



International perspectives on positive action measures

A COMPARATIVE ANALYSIS IN THE EUROPEAN UNION, CANADA, THE UNITED STATES AND SOUTH AFRICA



European Commission

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International perspectives on positive action measures

A comparative analysis in the European Union, Canada, the United States and South Africa

European Commission

Directorate-General for Employment, Social Affairs and Equal Opportunities
Unit G.4

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The information contained in this publication does not necessarily reflect the position or opinion of the European Commission. The consortium producing this report comprised the Centre for Inclusion and Diversity, University of Bradford, European Roma Rights Centre and Ludwig Boltzmann Institute of Human Rights.



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Executive summary

There is widespread recognition that the problem of discrimination in employment and service provision will not disappear on its own. The role of governments in promoting the use of positive action measures to address discriminatory practices is vital. At the EU level, there has been a significant expansion of legislation which provides the basis for activities to prevent and tackle discrimination. In spite of the wealth of EC legislation supporting the use of positive action however, limited progress has been made in defining the parameters for positive action and its application.

This study was undertaken to help the EU develop a framework for better understanding the role that positive action measures can play in practice in preventing or remedying discrimination, and to gain an insight into the kind of practical positive action measures already being taken in the EU (and in the EFTA-EEA countries Iceland and Norway), as well as the possible costs and benefits of the positive action measures. The study also sought to examine how legal frameworks, policies and practices of positive action in the European Union compare with Canada, the United States and South Africa.

The research adopted a mixed methodological approach with three distinct phases of data collection. The first phase consisted of a literature review and the development of a working definition of positive action. The second phase involved running an online survey about the use of positive action measures in the 27 EU Member States, two EFTA-EEA countries as well as Canada, the United States and South Africa. In the final phase, a comparative in-depth study of positive action practice in 11 countries was undertaken drawing upon data collected from consensus workshops, interviews, legal frameworks and policy documents in each of these countries.

Definition and understanding of positive action

The study highlights confusion and inconsistency in the terminologies used to describe positive measures across the study countries. Whilst European countries were more likely to talk about 'positive action', the term 'affirmative action' was more commonly used in the non-European countries. In comparison with target setting, there was very limited use of quotas and their strong association with preferential treatment attracted a negative response amongst study participants. On the whole, it was felt that greater clarification of the nature and purpose of positive action measures was needed which would in turn generate a more positive attitude towards the utility and application of positive action.

To this end, the legal definition produced by this study described positive action as 'consisting of proportionate measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are socially or economically disadvantaged, or otherwise face the consequences of past or present discrimination or disadvantage'.

Further to this definition, there is a strong need for the EC to work with pan-European special interest bodies including civil society organisations, issue-oriented lobby groups and trade unions to develop and communicate a shared understanding on which to base a common EU approach to positive action. In order to foster a shared understanding of what is meant by positive action within the European Union, the EC should promote dialogue with civil society organisations and the social partners. Based on such dialogue, EU-level guidance on the meaning of positive action should be developed. This could be in the form of

a non-binding legislative instrument, such as a Commission recommendation or a Council resolution. Alternative mechanisms could include a joint declaration by the social partners.

Context of equality and diversity

Positive action measures were generally undertaken by organisations within the framework of written equality policies, mission statements and annual reports. Whilst a good number of organisations had a written policy on equality and diversity, larger organisations were not as effective in setting appropriate targets for employment and service delivery. Equality monitoring was considered to be key to the development of positive action with gender being the most widely monitored and sexual orientation the least monitored ground. In the light of the centrality of monitoring in promoting sustained positive action measures, organisations need to gather disaggregated data in key sectoral fields on all grounds of discrimination. The lack of disaggregated data in key sectoral fields at present, however, means effective positive programmes cannot be comprehensively developed and implemented. This problem could be tackled by including positive action as an integral part of a wider organisational corporate mission, workforce planning and service development, working closely with the relevant governmental bodies. At the same time, positive action needs to be mainstreamed as part of a broader normative change and supported by institutions with proper mentoring and training. This might include a programme of education and training including seminars and events to increase knowledge and practice of positive action, its benefits and its role within diversity strategies.

Drivers for positive action

The study identified legislation as the main driver for positive action. Other key drivers include altruism, moral/ethical considerations, business reasons, demographic changes, corporate social responsibility, organisational policy and grassroots efforts. Negative factors were seen to drive positive action in some instances where organisations set up programmes for political and financial gains with little genuine interest in the essence of positive action. Given that an organisation's equality and diversity objectives can be hampered by a lack of understanding of the rationale for positive action (and the need to continue to make the case for and measure the impact of positive action), undertaking research around the economic advantages of positive action may prove beneficial. The research should include positive action's role within talent management, and the role that senior managers and line managers can play in implementing positive action. Additional attention might be paid to the image of organisations among potential customers or users — and, in the case of charities and public sector bodies, the image among those who fund or might donate to them.

Support for positive action

Support of the wider society is essential for the success of positive action programmes. Findings from the present study yielded divergent results regarding support for positive action and identified successful initiatives as those based upon meaningful involvement of target groups in relation to their design, planning, implementation and evaluation. There was also evidence of commitment of some public sector organisations to push the boundaries of policy, to develop a much broader application of positive action. Whilst strong individual commitment and senior management support were

identified as important factors, it was evident that individuals received relatively less support from line managers. These factors coupled with a number of barriers (discussed below) serve to militate against successful implementation of positive action. In light of these difficulties, the European Commission needs best-practice networks to support Member States in dealing with uncertainties and to ensure parallel translation and application of the EU approach to positive action. These networks should operate at national and cross-sector levels to enable the sharing of ideas, approaches and activities, and encourage organisations to move from intention to action. The EU institutions and Member States are recommended to introduce legal duties to implement positive action measures where necessary to achieve full equality in practice.

Barriers to positive action

Limited human and financial resources in addition to time were the most frequently cited barriers to positive action, particularly in the European countries. Lack of awareness of the benefits of positive action measures within the workforce and in the wider society, and the role of the media in problematising these measures and rendering outcomes as tokenistic, were also seen by study participants as major barriers to the acceptability of positive action. To address this problem governments should undertake to educate the general public through 'social marketing' about positive action, in order to address widespread misunderstandings that appear to exist, and to facilitate the linking up of various stakeholders already engaged in such measures. Widespread awareness-raising campaigns of both the need for positive action measures for disadvantaged groups and the benefits of such measures for wider society will also promote a wider acceptance and positive attitudes towards positive action.

Outcomes and impacts

A major problem identified by the study in relation to the effectiveness of positive action relates to the lack of systematic monitoring in terms of outputs and outcomes. Organisations were struggling to develop robust evidence, and tended to rely on 'soft' measures to assess the impact of positive action. Whilst on the whole, positive action measures are seen to be effective in raising awareness of equality issues in organisations, having real impact on minority groups, and improving an organisation's image and reputation, their potential contribution to business success is less well recognised and is not always deemed to translate into better financial results. Positive action initiatives were largely time-limited and not seen as long-term measures. Generally, the groups that were reported to benefit the most from positive action initiatives were minority ethnic groups and women, and the least likely to be beneficiaries were considered to be lesbian, gay, bisexual and transgender individuals.

Given the lack of evaluation tools used by organisations in relation to positive action initiatives, it is imperative to develop tools to assist organisations to establish baseline data to facilitate positive action implementation and design robust strategies to support the evaluation of the effectiveness of measures taken. In order to evaluate the need for, and effectiveness of, positive action, data collection is required. Whilst respecting data protection legislation, Member States should ensure that organisations may engage in data collection where this is designed to facilitate and analyse positive action measures. Our findings show that the future for positive action is hopeful and many organisations have plans to introduce positive action initiatives or programmes in the future. Research therefore should be undertaken to map the current

situation of 'disadvantage' with regard to the different fields in which positive action can be applied, e.g. employment, education, housing, healthcare, etc. relating to these different grounds. Furthermore, there is so little evaluation of 'good practice' in positive action that development of a model for evaluation might also be advantageous.

