or the Social Charter. This is particularly the case for discrimination against women and for race discrimination, where the human rights conventions contain a clear positive agenda. For a conflict actually to arise, a detailed analysis of all the sources and of their respective legal force would of course have to be conducted in the particular case. Where human rights conventions contain programmatic provisions aimed at state action, it seems logical that the more forceful Community law will dominate, irrespective of the human rights fallout.

Richard | 1988

## Part VII

# Comparative Law Benchmarks

82. European Community law on positive action is still in its development phase, given the limited number of issues settled by the ECJ and the recent proliferation of positive action in new directives. Exercises in comparative law in jurisdictions with more pedigree in positive action may therefore be useful as a source, not of authoritative information but of inspiration. Our exercise concerns positive action in two relevant Anglo-Saxon jurisdictions. It zooms in on *positive discrimination* and its judicial review. It does not provide an overall introduction to the law of positive action in those jurisdictions.

## 7.1. United States of America

83. The legal system of the United States contains a wide variety of positive or “affirmative” action provisions (hereinafter: AA) at federal, state, and local level. The courts, in particular the federal courts and the US Supreme Court (hereinafter: SCT) have played a major role in the development of AA. However, it must immediately be stated that even after decades of experience, many doubts and uncertainties on the limits of AA programmes remain. The SCT case-law has gradually evolved and diversified into a complex landscape that continues to confuse and divide observers. The major strands of the case-law are summarized hereunder. Two important dividing lines must be kept in mind when exploring the case-law. First, *voluntary action plans* must be distinguished from involuntary or *court-ordered affirmative action plans* as they are subject to similar but different criteria. Second, AA through *public entities* is not only subjected to statutory restrictions but also to general constitutional scrutiny under the Fifth and Fourteenth Amendment of the US Constitution (Equal Protection Clause).

### 7.1.1. University Admission

84. Affirmative action through some form of so-called “benign discrimination” in university admissions has been a highly contentious issue in the USA for decades. It involves the constitutional *Equal Protection Clause* and *Title VI of the Civil Rights Act 1964*, which was enacted to prohibit discrimination on the basis of race, colour and national origin in programmes and activities receiving federal assistance.

Two major SCT cases dominate the field. In *Bakke* (1978) a highly divided court rejected an admissions procedure that reserved a quota of seats in each entering class for disadvantaged minority students.<sup>63</sup> Although the exact meaning of the decision has been debated for decades, it is generally believed that the SCT chose to submit *any racial or ethnic classification*, regardless of its “benign” purpose, to *strict scrutiny*. This level of scrutiny only admits those AA programmes that correspond to a “*compelling governmental interest*” and whose measures are “*narrowly tailored*” to furtherance of that interest. Strict scrutiny imposes more restrictions than the alternative of intermediate scrutiny, which was advocated by proponents of AA and which essentially condones racial classification that serves an “important governmental interest” with “substantially related” measures.

After decades of uncertainty in academia and the courts, the ruling in *Bakke* was maintained and clarified by the SCT in the 2003 cases of *Grutter* and *Gratz*.<sup>64</sup> The SCT had to judge the extent to which the University of Michigan Law School could constitutionally use race to ensure a “critical mass” of underrepresented minority students. *Grutter* and *Gratz* stuck to strict scrutiny, distinguished the Michigan plan from actual quotas and held that *diversity is a compelling interest in higher education* and that race is one of a number of factors that can be taken into account to

<sup>63</sup> *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>64</sup> *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003).

achieve the educational benefits that flow from a diverse student body (Nowak and Rotunda, 826). In so doing, the Court both stuck to strict scrutiny while at the same time recognizing that its required compelling interest is not limited to the correction of prior discrimination by the same institution.

85. Racial quotas are thus, by definition, unconstitutional. Admissions or transfer policies that assign a fixed number of points based solely on race are conclusively unconstitutional. Multiple-tier admissions or transfer policies based on race are presumptively unconstitutional. Beyond these rather rudimentary points of law, the field remains wide open (Munich and Broy, 29).

