

Legal Seminar 25 November 2008 on the implementation of EU law on equal opportunities and anti-discrimination

DISCUSSION PAPER POSITIVE ACTIONS/POSITIVE DUTIES

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Positive action

Articles 3, 6, 5 and 7 of the Recast Directive (2006/54/EC), of the Services Directive (2004/113/EC), of the Racial Equality and the Employment Equality Directives accordingly, carve out a space for measures of positive action on all protected grounds. To that effect, the Directives provide that the principle of equal treatment will not prevent Member States to maintain or adopt measures which are *bona fide* intended to promote equality for vulnerable groups, such as measures

- a) to prevent or compensate for disadvantages linked to any of the discriminatory grounds
- b) to protect the health or safety at work of persons with a disability, or
- c) to create or maintain facilities for safeguarding or promoting the integration of people with disabilities into the working environment.

Positive action was identified as “measures to increase the participation of particular groups in certain spheres of economic, political or social activity, in which those groups are regarded as underrepresented”.¹ We could distinguish positive action from positive discrimination, in the notion that positive discrimination means hiring, retaining or advancing in employment certain people not because they possess more qualifications than other candidates, but due to the fact that they belong to a particular disadvantaged group. The two Directives do not specifically allow or even foresee positive discrimination. On the other hand, positive action encompasses measures that offer to all interested persons opportunities to compete on an equal basis; it is therefore more proactive than positive discrimination and targets to the whole rather than individuals.

According to EU law, discrimination arises through the application of different treatment in comparable situations or the same treatment in different situations. Although measures of positive action that in practice introduce such differential treatment do constitute discrimination, they are either aiming at compensate for past discrimination or at redistributive justice.² The Directives do not require such positive action measures if they do not already exist, therefore positive action is not compulsory for Member States.

¹ European Commission, *Anti-Discrimination Annual Conference ‘Equal Opportunities for All: What Role for Positive Action?’*, Conference Proceedings, Rome, April 2007,

http://ec.europa.eu/employment_social/fundamental_rights/pdf/events/rome/rm07rep_en.pdf

² Marc De Vos, *Beyond Formal Equality, Positive Action under Directives 2000/43/EC and 2000/78/EC*, MPG, HEC, European Commission, June 2007, page 12.



However, the preamble of the Recast Directive recalls that “Equality between men and women is a fundamental principle of Community law under Article 2 and Article 3(2) of the Treaty and the case-law of the Court of Justice. Those Treaty provisions proclaim equality between men and women as a ‘task’ and an ‘aim’ of the Community and impose a positive obligation to promote it in all its activities (par. 2).

While discriminatory treatment violates the principle of equality before the law, positive measures, are sometimes necessary in order to achieve full equality, compensating for disadvantages due to the protected grounds. Therefore, the existing inequality justifies the necessity of measures for its remedy.

Naturally, such positive measures are justified as long as this particular category continues to be on a disadvantaged position. Measures of positive action should serve a legitimate objective, aiming at remedying a proven imbalance; therefore, they should not necessarily seek to compensate for past discrimination.³ It should also be proportionate to the disadvantages experienced by the protected group and absolutely necessary for their remedy. According to the European Court of Justice’s jurisprudence⁴, such positive action measures amount to direct discrimination for the groups that are not favoured, but this is framed as an exception. However, if such measures are justified by objective reasons, adopted only in order to compensate for damages suffered by the group promoted by these measures and have a limited duration, then this preferential treatment should be accepted.

Both public authorities and private enterprises engage in positive action measures, usually with the cooperation of stakeholders that have specific knowledge of the situation of the disadvantaged group and the ideal strategy to be followed. Positive action is not charity; it does not exclusively benefit the minorities concerned but makes very good business sense and it tends to affect everybody’s working conditions positively.⁵

Positive action for people with disabilities

Article 7 par. 2 of the Employment Framework Directive calls for positive action especially for people with disabilities. It is clear from this provision that the Employment Framework Directive does not consider health and safety law as an obstacle to the achievement of a non-discriminatory and inclusive work environment. To a certain extent, it sees the principle of equality as being complemented by health and safety law and especially by the latter’s focus on adapting the workplace to suit the employee. However, in certain cases, employers might plead health and safety concerns in order to exclude persons with disabilities from the workplace, but we consider that this should be strictly scrutinised.

³ Marc De Vos, *Beyond Formal Equality, Positive Action under Directives 2000/43/EC and 2000/78/EC*, MPG, HEC, European Commission, June 2007, page 24.