Positive action in practice

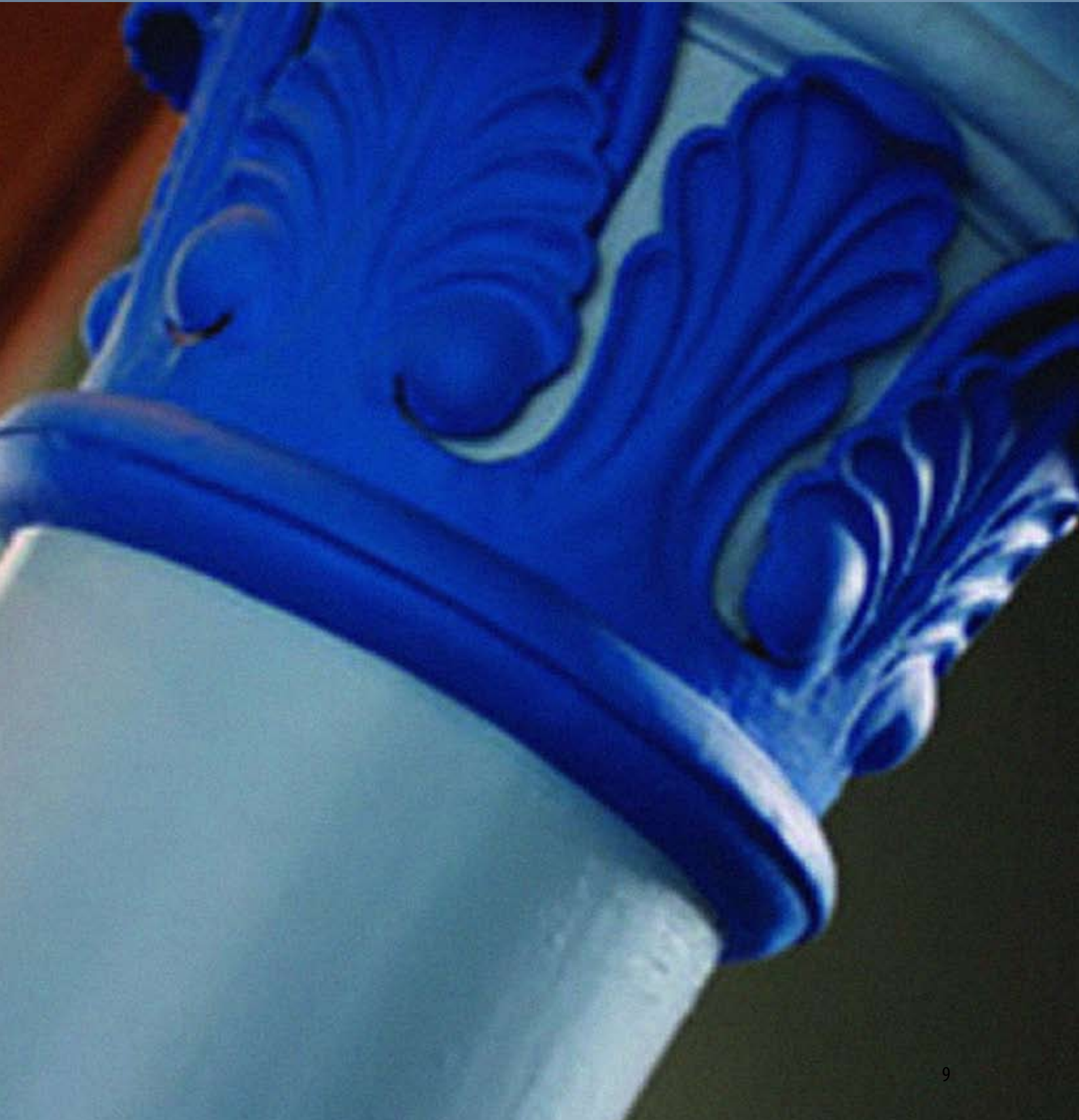
Examples of positive practice in organisations confirm confusion about the scope of positive action measures and the overlap with other complementary measures such as equality and diversity monitoring and impact assessment. There is an incredibly diverse range of activities that fall under the heading of positive action. Many countries focus on specific groups, perhaps at the expense

of others, which might be a reflection of the particular context or 'politics' of that country. Member States should revise national legislation where this prohibits or restricts the opportunity for public, private or voluntary organisations to take positive action. In practice, positive action measures tend to focus more on training and improving employment opportunities rather than service delivery. The introduction of positive action within organisations can produce some negative consequences or backlash such as negative stereotypes, stigmatisation, lack of proper oversight, dishonest behaviour and malpractice. It is noteworthy that the qualitative data from consensus workshops and interviews did not provide any examples of measures related to religion or belief.

This study revealed ethical, political, social, structural, strategic and opera-

tional issues for all stakeholders including leaders and human resource managers, aiming to bring greater equality and diversity to organisations. Positive action measures are widely perceived as politically contentious and require sensitive handling and careful introduction or renewal within organisations. The context for positive action is complex — its development will increasingly require a firm evidence base of best practice to demonstrate that it remains an effective avenue towards progress within pluralist cross-cultures, and that its benefits outweigh the dilemmas it can sometimes raise. In the introduction and revision of EC anti-discrimination legislation, it should be ensured that public, private or voluntary organisations who wish to engage in positive action are entitled to do so.

1 Introduction and methodological approach



1. Introduction and methodological approach

In this chapter we set the context and objectives of the study, discuss the design of the study and the development and application of the methods of data collection to the different phases of the study. We present an overview of the approaches to the literature review and development of the working definition of positive action. This chapter explains the procedure for developing the online survey and provides an overview of different methods utilised in the in-depth study and dissemination of the study.

1.1. Overview of the study

In recent years there has been a significant expansion of legislation by the European Commission in the area of equal treatment. The year 2000 saw the adoption of two Directives prohibiting discrimination on the grounds of race and ethnic origin ⁽¹⁾, and sexual orientation, religion or belief, disability and age ⁽²⁾. These were followed by amendments to the long-standing Directive (76/207/EEC) on equal treatment for men and women, the adoption of a ‘goods and services’ Gender Non-discrimination Directive in 2004 ⁽³⁾ and, more recently, the adoption of the ‘recast’ Gender Directive ⁽⁴⁾. As a consequence of this wealth of legislation, the EC is now the dominant force setting the tone and content of national non-discrimination and equality laws across the 27 Member States. In addition, specific work has been undertaken regarding positive action for Roma in the field of education by the European Network of Independent Experts on Fundamental Rights ⁽⁵⁾.

1 Council Directive 2000/43/EC.

2 Council Directive 2000/78/EC.

3 Council Directive 2004/113/EC.

4 Council Directive 2006/54/EC.

5 European Network of Independent Experts on Fundamental Rights (2005) Thematic Comment No 3, The protection of minorities in the European Union, at: http://ec.europa.eu/justice_home/cfr_cdf/doc/thematic_comments_2005_en.pdf

In spite of this extension of EC law, and the significant expansion in the personal and material scope which has occurred, enforcement of the legislation at national level is still to occur primarily through the action of individual victims who decide to challenge (allegedly) discriminatory behaviour before courts. This enforcement mechanism was also provided for in the earliest Gender Non-discrimination Directives which date back to the mid-1970s, and it has been the subject of criticism over the years (Blom et al., 1995). This is because victims face a range of obstacles in bringing discrimination cases, amongst which financial and emotional costs are some of the most significant (Bell, 2005).

Positive action, including the notion of positive duties to promote equality through, for example, contract compliance programmes, is one means of addressing the limitations and restrictions inherent in an individual enforcement model based on litigation. Nevertheless, while the use of positive action measures is recommended as a method of realising equality of opportunity, there is a dearth of empirical literature on the use of positive action across Europe.

This report is the result of a study to help the European Commission to better understand the role that positive action measures can play in practice in preventing or remedying discrimination, building on the knowledge of

the existing legal framework set out in other studies (De Vos, 2007). It will help the Commission gain a better insight into what kind of practical positive action measures are already being taken in the European Union (and in the EFTA-EEA countries), as well as the possible costs and benefits of the positive action measures. The study also seeks to examine how legal frameworks, policies and practices of positive action in the European Union compare with Canada, the United States and South Africa.

The Centre for Inclusion and Diversity at the University of Bradford was commissioned to lead this 15-month project in collaboration with the European Roma Rights Centre and the Ludwig Boltzmann Institute of Human Rights. The research team sought to undertake four tasks during the course of the study:

1. develop a working definition of positive action;
2. conduct an online survey in the 27 EU Member States and the EFTA-EEA countries;
3. produce in-depth case studies of eight EU countries, plus Canada, the United States and South Africa;
4. disseminate the findings of the research through a seminar and publications.

In addition to this report, the study has produced important material that provides valuable additional information and insight into all aspects of the study. These are as follows.

- A synthesis report which provides a comparative analysis of all aspects of the study is presented in PAMECUS Vol. 1.
- A survey report which collates and summarises the responses from the online survey with comparative analyses by subgroup is presented in PAMECUS Vol. 2.
- Eleven country reports on the situation of positive action measures, including examples in Austria, Canada, France, Hungary, Ireland, the Netherlands, Slovakia, South Africa, Sweden, the United Kingdom and the United States are presented in PAMECUS Vol. 3.