## 7.1.2. Private Sector Employment

86. Title VII of the Civil Rights Act 1964 is the essential federal statute governing employment discrimination. It marks as unlawful, inter alia, “to discriminate against any individual (...) because of such individual’s race, color, religion, sex, or national origin”. Both phraseology and drafting history require neutrality from the employer, so-called “colour-blindness”. Starting with *Weber* (1979), the SCT has nonetheless admitted that Title VII’s prohibition of racial discrimination does not condemn all private, **voluntary, race-conscious action plans**.

Moreover, the court’s scrutiny of such plans is only of an *intermediary nature*. An employer need not point to his own prior discriminatory practices, but only to a “conspicuous imbalance in traditionally segregated job categories” (*Johnson v. Transportation Agency*). The purpose of the AA should merely mirror those of the statute, namely breaking down old patterns of segregation and hierarchy. On the other hand, AA should not “unnecessarily trammel the interests of the white employees” (*Weber*). This has brought the courts to value such elements as the absence of an absolute bar, the absence of rigid quotas, the relationship of the targets to the relevant labour market, the temporary duration of AA, or its periodic review.<sup>65</sup>

87. In the presence of a provision that points toward neutrality and in the absence of any provision endorsing positive action, the flexibility of the American courts vis-à-vis AA is quite remarkable. This is all the more so since the *Weber* test was eventually extended beyond the historical issue of race, for instance in **gender cases**. It is perhaps not surprising that a 1991 amendment to Title VII of the Civil Rights Act has restricted the scope of AA in selection, explicitly rendering as unlawful any practice “to adjust the scores of, use different cut-off scores for, or otherwise alter the results of employment related tests on the basis of race, color, religion, sex, or national origin” (§703 section I). It should also be noted that the *Weber*-test applies only to voluntary AA plans in private sector employment. The scope for court ordered AA is much narrower, whereas the Equal Protection Clause of the US Constitution equally imposes stricter scrutiny for AA in public sector employment, in line with the general strict scrutiny applicable to governmental AA.

## 7.1.3. Government Programmes

88. After several hesitations in the SCT case-law, it is now clear that *all AA plans which are enacted through government* – whether local, state or federal, and whether as a contractor, as regulator or as a public employer – are subjected to *strict scrutiny* whenever they entail some form of race bias or other “benign discrimination”. As in the case of university admissions, this requires a *compelling governmental* interest to which the contested AA must be *narrowly tailored*.<sup>66</sup>

<sup>65</sup> *United Steelworkers v. Weber*, 443 US 193 (1979); *Johnson v. Transportation Agency of Santa Clara County*, 480 US 616 (1987). See Pfeiffer, 1059 *et seq.*; Larson, 62-24 *et seq.*

<sup>66</sup> *Richmond v. Croson Co.*, 488 US 469 (1989); *Adarand Constructors Inc. v. Peña*, 515 US 200 (1995).

The difference lies in the interpretation of what meets the common standard of scrutiny. Scrutiny of AA in university admissions recognizes the unique role played by universities in fostering the free exchange of ideas. Governmental AA will have to be tailored to the realities of the governmental programme at hand. This will imply, for instance, very clear findings on past or lingering governmental or societal discrimination, not in general but in the specific field for which the AA is designed. It is also unclear whether the mere purpose of *diversity*, other than the remedial curing of discrimination, can be recognized as a “compelling interest” for governmental AA (Nowak and Rotunda, 803-837).

## 7.2. Canada

### 7.2.1. Legislation

89. Affirmative action in Canada is based on a variety of sources. The general *Human Rights Acts* (hereinafter: HRA) of the different Canadian provinces typically contain permissive rather than mandatory affirmative action provisions. In the sphere of employment, the *Employment Equity Act* (hereinafter: EEA) aims at the active correction of the situation of disadvantage for women, aboriginal peoples, disabled persons and members of ‘visible’ minorities. It requires *employers* to take systematic steps towards the achievement of equality, including surveys of the workplace, an employment systems review, and an action plan with concrete goals and specific measures to address them. In essence, the EEA is an instrument of compulsory diversity rather than a source of reverse discrimination.