⁴ See, for instance, Case C-409/95 *Marschall v Land Nordrhein-Westfalen*, Case C-158/97 *Badeck and Others*, C-407/98 *Abrahamsson and Anderson v Fogelqvist*, Case C-476/99 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* on the interpretation of Article 2(1) and (4) of Council Directive 76/207/EEC.

⁵ Fundamental Rights Agency, International Centre for Migration Policy Development, *The Benefits of Positive Action*, Thematic Discussion Paper, March 2008, p. 24.



What is the difference between positive action for people with disabilities (Art. 7 par. 2) and reasonable accommodation?

Article 5 of the Employment Framework Directive provides for positive measures for people with disabilities through reasonable accommodation. It is a different notion than the one of Article 7 par. 2 of the Directive that calls for positive action especially for people with disabilities. According to the letter of Article 5, reasonable accommodation is provided so as to “guarantee compliance with the principle of equal treatment”. A key distinction is that while positive action is a possibility open by art. 7.2, reasonable accommodation is mandatory and could therefore be considered as one example of positive duty. Although both reasonable accommodation and positive measures have as a result a different treatment for people with disabilities, only positive action approach different treatment as an exemption to the principle of equality. Reasonable accommodation constitutes more an example, than an exemption, of equality, as it demonstrates the typical obligation that different treatment applies to different situations. On the contrary, the aim of positive action is not to adopt special measures for people with disabilities, but to eliminate barriers for their participation into society.

What is more, reasonable accommodation requests an individual approach and a solution on a case-by-case basis, while positive action seeks to remedy existing or future discrimination for a whole disadvantaged protected group.

Positive duties

Apart from positive action clearly stipulated by the Directives, there is another type of approach, not simply prohibiting discrimination, but also reaching out to the most vulnerable groups, by placing a burden on society to actively promote diversity and equality. Positive duties can be seen as building on positive action by making it compulsory, a part of the equality principle, rather than an exception to it. It can be distinguished from reasonable accommodation in that it has a group dimension rather than an individual one.

Positive duties perceive discrimination as a problem of the society as a whole, and not of the specific disadvantaged group; they aim to combat institutional discrimination and place the burden of remedying inequality to the public stakeholders that have the necessary power to take positive steps in order to eliminate discrimination and promote change, rather than to those who commit discriminatory acts.

Quite often the anti-discrimination laws cannot eradicate systemic discrimination that has been existing in the practises of the public institutions, without ever been detected. For that reason, it has been admitted that the laws which simply prohibit discrimination are not sufficient to solve the problem: positive duties should be put in place, obliging public authorities operating in the areas of employment, law enforcement and provision of services, not only to respect the relevant laws, but most important, to detect the potential discriminatory impact of their policies, to advance equal treatment and encourage good relations between different social groups.

Types of positive duties

Besides the general duty to promote positive action for all vulnerable groups and encourage good relations within different social groups, there are also more specific positive duties that may be imposed upon public authorities, and upon private stakeholders, at least when they interact with the public service. These include, *inter alia*, the obligation to collect data on the racial/ethnic, sex, religious, age and disability background of staff, to set out equality plans and to publish regular reports on how the organisation is fulfilling its general and specific duties to promote equality or on the actual impact that its equality policies have on the disadvantaged groups. Therefore, the meaning of general and specific positive duties is that the public authorities are not simply obliged to avoid discriminatory acts or remedy the problem after receiving a relevant complaint, but to actively enhance equal chances for all, irrespective of the group they belong to.

Enforcement mechanisms

Unlike positive action, that is based on the discretion of the public authorities to be adopted, positive duties, in which legislative systems have been foreseen, are obligatory and therefore, the individuals can seek judicial remedy. Accordingly, an important result of providing for positive duties through the national legislation is that the potential victims of discrimination have the possibility to explicitly know what they can expect from public administration, unlike documents that foresee general plans or guidelines, which at most times are not available to the wider public and not legally binding. Apart from the individuals that allege discrimination, also the equality bodies might be responsible to monitor the compliance of the public authorities with their obligation to positive duties, through reports that the authorities are obliged to submit, or through ad hoc audits or inspections that might have the right to conduct. Therefore, if adequate enforcement mechanisms are put in place, the positive duties do not remain wishful statements but form legal obligations enforceable through the judicial system.

Questions:

- *Is positive action embodied in your national law transposing the Directives? If yes, is it based upon the state's discretion or does it constitute an obligation?*
- *Is there any differentiation depending on protected grounds?*
- *Please give some examples of good policy measures, practises and programmes that have been adopted by the government, public and private actors in your country. Do you consider them efficient to remedy long-standing discriminatory treatment against a protected group?*
- *Should positive duties be provided for in national legislation? Please give examples of positive duties in your country and explain how this works.*