1.2. Defining positive action

Evidence from previous studies (e.g. Archibong et al., 2006b) show confusion and mixed interpretations of positive action. Whilst organisations are permitted by law under certain circumstances to take positive action measures, no legal definition exists of the concept. Therefore a clearer understanding of positive action is required, as the current confusion is unhelpful in the design of measures. To this end, the legal definition produced by this study described positive action as ‘consisting of proportionate measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are socially or economically disadvantaged, or otherwise face the consequences of past or present discrimination or disadvantage.’ A full legal definition of positive action measures as used in the study is provided in Chapter 3.

In the context of this project, the phrase ‘positive action measure’ should be regarded as an umbrella term covering all kinds of activities, initiatives, strategies and interventions, which seek to achieve one or more of the goals identified for positive action in both employment and service provision.

1.3. Aims and objectives of the study

The study involves individuals who are responsible for designing and implementing positive action measures e.g. human resources personnel, equality and diversity leads, cohesion and service development managers, chief executives and other senior managers with responsibility for equality. The following are specific objectives:

- exploring the historical, social and political context within which legal frameworks on positive action have been developed across both employment and service provision;
- assessing perceptions, understanding and the rationale for developing and implementing strategies for positive action, covering the discrimination grounds of age, disability, race, religion and belief and sexual orientation; aspects of gender which intersect with other grounds will also be considered;
- identifying types, range of positive action measures and how widespread they are across the private, public and third sectors, and the lengths of time these have been in operation;
- examining the outcomes and impact of positive action measures in participating organisations;
- obtaining the views of organisations about the actual or perceived benefits, including relative success, and main obstacles and barriers of

implementing positive action (focusing on best practice) and lessons learned;

- exploring the perceived effectiveness of the actions undertaken and how this could be improved;
- identifying key messages and good practice to inform policy and practice.

1.4. Structure of this report

This chapter sets out the background to the study, its formal aims and objectives and addresses the methodology and design of the study. Chapter 2 presents a review of the literature. Chapter 3 explores positive action from a legal perspective and provides the working definition of positive action applied in the current study. Chapter 4 discusses the perceptions of positive action in the European Union and EFTA-EEA Member States. Chapter 5 examines how positive action is perceived in Canada, the United States and South Africa. Chapter 6 analyses the perceptions of positive action held by respondents from all the countries participating in the survey, focusing specifically upon differences across discrimination grounds, sectors and organisation types. Chapter 7 presents conclusions and recommendations including a comparison of positive action measures in the European and non-European countries.

1.5. Methodological approach

1.5.1. Design

A mixed methodology using both qualitative and quantitative methods was employed, in order to meet the aims of the study, with a rationale that seeks elaboration, enhancement, illustration, (and) clarification of the results from one method with the results from another’ (Adamson

et al., 2004). Combining both methodologies allowed us to triangulate the study, thereby providing us with a more complete picture of the situation in different countries and ensuring greater validity of the study findings (Tashakkori and Teddlie, 1998).

The research was carried out in three distinct phases: a literature review and development of working definition of positive action; an online survey in the 27 EU Member States; two EFTA-EEA countries and three non-EU countries participating in the study and comparative in-depth study. Before beginning the study, we held two meta-planning meetings with some members of the steering group and the EC official, to discuss the context and focus of the study, sources of data and how these would be collected and strategies for engaging with different stakeholders. A detailed discussion of the methodological approach employed within the study is presented in PAMECUS Vol. 1 — Synthesis report.

Prior to commencing the fieldwork, the Bradford research team was granted ethics approval to ensure that the study was undertaken in line with the University of Bradford Code of Research Ethics and in compliance with the Data Protection Act. Our partners at York University in Canada, Johns Hopkins University in the United States and University of KwaZulu Natal in South Africa were also granted ethical approval.

1.5.2. Literature review and development of the working definition of positive action

There is already a good deal of information on positive action measures in reports and studies such as the research by Dhami et al. (2006), Archibong et al. (2006b) and Baxter et al. (2008). Before commencing fieldwork, an in-depth literature review was conducted to explore the context of positive action

measures as currently implemented in non-European and EU countries. Utilising extensive electronic and library resources as well as other facilities, we conducted a comprehensive review of the wider literature on the research, practice and theoretical debates on positive action. Information gathered from the literature study informed the task of providing a definition of the concept of positive action. The information also identified themes and dimensions to be built into the other phases of the study.

This phase involved the research team conducting a comprehensive review of the literature and building on previous studies in order to have a clearer understanding of positive action. The working definition was put through a rapid consultation process for scrutiny by consortium members, steering committee, EC official and an expert panel comprising legal, human resources and equality and diversity personnel. The working definition and responses to the definition are presented in Chapter 3.

1.5.3. Online survey

The online survey was conducted between 15 May and 24 October 2008. The survey involved the 27 EU Member States plus two EFTA countries (Iceland and Norway) and three non-European countries (Canada, the United States and South Africa). We utilised different strategies to collect data from multiple constituencies within public, private and third sector organisations. An online questionnaire ⁽⁶⁾ was launched in May 2008 with an option for respondents to complete the questionnaire in English, French or German, and was later translated into five additional languages (Bulgarian, Hungarian, Italian, Polish and Slovak) for use in

⁶ A copy of the questionnaire is available in Pamecus Vol. 1 — Synthesis report.

the survey. The questionnaire is divided into 10 sections and consists of 35 questions covering information about implementation of equality and diversity policies, understanding and perceptions of positive action and use of positive action measures, including outcome measures. The survey also asks organisations to identify possible barriers to positive action and about their future plans to conduct positive action.

A total of 632 respondents completed the survey. The majority of them were from Italy (12.2 %), the United Kingdom (9.2 %), Austria (7.3 %), Belgium (6.5 %), Canada (5.5 %) and Germany (5.2 %). Other countries provided less than 5% of the responses ⁽⁷⁾. In general, 40 % of the respondents were from the eight European countries and 11 % from non-EU countries involved in the in-depth study. Equality and diversity managers represented the highest pool of respondents (23 %) while managing directors were next (20 %). Nearly half of the respondents had been in post for five years; over 30 % in post between one and five years and 12 % under one year.

In terms of sector distribution in the total sample, the vast majority were from the public sector (39 %), then the voluntary sector (37 %) and the private sector (19 %). However, the private sector comprised a larger proportion in North America and South Africa, at 43 %. Whilst the majority of the public sector respondents were from colleges/universities (24 %), most of those from the voluntary sector came from education (20 %), and private sector respondents were predominantly from the professional and business services sector (29 %). Respondents came from organisations of varying size with the majority (40 %) from public/private organisa-

⁷ A full breakdown of the respondents is available in Pamecus Vol. 2 — Survey report.

tions with over 1 000 employees. Over 50 % of those from the voluntary sector/NGOs had between one and 10 paid and unpaid staff. A quarter of the respondents were from organisations with a branch/subsidiary or significant customer base in European countries other than their own; whilst one in five organisations has a branch/subsidiary or significant customer base in other countries outside Europe.

1.5.4. Comparative study on positive action

A comparative case-study approach was adopted in exploring legal frameworks and practical applications of positive action measures in selected non-European and European Union countries (including EFTA-EEA countries). The case-study approach facilitated a sufficiently thorough investigation of each country within its real-life context, using multiple sources of evidence. The findings of the comparative study are presented in Chapters 3, 4, 5 and 6.

The non-European countries chosen for an in-depth comparative case study were Canada, the United States and South Africa. These countries were selected because of their history and credibility regarding anti-discrimination laws and affirmative action measures they practised. For Canada and the United States, the measures are well established, but in South Africa the measures and legal framework have been more recent.

The European countries involved in the case study are Austria, France, Hungary, Ireland, the Netherlands, Slovakia, Sweden and the UK. In general, these countries were selected on the basis of geographical importance, covering different regions in Europe, size and experience of positive action measures on the different grounds of equality, and evidence from a review of the literature (e.g., Dhimi et

al., 2006). Changes were made to the original EU countries in negotiation with the European Commission in order to capture as many examples of positive action (on all grounds) and lessons for the effectiveness and replicability of these measures. In addition, we also considered the need to work with countries represented by members of the project team to ensure ease of access to the required participating organisations.

This comparative study allowed for further elucidation of the need for, use of and impact of positive action measures. This aspect of the study specifically aimed to identify the historical, social and political context of positive action, to explore its implementation, identify methods of measuring its impact, seek the views of organisations regarding its benefits, success and challenges and invite suggestions for overcoming challenges to the successful implementation of positive action. In addition to an in-depth literature review of the context and application of positive action in the selected EU and non-EU countries, the comparative case-study data were collected by means of participatory methods, including a consensus workshop, interviews and the analysis of the legal framework and policy documents of participating organisations. The in-depth study fieldwork was conducted from 10 July to 24 September 2008.

Consensus workshops and interviews

A consensus workshop method was adopted in bringing together the wisdom, interpretations and experiences of all stakeholders for the best possible results and decisions in the context of positive action activities in each country (Spencer 1989; Stanfield 2002). In order to gain a deeper insight into peoples' perceptions and experiences of positive action, we conducted

consensus workshops in nine of the 11 case-study countries.