Another key instrument for positive action is the **Canadian Charter of Rights and Freedoms** (hereinafter: the Charter), which is part of the Canadian Constitution. The Charter applies to the *government*, including the state as an employer, but not to private actors. Section 15 of the Charter includes a general right to equality (Section 15(1)) as well as a “special program provision” (Section 15(2)) validating “*any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability*”. It is unclear from the text whether subsection 15(2) provides an exception to or a clarification of subsection 15(1) (Hogg, 52-46). In any event, the Canadian Supreme Court has had no qualms in using section 15 as an open constitutional mandate for genuine positive action. Unlike the USA therefore, where the constitution sides with equal protection and the constitutionality of AA is still controversial, the Canadian constitution expressly recognizes positive action.

### 7.2.2. Case-Law

90. Relatively few cases deal with the **affirmative action provisions of the HRA**, due to the support of AA by the different human rights commissions. The existing case-law is extremely flexible. On several occasions, the Canadian Supreme Court has readily accepted AA programmes that remedy proven systemic discrimination, even where such programmes entail remedial quotas or introduce positive discrimination for the previously marginalized group.<sup>67</sup> The Court adopts a purposive approach that recognizes AA as an instrument to remedy against systemic discrimination (Finkelstein, 1285). It has even explicitly contrasted the Canadian recognition and accommodation of group rights with the individual approach under US law. From the same comparative perspective it is also surprising how the Canadian Supreme Court has failed to develop any standard of scrutiny, restricting itself to recognizing the need for AA to realize substantive equality.

<sup>67</sup> *Athabasca Tribal Council v. Amoco Canada Petroleum Company* (1981) 1 SCR 699; *Action Travail des Femmes v. Canadian National Railway Co.* (1987) 1 SCR 1114; *NCARR v. Health Canada* (1997) C.H.R.D. No. 3 (Q.L.) 523.

In several cases the Canadian Supreme Court has extended to **Section 15 of the Charter** its recognition that equality may also require unequal treatment for the purpose of substantive equality.<sup>68</sup> The Court sustains AA as long as its discrimination is not based on a stereotype and therefore has an ameliorative purpose that does not coincide with the needs and circumstances of the non-disadvantaged group.<sup>69</sup> Moreover, the Court does so on the basis of the *general right to equality* in section 15(1) of the Charter and not through its explicit *special programme provision* in section 15(2). This again underscores the pragmatic Canadian attitude that sees AA as part of equality law, rather than as an exception to it (Drumbl, 91-94; Ventura, 131-132).

<sup>68</sup> *Andrews v. Law Society of British Columbia* (1989) 1 SCR 143; *Weatherall v. Canada* (1993) 2 SCR 872.

<sup>69</sup> *Lovelace v. Ontario* (2000) 1 SCR 950.

Piebe | 1970



# Part VIII

## Overall Conclusions

91. The legal framework for positive action is multilayered. It combines elements of both international and European human rights law, of European Community law, and of national law, often including national constitutional law. All these sources approach the interaction of equality and positive action in their own way. Legal complexity is further compounded by the enormous variety of measures which can be labelled as “positive action”. As a mixture of all these components, the reality of equality therefore means different things in the different Member States of the European Union.

This study has focused on positive action in the Race and Ethnic Origin Directive 2000/43 and in the Framework Directive 2000/78. It has sought to establish its relationship with general Community equality law and with the positive action *acquis* in the field of gender. Our analyses have yielded several revealing conclusions for the further development of positive action in EC law.

