



**Legal Seminar 9 November 2010**  
**Making Equality Rights Work in Practice**

**DISCUSSION PAPER WORKSHOP 3**

*Positive Obligations*

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*The present discussion paper is based on the conclusions of a report recently published by the European Network of Legal Experts in the field of Gender Equality and Sandra Fredman: 'Making Equality Effective: The role of proactive measures'. It does not necessarily reflect the opinion or position of the European Commission, Directorate-general for Employment, Social Affairs and Equal Opportunities.*

**Introduction**

Anti-discrimination laws in EU member states tend to rely for their enforcement on individual complaints to a court or tribunal to establish a breach (the complaints-led model). When it functions well, this approach is an important avenue of redress for individuals. However, although the possibility of judicial recourse is universally provided in MS in the EU, there are remarkably few claims compared to the scale of inequality. This is because of the difficulty of proof, the cost and length of the process, inadequate remedies, lack of awareness and fear of stigma. In addition, the complaints-led model only addresses discrimination where there is an identifiable perpetrator. In fact, inequality has causes which go well beyond individual actions. Many jurisdictions have introduced modifications to the pure complaints-led model to address these issues. These include wider standing; alternative tribunals, which are quicker and cheaper; and non-adjudicative procedures. These mitigate some of the limitations of a pure complaints led approach, but they are still not widely used.

More recently, attention has shifted to measures to promote or achieve equality. Rather than being initiated by individual victims against individual perpetrators, responsibility is placed on bodies, such as public authorities or employers, who are in a position to bring about change, whether or not they have actually caused the problem. Such models aim to remedy each of the deficiencies of the complaints-led model above. Firstly, instead of consisting in reactions to ad hoc claims brought by individuals, the initiative lies with policy makers and implementers, service providers, employers and trade unions. Secondly, change is systematic rather than random or ad hoc, ensuring that all those with a right to equality are covered. The structural causes of inequality can be diagnosed and addressed institutionally. Thirdly, there is no need to prove discrimination or find a named perpetrator. Instead, the duty to bring about change lies with those with the power and capacity to do so.

Finally, proactive models broaden participation, both in norm setting and in norm enforcing. The citizen is not a passive recipient but an active participant. MS have instituted a wide range of proactive measures. Most include an element of discretion, and while some impose legally binding duties, others are based on incentives, political accountability or goodwill.

### **Points for Discussion:**

#### **(1) Enforcement**

A key challenge is to devise appropriate means of enforcement. This has proved to be the most problematic aspect of proactive duties. Much depends on political goodwill and a sense of responsibility on the part of duty-bearers, and when these are lacking, there is no easy solution. One possible enforcement mechanism is to require regular reporting to Parliament, a practice which is widespread among MS. Its effectiveness depends on the seriousness with which it is regarded by Parliament or the relevant Ministry and whether further action is taken. There is little information on how this process works in most jurisdictions. Secondly, equality bodies might have enforcement powers, as is the case in eleven MS. The ideal model is a pyramid of enforcement, according to which the first response to non-compliance is to initiate a process of discussion and negotiation. If this is not successful, the recalcitrant respondent could be subject to an order to comply issued by the equality body. Only if this further step fails do fines or other judicially enforced sanctions come into play. A handful of MS follow a permutation of this pattern. A third possibility is to enforce legal obligations through collective bargaining structures. In countries without a well-developed collective bargaining structure, this means of enforcing proactive measures is conspicuously absent.

**Discussion Question One: How should appropriate incentives, sanctions and mechanisms for accountability be constructed to ensure that elaborate structures do not simply conceal apathy or proceduralism? To what extent should courts be involved in enforcement?**

#### **(2) Defining the Goals**

Proactive models can be ill-defined and therefore it is not easy to determine whether they have been breached. This contrasts with anti-discrimination legislation, which defines more clearly who has rights and remedies in cases of discrimination. A process of monitoring and review is essential to assess whether a proactive measure is effective, to review its progress, and to readjust it if necessary.

As a first step, it is necessary to gauge the extent of the problem, usually through constructing a statistical picture. However, it is not sufficient simply to collect data or reports. It is also important to make use of these instruments to assess and review the progress of proactive measures.

This in turn requires clear benchmarks and timetables. Several MS have instituted sophisticated structures for reviewing proactive measures in the light of the outcomes of monitoring, but many do not go beyond the collection of statistics.

**Discussion Question Two: How can concrete measurable objectives be designed to assess the extent to which proactive measures have been implemented and who should be responsible for doing the assessment?**

### **(3) The Role of the Individual**

Proactive models can be highly bureaucratic and 'top-down.' This contrasts with complaints led models, where the individual can take the initiative without being dependent on authorities to do so. Where successful, the complaints-led model makes it possible to satisfy the specific needs of the individual claimant; whereas proactive measures are normally more sensitive to the general needs of the victims of the discrimination. This raises the question of what role the individual should play in relation to proactive measures. Without reverting to an individual complaints model, pro-active measures might nevertheless better serve the objective of achieving real and substantive equality if tools were granted to the victims themselves. Most Member States have no such possibility, although a handful of Member States do allow individuals to bring complaints where proactive measures have not been fulfilled. Judicial review is particularly rare. More promising is the potential for trade unions to complain in these circumstances, a possibility in both Sweden and France. Also interesting is the possibility of a creative synthesis between a judicial and a proactive model. This can be created by giving powers to judges or equality bodies to order collective and forward-looking solutions.

**Discussion Question Three: How should individual complaints models be integrated with proactive models so that they complement each other rather than undermining each other?**

### **(4) Participation**

One way of countering the top-down nature of proactive measures is to involve stakeholders, potential victims, trade unions, service users, relevant NGOs, and others in the process. However, it is not always clear how these participants should be selected, or how much weight to be given to their views.

Several MS have created a durable consultative framework, involving equality bodies, members of the Government, social partners and other interested parties, while others give this role primarily to the equality body.

Collective bargaining or works council structures also constitute an important arena for consultation at the enterprise level. Also of importance is the function of consultation. Consultation could be aimed merely at exchanging information, or it could have binding effect.

The weight given to opinions of consultees depends largely on the political culture, the goodwill of decision makers and the political or industrial strength and influence of consultees. An active and engaged civil society is therefore crucial to the success of participation mechanisms.

**Discussion Question Four: How important is participation, how should it be fostered, and what should its role be?**