Excepting France and Sweden, half-day consensus workshops were held in each country, as the main focal point for data collection activities during this phase. During each workshop, two discussion groups were held with representatives from all stakeholders including employers covering private, public and third sector organisations, campaigning bodies representing disadvantaged groups, employer associations and trade unions. Each workshop began with a plenary session presenting a keynote address and an overview of the research study. This was followed by group discussions, facilitated by the researchers, culminating in a final plenary session. A total of 272 people took part in 18 heterogeneous small group discussions. The groups were presented with a series of questions to structure the initial discussions, but they were not precluded from discussing other pertinent issues.

Themes elicited from workshops were further validated by conducting targeted follow-on face-to-face or telephone interviews with individuals identified from consensus workshops who were willing to discuss their views in more detail and those people who were unable to attend but wished to contribute. More specific areas, mostly context-specific questions, were covered. A total of 141 detailed interviews were conducted between July and September 2008. With the consent of the interviewees, most interviews were taped and lasted approximately 30 to 60 minutes. The interviews took a semi-structured, in-depth form with key actors, using an interview pro-forma to facilitate 'guided conversation[s]' (Fielding, 1993, p. 144).

Questions for the workshops and interviews were designed to explore understanding and commitment to

positive action, and identify examples of good practice to determine the level of ownership within the process of designing and implementing such initiatives, the extent to which positive action measures addressed the whole employment cycle and the goals of positive action — why the actions were set up, who was responsible, how they were designed and what thoughts were put into the design and who was consulted about the initiative. Workshops and interviews were conducted to check if the experiences of positive action matched the aspirations of the initiatives.

Documentary analysis — policy and legal framework

In addition to the consensus workshops, this phase involved a detailed analysis of organisational policies / legal frameworks underpinning positive action measures in each of the 11 countries. Documentary analysis has a long history in social science and can be a valuable source of data (Prior, 2003). Acquiring documents can be a relatively economical and expedient method of data collection and can be undertaken either quantitatively or qualitatively. The researchers compiled an initial list of all the required documents based on the project aims and objectives. Interviewees were requested to provide relevant documents. The documentary analysis

provided an overview of how legal frameworks, policies and procedures supported different positive action measures in the countries involved. The legal analysis was undertaken using a template and was based around four key questions, which are presented in Chapter 3.

Expert panel

An expert panel approach was used at two stages in the project. It was first utilised during the development of the working definition of positive action and then through a teleconference conducted for confirmability⁽⁸⁾ involving three members of the research team and three panel members from education, health and human resources backgrounds. The confirmability was necessary to assess trustworthiness of the US consensus workshop data, as participants were drawn from a less divergent pool. All panel members were selected for their substantial academic and practical experience of the issues involved in this study. Panel members were initially presented with an overview of the main issues, particularly the key statements identified from the consensus workshop in the United States. They were then asked to present additional views on their understanding, drivers, effectiveness and impact of positive (affirmative) action in the United States.

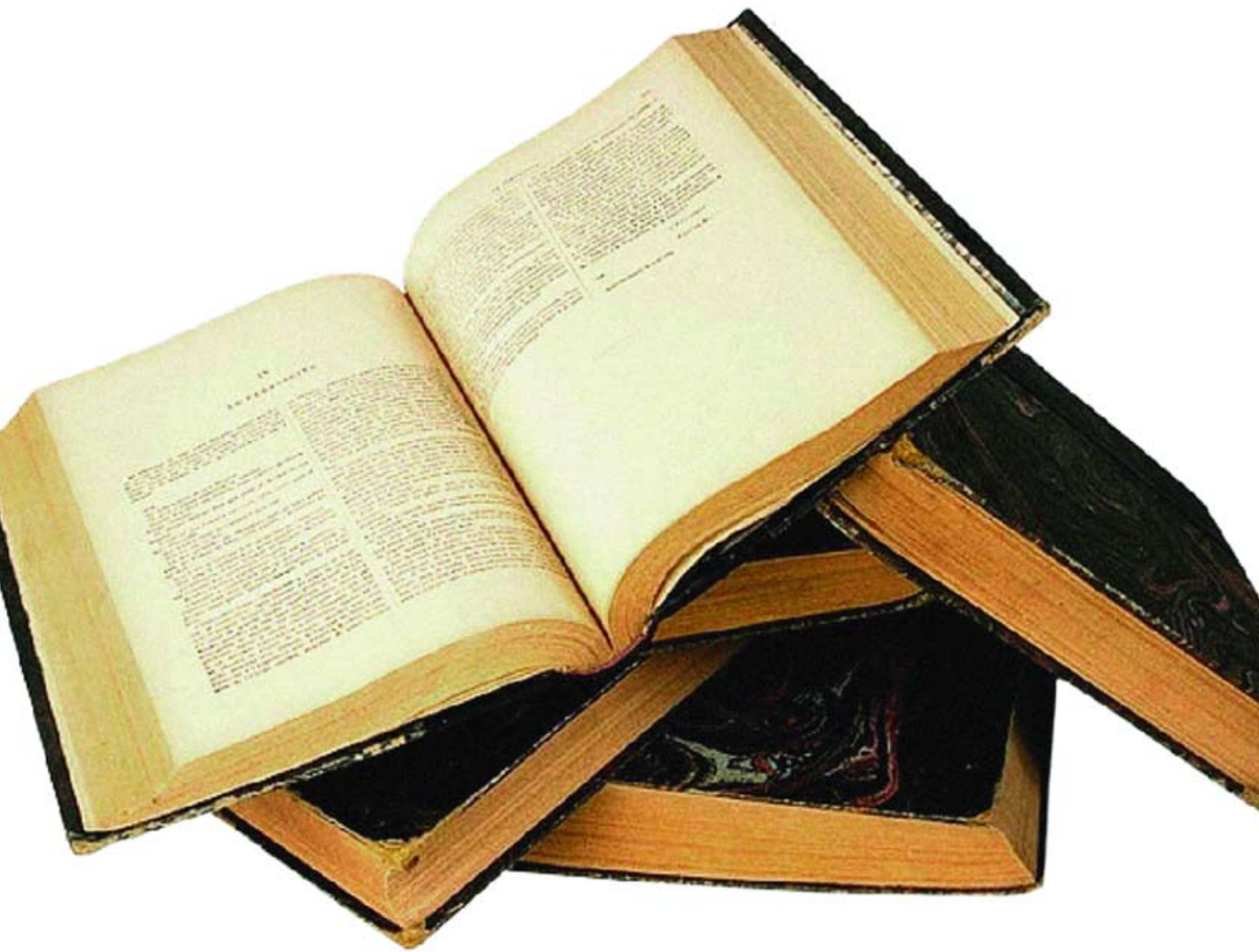
1.6. Data analysis

The survey data were analysed using the statistical package for the social sciences (SPSS) employing a combination of descriptive and inferential statistics. Because of the difficulties in establishing a suitable sampling frame, and the subsequent use of snowballing to improve the response rate, the sample is unlikely to be entirely representative of the population of all organisations in the participating countries and cannot be treated as if it were a random sample. Nevertheless, it was considered to be useful to perform cross-tabulations of responses with organisational characteristics and use a p-value threshold of 0.05 to provide an indication of characteristics that appeared to be related to a response considerably above or below the mean response of the sample in each section of the questionnaire. The chi-squared or Fisher's exact tests were used, as appropriate.

To introduce transparency and a systematic approach, we used a framework approach to qualitative data analysis (Silverman, 2001) on the consensus workshops, interviews, policy analysis and expert data. A thematic framework was cross-referenced with project aims and objectives, as well as the main discussion points highlighted in the literature review. Documentary analysis was undertaken using a context-based content analysis approach (Prior, 2003).

⁸ Confirmability refers to the degree to which the results could be confirmed or corroborated by others.

2 Contextualising the study



2. Contextualising the study

In this chapter we present an overview of the literature and current research and debates around positive action. A review of EC legislation and policy, including an analysis of the legal framework of study countries is provided in Chapter 3. However, research that looks at the effects of the legislation on positive action will be presented in this chapter. We examine the various meanings and range of positive action, as well as related theoretical debates. The chapter also highlights important policy developments and implications for the implementation of positive action measures in some countries involved in this study. The literature review helped provide sufficient insights into exploring the empirical data collected from the survey and the in-depth country study. With respect to the country-specific literature on positive action policy and practices (and legal analyses), consortium partners have assisted with some of the review of pertinent publications in order to overcome language barriers.