92. Notwithstanding minor textual differences, the positive action provisions in the 2000 Directives essentially copy article 141(4) TEC to their respective scopes of application (par. 27-34). Article 141(4) TEC itself has not (yet) been used by the ECJ to allow more room for positive action than under Article 2(4) of the original Equal Treatment Directive. Positive action that establishes some form of positive discrimination is still construed as an exception to the principle of formal equality. The delineation of this exception is increasingly done through the prism of *proportionality*. The application of the overall proportionality standard to specific cases has brought the following guidelines (par. 25-26 and 33-34):

- Any positive discrimination should, in accordance with the *principle of proportionality*, serve a legitimate aim and remain within the limits of what is appropriate and necessary in order to achieve that aim, *reconciling the principle of equal treatment as far as possible with the requirements of the aim pursued*.
- As far as *legitimacy* is concerned, *group characteristics* may justify some measures that result in individual positive discrimination, if they have the correct aim, making a requirement for *individual harm* redundant.
- Positive discrimination measures should *objectively serve the stated aim and rely on objective and transparent criteria*.
- *Proportionality in selection* is not fulfilled when the preferential treatment is automatic and unconditional and does not include an objective assessment of all personal circumstances of all the candidates. Automatic quotas are therefore unacceptable.

The required *legitimate aim* can vary according to the context and the groups concerned. For the *employment of women*, the aim should be to *eliminate and correct the causes of reduced opportunities of access to employment and careers* and to improve the ability of the underrepresented sex to compete on the labour market and pursue a career on an equal footing, thus remedying a proven imbalance between the sexes (par. 15-24). It is unclear what *level of imbalance* is required to justify positive discrimination or if and how the *effectiveness* and *cost/benefit impact* of positive discrimination has to be judged (par. 26).

It is fair to assume that the dramatic increase in protected grounds and in material scope of the Community's equality law through the 2000 Directives will yield more and various acceptable aims for positive action. However, this logical evolution is based on a uniform conceptual framework which is essentially identical to the *acquis* in the field of gender. Therefore, the flexible nature of the proportionality test may yet produce more European leniency towards positive action in the future, but that does not *a priori* result from the framework which the 2000 Directives have adopted (par. 33-34).

93. Disability is a class in itself, both at Community and at Member State level. The Framework Directive allows *special provisions* for the disabled that may include formal quota (par. 35-36). *Reasonable accommodation* imposes individualized positive action in employment and thus deviates from the otherwise optional and collective nature of positive action in EC law (par. 37-39). While many Member States provide quota systems for the disabled, their internal flexibility often renders their practical impact limited, especially in the private sector (par. 57-58).

94. The EC law on equality and positive action contrasts only partially with human rights standards. The European Convention on Human Rights, its Protocol n° 12, and the European Social Charter conditionally tolerate rather than require positive action in the substantive application of non-discrimination clauses which do not explicitly mention positive action measures. As such, their framework of reference is remarkably similar to that of the European Community. The Social Charter's focus on effective non-discrimination essentially derives from a prohibition of indirect discrimination which is equally present in EC law (par. 61-69).

International human rights standards, however, in varying degrees see positive action in the form "temporary special measures" as an integral part of a concept of substantive equality. This may implicitly and occasionally even explicitly result in compulsory positive action that goes beyond the Community's optional standard. It is not excluded that the degree of positive action warranted by international human rights may cross the boundaries of the strict scrutiny prevalent under EC law (par. 70-81).

95. The comparative law analyses conducted in this study reveal remarkable differences. While both the USA and the EU function under equality law that focuses on neutrality, American case-law is more lenient in accepting "affirmative action" through "benign discrimination", especially in private sector employment (par. 83-88). Canada simply looks like a different planet altogether, since both its constitutional framework and its case-law appear to validate substantive equality almost as a matter of principle (par. 89-90).

96. There is no doubt that the European Union's equality agenda is in need of positive action. The prohibition of sex discrimination in employment is more than thirty years old but many inequalities are still entrenched. The Community's recent turn to positive duties and mainstreaming<sup>70</sup> symbolizes a shift from static prohibition to dynamic activation. There is plenty of room for result oriented positive action that does not interfere with formal equality but enforces its legitimacy (par. 3-6). The contentious demarcation line between formal equality and unlawful reverse discrimination should not blind Europe for the wide and open field below it.

<sup>70</sup> See Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

Nanette | 1987

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