2.1. Conceptualisations of positive action

The understanding of the term 'positive action' and related terminology vary significantly across countries, sectors and discrimination grounds. This situation is further compounded by the fact that terms such as 'positive action', 'reverse discrimination', 'positive discrimination', 'affirmative action' and 'corrective action' are used synonymously in myriad contexts (Adam 1997; Archibong et al., 2006a). Alternative labels for positive action include 'constructive action' and 'structural initiatives', 'diversification strategies' (Groschi and Doherty, 1999) and 'mainstreaming projects' and 'balancing measures' (McCrudden 2007). Whilst these terms may be considered to be related and borderline cases, Archibong et al., (2006a) posit that the terms should, however, remain distinct from positive action itself. A more detailed description of some of these concepts is provided in Chapter 3 under the legal annotation of the definition.

More broadly, Iles and Hayers (1997) use the overarching 'diversity competence approach' to describe effective

international team working, whereas Miller and Rowney (1999) prefer to use 'managing diversity'. Diversity management is an emerging paradigm utilised by human resource professionals to maximise the potential of diverse staff in fulfilling the mission of the organisation (Dhami, et al., 2006; Thomas and Ely, 2002). Dhami et al. (2006) define diversity management as 'a process intended to create and maintain a positive work environment where the differences of individuals are valued so that all can reach their potential and maximise their contributions to the organisation's strategic goals' (p. 22). Whilst positive action has a legal basis, diversity management is fundamentally a management technique, which complements positive action. Complementary measures can promote success and sustainability, and in turn maximise the impact of positive action (Welsh et al., 1994).

Archibong et al. (2007) describe positive action as having three significant conceptual dimensions: the legislative, the executive or practice, and the political, which includes its communication or surrounding debate. They posit that while the statutory bodies explain the legislative concept, managers ap-

ply this concept through workforce diversity measures, but above all positive action is embedded within a larger political context. These factors can impact on the nature of positive action and initiatives and can lead to misinterpretation of positive action, which can in turn result in a lack of, or limited engagement with, positive action (Chater & Chater, 1992; Johns, 2005; Archibong et al., 2007).

McCrudden (1986) provides 'five types⁹ of positive action ... not in the sense of what is legally permissible, but in how the term appears to be used in common parlance' (p. 223). Burrows and Robinson's (2007) work 'explores some of the ways to conceptualise positive action measures in relation to sex discrimination in the context of the law of the EC and of Great Britain' (p. 24). The authors argue that the EC law is more progressive and consequently provides insights into possible legislative reform in United Kingdom. The authors also express frustration with the slow pace

⁹ McCrudden's typology of positive action: (1) eradicating discrimination; (2) facially neutral but purposefully inclusionary policies; (3) outreach programmes; (4) preferential treatment in employment and (5) redefining 'merit'.

of legal reform and call for United Kingdom to align its legislation with that of the EC in relation to conditions of women in employment. Their article provides a more detailed analysis of positive action and draws from the literature to illustrate core underlying principles (for example, equality) that might potentially present an obstacle to future legislative amendments. Citing McCrudden's analysis, the authors present three types of positive action 'that might be utilised in the context of a revision of employment legislation' (Burrows and Robinson, 2007, p. 26) namely purposefully inclusionary policies, outreach measures and preferential treatment.

2.2. Positive action-related research in different sectors

This section summarises positive action-related findings within the literature emerging from the different sectors. The literature reveals little research on positive action in the different sectors (Shields and Price, 2001; Carter, 2000; Sheffield et al., 1999; Bagilhole, 1999; Iganski et al., 2001), most of which were from the private and public sectors. In general, there was a dearth of research relating to positive action in the voluntary sector.

There is a blurring of categories between the public and privatised sectors, and this has presented some challenges with respect to deciphering public from private sector organisations. Most of the studies dealt with positive action measures in the public sector in health and education. One of them examined several positive action initiatives within the UK National Health Service (NHS) trusts, ranging from work experience placements and mentoring schemes, to apprentice schemes designed to promote equality of opportunities and diversity within the workforce (Baxter et al., 2008) but not carefully coordinated nationally (NHS Employers, 2005).

Another study examined positive action measures in the health and educational institutions (Archibong et al., 2006b) and suggests that there was mixed interpretation or confusion between equal opportunities practices and positive action policies. Generally, most of the participants in the study felt that there were more positive action activities within the NHS and educational institutions that were geared towards women and black and minority ethnic groups than for those with disabilities.

Murphy's (1993) review of a three-year positive action project in Northern Ireland found programme expansion, a high success rate of women finding jobs and benefits across the community. The project had become a catalyst for links regionally, nationally and with partners across Europe. There are many other organisations involved in offering positive action schemes, such as the Museums Association. These schemes are monitored and evaluated regularly and are perceived to be successful (Museums Association, 2008). In addition, there are some positive action related projects that are not named as positive action. These include initiatives such as the 'cultural understanding in leadership and management project' (CULM) (Archibong and Burford, 2007) which was acknowledged to have created a confidential and safe environment for answering awkward questions and remaining open and unconstrained about views.

Mathur-Helm (2005) found that in spite of the various affirmative action and equal opportunity initiatives, women in South Africa were constantly faced with career advancement barriers owing to the prevalence of patriarchy in organisations, which made it 'difficult to rise to senior and executive management levels, and not benefiting from government policies and legislation to advance their careers' (p. 58). Mathur-Helm's study

cited statistics showing women were significantly under-represented in top corporate leadership positions, with only 3 % as chairs of boards and 1.9 % as chief executive officers.

Parker et al.'s (1998) qualitative research found that banks' implementation of equal opportunities policies made a career in management a practical possibility for many women, whilst British Telecommunications (BT) were commended by Liff (1999) for their progressive positive action approaches including targeted recruitment activities, training directed at minority employees, encouragement to job sharers and childcare support. Examples of positive action initiatives based in the voluntary sector include a government-funded 'positive action training in housing' (PATH) scheme aimed specifically at recruiting people from under-represented ethnic minority backgrounds and offering them management training opportunities (Echiejile, 1994; Bowes and Sim, 2008; PATH, 2008).

2.3. Measurement of impact / success of positive action

The review did not find evidence of a discrete list of outcome criteria characterising 'successful' interventions. However, success is largely dependent on what the initiative sought to achieve through its aims and objectives. As a result, there is a shortage of evaluative literature for positive action initiatives. Measures of success and evaluation of interventions were generally either omitted altogether from the literature, or were incomplete (Band and Parker, 2002), and 'success' was instead discussed elusively. Nevertheless, there is some indication of encouraging outcomes following positive action initiatives in the health and education sectors (Payne and Huffman, 2005). It is imperative that those either directly or indirectly affected by it have a clear understanding of its purpose, and that

initiatives that are costly to implement can demonstrate clear utility and value for money.

Dhami et al. (2006) echo our observation, as they describe measurement of the effectiveness of affirmative action policies in the United States as a difficult endeavour. They assert that most studies on this subject focus on the economic attainment of ethnic minority groups, but whilst some measure gross outcomes, others focus on labour force participation, and yet others on earnings. These factors all affect the evaluations made. Whilst Stephanopoulos and Edley's (1995) review of the effectiveness of affirmative action in the United States found that, overall, the extent to which affirmative action had expanded minority employment in skilled positions was unclear, the programmes considered were effective, but could possibly be implemented in a fairer manner. In other studies, Holzer and Neumark (2000) note clear evidence of better medical care to minorities and low-income people from affirmative action in medical schools. Holzer and Ihanfeldt (1998) suggest that customers often like being served by 'co-ethnics', implying that minority customers might be happier (and white customers less happy) as a result of affirmative action.

Evaluation of the effectiveness of affirmative action statutory laws and policy instruments in the Netherlands has been seen largely as a 'bureaucratic monstrosity' (Glastra et al., 1998) due to the added burden it places on employers. Despite the legal consequences (recourse to criminal law proceedings) most firms did not comply fully, primarily because employers saw the reality of minority (un)employment 'as a supply-side rather than a demand-side problem' (Dhami et al., 2006, p. 44). As an alternative to any form of legal compliance, the government proposed a set of voluntary measures, including 'di-

versity contracts', establishing a Centre for Management of Diversity and extending voluntary 'covenants'. In the light of these developments in the Netherlands, workshop participants confirmed that the term enjoying currency is 'diversity management', while the literature uses 'affirmative action' (e.g. Dhami et al., 2006; Vries and Pettigrew, 1994) and 'positive action' (e.g. Bacchi, 2004) to describe similar activities in the Netherlands.

Recent studies have engaged in an empirical assessment of the Fair Employment Act in Northern Ireland and analysed the patterns of affirmative action agreements between the Fair Employment Commission and employers in Northern Ireland between 1990 and 2000 (Heaton and Teague, 1997; Osborne and Shuttleworth, 2004; McCrudden et al., 2004). Heaton and Teague argued that the tension between a positive institutional context for affirmative action and negative ground-level religious circumstances could be better managed in a climate of peace. More recently, Osborne and Shuttleworth (2004) considered the effects of the legislation 'a generation on' and highlighted the success of affirmative action measures in securing change, particularly in producing a substantial improvement in the employment profile of Catholics, who are now well represented in senior-level jobs.

Reports frequently state that initiatives have been 'successful' because they have led to increased minority group recruitment. In fact, most of the positive action literature focuses on the recruitment stage of the employment cycle (Secker, 2001; Refugee Council, 2006; Ward, 2006). Certainly there is some justification for this focus on reaching targets. For example Dainty et al. (1999) found that, unlike men, women were unlikely to be advised by friends and family or same-sex role models to join the construction industry. Thus, a physical increase in

representation was important and this study found that women in the industry tended to have been targeted by recruitment campaigns or have read literature specifically aimed at attracting them. However, meeting targets or increasing numbers does not necessarily confirm 'success'. Research into positive action in the aviation industry found that whilst positive action led to increased female representation, women were also far more likely to leave the industry. Whilst women were successfully recruited through positive action, this could not necessarily be considered to be synonymous with success, as many experienced inherent difficulties in working in a male-dominated organisation (Davey and Davidson, 2000).

Agocs' (2002) study in Canada argued that formalised employment equity (an alternative expression of positive action) programmes, with mandatory goal-setting and vigorous enforcement by government authorities, has a significant impact on results. The study admonished organisations to adopt 'mandatory equality policy rather than voluntary for employers' (Agocs, 2002, p. 22). Whilst the author noted that, relative to other countries, Canadian employment equity legislation was advanced and broad in scope and coverage, the gap between the promise of the policy and the limited results was attributable to a lack of support for implementation and enforcement by political leaders and employers and a lack of commitment and resources. Thomas and Jain (2004) attempted to look at the potential lessons for South Africa based upon the Canadian experience and concluded that 'employment equity must be viewed from both macro — and micro — perspectives ... the real challenge existed to go beyond compliance in the ensuring of top management commitment to the sentiments that underlie the legislation and the holistic development of

people and organisational cultures that are free of historical discrimination' (p. 51).

Other studies have reported improved beliefs and attitudes amongst those who have taken part in positive action schemes (Brew and Garavan, 1995; Band and Parker, 2002). In Band and Parker's (2002) evaluation of ethnic minority undergraduate mentoring schemes, successful outcomes included satisfaction among those being mentored that the scheme had met their expectations, especially in terms of career development, self-confidence and study skills. Success was also measured in terms of the enthusiasm and commitment of mentors and their satisfaction with the level of benefit provided to their students. Several initiatives have reported that participants enjoyed the initiative (Brew and Garavan, 1995),

and this has been interpreted as success. Nevertheless, evidence suggests that self ratings are not always reliable and valid measures of success (David and Sutton, 2004).

All of the success factors discussed have been associated with changes in the individuals themselves. However, it has been noted that individuals do not operate within a vacuum, but within the broader context of an organisation in which factors such as perceptions of fairness, threat and utility can individually or collectively impact on the success of positive action programmes (Kottke and Agars, 2005). Anderson (2004) referring to a case study, has claimed that positive action training can help raise awareness and understanding of organisational attitudes but strongly implies such initiatives will have a limited impact unless they are implemented

as part of a wider portfolio of measures designed to induce change at an organisational level. This literature review, however, did not find any study that had evaluated the effect of positive action on culture that was based on evidence and measurement. Furthermore, we found little evidence of longitudinal research into the success of positive action interventions. Typically, where an intervention was reviewed, it was evaluated in the immediate to mid-term. Nevertheless, the review did find encouragement in a study by Payne and Huffman (2005) which found that mentoring of US army officers was positively related to affective commitment and negatively related to turnover behaviour. It also provided longitudinal evidence, as affective commitment partially mediated the relationship between mentoring and actual turnover behaviour 10 years later.

2.4. Summary

Whilst policy initiatives around positive action typically apply to all sectors, there is a general tendency for the public sector, which is dependent to a larger extent on public funds, to implement the letter of the law with regard to positive action measures. Furthermore, mechanisms built into positive action, such as impact assessments, guarantee that public sector organisations have an incentive to implement positive action measures. On the other hand, private sector organisations, while under less scrutiny to implement positive action measures, are driven by business imperatives. Documentary policy evidence on third sector organisations suggests a higher level of implementation than public sector organisations. More practitioners within the third sector have attributed their commitment to positive action measures to the vision and mission of their organisations, as opposed to monetary (private sector) or assessment (public sector) incentives. However, we acknowledge the general lack of research evidence on the impact of positive action in the third sector as a limitation to this literature review.

This rapid appraisal of positive action literature reveals ethical, political, social, structural, strategic and operational issues for leaders and human resource managers, aiming to bring greater equality and diversity to organisations. Positive action measures are widely perceived as politically contentious and require sensitive handling and careful introduction or renewal within organisations. The context for positive action is complex — its development will increasingly require a firm evidence base of best practice to demonstrate that it remains an effective avenue towards progress within pluralist cross-cultures, and that its benefits outweigh the dilemmas it can sometimes raise.

3

Exploring positive action from a legal perspective



3. Exploring positive action from a legal perspective

Given the importance of the law, in this chapter we discuss positive action from a legal perspective. The first part of the chapter explores positive action from the perspective of EC law, and discusses both the relevant legal provisions and the case-law of the European Court of Justice. An extensive study of EC law in this area was also the basis for the working (legal) definition of positive action that was developed for use within this study. The working definition and annotation are given in the second section of this chapter. Moreover, the reaction of respondents to the working definition, as given in the survey, is noted. Lastly, this chapter provides a comparative overview of the laws regulating positive action in the 11 countries that have been the focus of case studies.

3.1. European Community law⁽¹⁰⁾

Given that all positive action must be adopted and implemented within a legal framework, it is important to have an understanding of the scope for, and limitations imposed upon, positive action as established by the law. Within the European Union, the basic legal framework with regard to positive action is established by a number of Council directives and the EC Treaty itself, as well as related case-law from the European Court of Justice. In essence, these instruments allow Member States the possibility to permit positive action, but only within certain limits. Within each Member State, and also within the non-European countries covered in the PAMECUS study, the limitations to positive action are (further) established in various legal instruments, which include national constitutions and case-law. EU Member States cannot allow positive action which exceeds the limits established by EC law; but neither is there any obligation on them to allow the maximum scope for positive action as provided for in EC law, and they may impose further restrictions that EC law does not require.

¹⁰ Parts of this section are based on an extract from Waddington, L. and Bell, M. (2001), 'More equal than others: distinguishing European Union equality directives', *Common Market Law Review*, 38, pp. 587–611.

For many years, European Community law only addressed non-discrimination, and therefore positive action, with regard to gender. This situation changed with the incorporation of Article 13 in the EC Treaty of 1999, which led to the Community obtaining the competence to take action to combat discrimination on the grounds of sex⁽¹¹⁾, racial and ethnic origin, religion or belief, sexual orientation, age and disability, and with the subsequent adoption of the Racial Equality⁽¹²⁾ and Employment Equality Directives⁽¹³⁾. Nevertheless, in order to gain an understanding of the scope for adopting positive action measures under Community law, it is important to begin by considering the relevant provisions within the Gender Equality Directives of the 1970s and 1980s⁽¹⁴⁾, and related case-law. To date, no ECJ case-law has arisen on this issue with

¹¹ As noted, earlier versions of the EC Treaty also allowed some scope for the adoption of directives addressing gender discrimination.

¹² Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22.

¹³ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

¹⁴ In particular Directive 76/207/EEC on equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, p. 40 (henceforth: original Gender Equal Treatment Directive).

regard to the other grounds covered by Article 13 EC.

The original Gender Equal Treatment Directive, which addressed employment discrimination, provided an exception from the prohibition of discrimination for positive action measures in Article 2(4): 'this Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities ...'. This early provision already reveals an essential element of the Community's approach to positive action: there is no obligation on Member States or other parties, to permit or adopt positive action measures. Instead, as De Vos (2007) has noted: 'the Community's positive action provisions provide Member States with a policy option which, within the general limits [established by EC law, MB/LW], is essentially used at their discretion' (De Vos, 2007, p. 38).

The European Court of Justice (henceforth: the Court) had various opportunities to consider the meaning of Article 2(4) of the Directive⁽¹⁵⁾. In its

¹⁵ See C-450/93, *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3069; C-409/97, *Marschall v Land Nordrhein-Westfalen*, [1997] ECR I-6363; C-158/97, *Badeck v Hessischer Ministerpräsident*, [2000] ECR I-1875; C-407/98, *Abrahamsson and Anderson v Fogelqvist*, [2000] ECR I-5539; Case C-476/99, *Lommers v Ministerie van Landbouw, Natuurbeheer en Visserij*, [2002] ECR I-2891.

most controversial decision, *Kalanke*, the Court stressed that ‘as a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly’⁽¹⁶⁾.

As of 1999, the Treaty of Amsterdam resulted in the insertion of a new provision in the EC Treaty which concerned positive action, Article 141(4) reads: ‘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 under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers’. Although this provides a more positive formulation than that found in Article 2(4) of the aforementioned Directive, the Court’s interpretation of Article 141(4) EC suggests it does not significantly increase the scope for positive action⁽¹⁷⁾.

Since *Kalanke*, the Court has consistently maintained that it will not accept positive action schemes based on gender which produce ‘equal results’ through automatic mechanisms at the selection stage. At the same time, it must also be acknowledged that the Court is willing to permit a wide range of positive action measures, including strict quotas, prior to the point of employment selection. For example, in *Badeck*, the Court was prepared to accept measures which imposed a strict quota reserving at least 50 % of training places for women, and requiring at least 50 % of all candidates invited to interview to be women⁽¹⁸⁾. Moreover, the Court has not rejected all forms of positive action at the point of selection, but does require that these are

flexible in nature and guarantee an objective and individual assessment of all candidates⁽¹⁹⁾.

The Court has also addressed positive action in the context of working conditions. In *Lommers*, which concerned a provision which offered female staff access to childcare facilities, but only allowed male staff such access in situations of ‘emergency’, the Court held that ‘it is not places of employment which are reserved for women but enjoyment of certain working conditions designed to facilitate their pursuit of, and progression in, their careers ...’⁽²⁰⁾. The Court regarded this measure as forming ‘part of the restricted concept of equality of opportunity’⁽²¹⁾, which was allowed under Article 2(4).

In the meantime, the original Equal Treatment Directive has been replaced by the ‘recast’ Directive⁽²²⁾, which codifies all of the older Gender Equality Employment Directives. Article 2(4) has been deleted, and instead, all gender-based employment positive action schemes find their legal foundation in Article 141(4) EC⁽²³⁾.

Turning to the newer instruments, Article 5 of the Racial Equality Directive provides: ‘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’. Whilst this text closely follows that found in Article 141(4) EC, it omits

the positive element of that article, notably the possibility of conferring ‘specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity’. At first sight, Article 5 of the Racial Equality Directive seems to be more restrictive than Article 141(4) EC. Similarly, Article 7(1) of the Employment Equality Directive only lifts the ‘positive action as compensation for past wrongs’ dimension from Article 141(4) EC⁽²⁴⁾. Nonetheless, one cannot conclude that the scope for positive action under the two directives of 2000 is more limited than that allowed for with regard to gender under Article 141(4) EC. Firstly, in the light of the decision in *Abrahamsson*, it is not evident that these textual differences will result in a broader scope for positive action in favour of women, in comparison with the other Article 13 EC grounds. In that case, the Court declined an opportunity to make a fresh start on gender-based positive action in Community law, but rather it wove Article 141(4) EC into the principles already established through its existing case-law. Moreover, the position, past and present history of disadvantage and discrimination, and the nature of the barriers experienced, of the eight grounds, or groups of people, covered by Article 13 EC are not the same, and this may influence the finding as to what kinds of positive action measures are compatible with EC law. Following the wording of the directives, one could argue that where a group experiences a particularly severe form of disadvantage, more radical and far-reaching forms of positive action should be allowed, than where lesser degrees of disadvantage exists. This would suggest that a ‘one

¹⁶ *Kalanke*, *ibid*, p. 3078.

¹⁷ *Abrahamsson and Anderson v Fogelqvist*.

¹⁸ *Badeck*, *pars.* 55 and 63.

¹⁹ *Marschall*, *par.* 35.

²⁰ *Lommers*, *par.* 38.

²¹ *Ibid*.

²² 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), OJ L 204, 26.7.2006, p. 23.

²³ See Article 3 of the ‘recast’ Directive.

²⁴ ‘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 discriminatory grounds referred to in Article 1.’

size fits all' approach⁽²⁵⁾, which the Court adopted in its gender case-law in the 1990s, would not be appropriate in the context of the Racial Equality and Employment Equality Directives.

However, given the lack of case-law at the European level on the new grounds, there remains a variety of positive action schemes which have yet to be tested for their compatibility with European Community law. For example, whilst in *Badeck* the Court was willing to permit training schemes which reserved 50 % of the places for women, how would the Court regard training schemes which are exclusively provided for persons of a particular ethnic origin⁽²⁶⁾?

A further potentially challenging issue is the compatibility of employment quotas for people with disabilities with the Employment Equality Directive. A significant number of Member States of the European Union provide for some form of (obligatory) quotas⁽²⁷⁾, and, in countries such as France and Germany, quotas are regarded as an intrinsic element of disability employment policy. Such schemes would naturally fall foul of the test established in *Kalanke*, though, as noted above, the Court may regard the different social context for each of the grounds of discrimination as justifying a change in the scope for positive action. Moreover, Article 7(2) of the Employment Equality Directive provides additional protection for positive action in respect of people with disabilities. It states that 'with regard to disabled

persons, the principle of equal treatment is 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'. The latter element of this provision appears to stem from proposals of the Dutch delegation⁽²⁸⁾, reflecting a desire to protect existing elements of Dutch law which provide for preferential treatment of disabled persons in order to support their reintegration into the workforce⁽²⁹⁾. It is less clear how the reference to health and safety law in this context relates to positive action for disabled persons. The most logical explanation is that this provides Member States with the possibility to adapt their health and safety regimes to take account of the particular situation of disabled workers. This reinforces certain existing obligations on employers imposed under Health and Safety Directives⁽³⁰⁾. Nonetheless, there is also a risk that excessively protectionist measures ostensibly designed to guarantee the health and safety of workers with a disability, could in fact result in the exclusion and denial of equal treatment to people with disabilities⁽³¹⁾.

28 Council of the EU (2000) 'Outcome of proceedings of the working party on social questions of 14 and 28 March 2000', 6941/00, Brussels, 31 March 2000, pp. 5–6.

29 Specifically Article 7 of the *Wet op de (re) integratie arbeidsgehandicaten*. See Waddington, L. (2000), 'Tweede-generatie richtlijnen Gelijke Behandeling: de nieuwe Richtlijn inzake gelijke behandeling ongeacht ras of etnische afstamming en de Kaderrichtlijn gelijke behandeling in arbeid en beroep', *Sociaal Recht*, 12, pp. 357–362.

30 See, for example, Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1, Article 15.

31 For a consideration of this problem from a British perspective see Davies, J. and Davies, W. (2000), 'Reconciling risk and the employment of disabled persons in a reformed welfare State', *Industrial Law Journal*, 29, pp. 347–377.

3.2. Working definition of positive action

Drawn from EC law, a working definition of positive action was developed for use throughout the current study.

For the purpose of this study, positive action consists of proportionate measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are socially or economically disadvantaged, or otherwise face the consequences of past or present discrimination or disadvantage. In order to achieve this, positive action measures are designed to achieve one or more of the following goals:

- preventing or compensating for disadvantages and discrimination, whether these arose in the past or are still ongoing;
- promoting substantive equality by taking into account the specific situation of members of disadvantaged groups and breaking the cycle of disadvantage associated with membership of a particular group;
- redressing under-representation and promoting diversity in participation of all groups in social, economic, cultural and political life.
- Positive action measures achieve these goals by influencing the way in which social goods, such as employment, education, housing or healthcare, are allocated.

Positive action covers a wide range of measures, but, in the light of EC law, it is not viewed as including automatic and unconditional preferential treatment for women (or men) in selection for employment (e.g. quotas). Taking into account EC legislation, positive action also has a broader meaning in relation to disability, where it includes measures aimed at creating or maintaining provisions or facilities for safe-

25 By this is meant judgments which purport to set out what kinds of positive action are always prohibited, for all Member States and in all circumstances.

26 For example, this is permitted under Section 37 and Section 38 of the British Race Relations Act 1976.

27 For further information see Waddington, L. (1996), 'Reassessing the employment of people with disabilities in Europe: from quotas to anti-discrimination laws', *Comparative Labor Law Review*, 18, pp. 62–101.

guarding or promoting the integration of disabled persons into the working environment. This includes preferential treatment for disabled persons, such as quotas.

3.3. Annotation to the definition of positive action

As is clear from the definition given above, positive action measures can be targeted at many different groups, serve related but different goals, and impact on many different areas of life. Furthermore, positive action measures can apply at the national level, and be established by legislation or government policy, or at the workplace level and only be based on the efforts of one individual, or may fall in between these two extremes. As a consequence, positive action measures can be very diverse indeed.

In order to provide further insight into the kinds of measures that can be regarded as positive action, it is helpful for this annotation to discuss and elaborate on various aspects of the definition of positive action, as developed for the current study.

3.3.1. Terminology - positive action, positive discrimination, affirmative action

Although the term ‘positive action’ has been selected for this report, there is little consensus within the academic literature on precisely what this entails. This confusion is exacerbated by the use of other related terms, such as ‘affirmative action’, ‘positive discrimination’ or even ‘reverse discrimination’.

‘Affirmative action’ is a term which is used less frequently in Europe, but which is the dominant term in the USA. In that context, it has been associated with a wide range of measures including strong forms of preferential treatment for disadvantaged groups,

such as quotas for ethnic minorities. The European context is distinct in two respects. First, there has generally been less recourse to strong forms of preferential treatment, with the exception of disability and, to a lesser extent, gender. Secondly, in its case-law on gender equality, the Court of Justice has held that measures which give absolute and unconditional priority to the under-represented sex (typically women) at the point of employment selection, constitute unlawful discrimination against members of the other sex⁽³²⁾. As a result, it is helpful to distinguish in the terminology used between different types of measures targeted at disadvantaged groups.

‘Positive action’ is generally taken to include all those measures which seek to benefit socially or economically disadvantaged groups, but which do not involve unconditional preferential treatment in the allocation of social goods based purely on an individual’s characteristics. In contrast, ‘positive discrimination’ connotes those measures which go further, such as admitting ethnic minority students to university with lower entrance qualifications than those of other students. In the context of gender equality in the labour market, this distinction between positive action and positive discrimination reflects what EC law permits; positive action is lawful and positive discrimination is unlawful. Whilst it is frequently assumed that the Court of Justice will apply similar principles to other forms of discrimination⁽³³⁾, this has not yet been tested through litigation. Moreover, it remains difficult to maintain a watertight distinction between positive action and positive discrimination.

³² See e.g. para 27, Case C-319/03 *Briheche* [2004] ECR I-8807.

³³ European Commission, ‘The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin’ COM(2006) 643, p. 7.

In relation to disability, the Employment Equality Directive uses the heading positive action to permit measures that would otherwise fall within the category of positive discrimination⁽³⁴⁾.

3.3.2. Beneficiaries of positive action

As is clear from the definition given above, positive action measures are designed to improve the position of socially or economically disadvantaged groups and groups which face the consequences of past or present discrimination or disadvantage. However, since groups, by their very nature, consist of numerous individuals, the beneficiaries of positive action measures are also individuals who are themselves members of the target group. By targeting and benefiting (sufficient numbers of) members of the group in question, positive action aims to ensure that the group as a whole will cease to be disadvantaged.

Not all groups are the (potential) target of positive action measures — instead, such measures are directed towards socially or economically disadvantaged groups and those which face the consequences of past or present discrimination or disadvantage. Since the level of social and economic disadvantage, as well as the history of discrimination, is sometimes influenced by the state of economic development within a country or sector, and by cultural perceptions, it is important to establish and identify real disadvantage before proceeding to develop a positive action scheme.

The examples given in the report also reveal that positive action measures can be targeted at many different groups. In contrast, European Community law only addresses non-discrimination, and therefore positive action, with regard to six named

³⁴ Article 7(2), Directive 2000/78/EC.

categories, namely those groups identified on the basis of sex, race or ethnic origin, sexual orientation, religion or belief, disability and age. This implies that any positive action scheme directed at such groups, whether at the national or the workplace level, must be in conformity with Community non-discrimination law. The limits of Community law with regard to positive action based on sex and disability have been noted briefly in the definition and above, and are based on EC legislation and case-law³⁵). Community law imposes no direct limits on positive action targeted at groups which do not fall into these categories, such as people with a criminal record, or asylum-seekers. However, national law may also limit the possibility of directing positive action at certain groups, and may indeed be more restrictive than European Community law in this respect.

3.3.3. Bodies responsible for implementing positive action

It is up to the State to decide whether, and how far, to permit positive action measures (within the boundaries allowed by EC law). However, once the State has provided that positive action measures are permissible, a wide variety of actors can then implement specific measures and programmes. The State itself can both legislate to establish positive action schemes, such as through the establishment of a (binding) employment quota designed to benefit people with disabilities, or

35 Specifically Article 2(4) of Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, OJ L 39, 14.2.1976, p. 40 and the related case-law (for a good overview of the case-law see Gijzen, M. H. S. (2006), 'Selected issues in equal treatment law: a multi-layered comparison of European, English and Dutch law', Thesis, Intersentia, pp. 227–234 (Section entitled: 'From Kalanke to Briheche'); and Article 7 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

establish positive action measures in its capacity as an employer and a provider of services and grants. Such initiatives can be taken by central government, as well as by federal government and local authorities within the scope of their powers. Private employers and service providers, as well as employers and service providers in the public sector, such as universities and hospitals, can also implement positive action measures, as can voluntary sector organisations. Such measures can be adopted by both large and small organisations, and cover the whole of their operations, or just a specific part or region in which they operate.

3.3.4. Positive action must be proportionate

Positive action measures provide for benefits for members of disadvantaged groups, in terms of enhanced access to certain social goods, and serve specific goals. However, positive action measures can have negative effects on individuals who are not members of the target group, in that they may find it more difficult to access social goods than would otherwise be the case. This is because social goods, such as employment opportunities or housing, are finite, and a distribution of such goods which favours one group, must inevitably lead to reduced opportunities for other groups. Nevertheless, positive action measures are necessary and appropriate when, inter alia, the previous distribution method disproportionately disadvantaged members of certain groups, and the positive action measure serves to correct this disadvantage.

However, positive action measures can only be justified as long as the target group remains socially or economically disadvantaged, or the consequences of past or present discrimination or disadvantage remain ongoing, and the positive action measure serves to eliminate or reduce this disadvantage. In essence this means that positive action measures must be proportionate to the aim

they are pursuing. For example, where a group experiences particularly severe disadvantage, exclusion and discrimination, the proportionality principle implies that more radical positive action measures will be justified — than in the case of a group which experiences less disadvantage. Furthermore, the principle implies that once a positive action measure has achieved its aim, and the situation of social or economic disadvantage or the consequences of past or present discrimination or disadvantage have been eliminated, the measure should be discontinued. However, one should not conclude from this that all positive action measures should automatically be temporary in nature. Some forms of exclusion and disadvantage are so embedded that only long-term positive action schemes can help to correct them and where a group-related characteristic is likely to lead to a permanent reduction in (employment and educational) possibilities, such as is the case with certain kinds of (intellectual) disability, permanent positive action schemes can be proportionate and justified.

3.3.5. Positive action and data collection

Positive action is often closely associated with data collection, although the two are distinct. Data collection refers to mechanisms for gathering information on the situation of disadvantaged groups. These take a wide variety of forms³⁶). On the one hand, quantitative data collection might entail the disaggregation of statistics by reference to gender or age, or alternatively monitoring the proportion of job

36 For a range of examples, see Makkonen, T. (2006), *European handbook on equality data*, Luxembourg: Office for Official Publications of the European Communities; European Commission (2004), *Comparative study on the collection of data to measure the extent of discrimination within the United States, Canada, Australia, the United Kingdom and the Netherlands*, Luxembourg: Office for Official Publications of the European Communities.

applicants from ethnic minority communities. On the other hand, qualitative data collection methods could include a survey of lesbian and gay persons in order to discover their experiences in the healthcare system.

Collecting data does not, by itself, meet any of the goals of positive action which are identified in the definition adopted by this project. Compiling statistics does not compensate for disadvantages or prior discrimination, nor does it redress under-representation.

The main reason for data collection is to identify where inequalities are currently being experienced. This then forms the context against which positive action initiatives can be taken. For example, if data collection reveals a low level of participation by young black men in law courses at university, then it would be appropriate to design positive action schemes in response, such as recruitment programmes targeted at this group.

3.3.6. Positive action and mainstreaming

Mainstreaming is an approach which seeks to promote equality by mobilising all areas of law and policy⁽³⁷⁾. Rather than relying only on specific measures, such as anti-discrimination legislation, mainstreaming implies that equality needs to be pursued in all activities. In practice, this means that equality needs to be taken into account during policy formulation, implementation and evaluation. For example, it might be assumed that equality issues are not especially relevant to transport policy. In contrast, mainstreaming demands that transport policy is used to promote equality. This could entail ensuring that public transport is accessible for persons with disabilities or that the transport

³⁷ Centre for Strategy and Evaluation Services (2007), 'Non-discrimination mainstreaming — instruments, case studies and ways forward', Brussels: European Commission.

infrastructure in urban areas with a large ethnic minority population is as good as that available in other parts of the city.

Whilst it might be argued that mainstreaming is akin to positive action, it is arguably clearer to see the two as distinct. Whereas positive action involves targeted measures that, inter alia, attempt to compensate for specific disadvantages, mainstreaming has a broader agenda. Its methods are more procedural in nature: incorporating the promotion of equality into decision-making and service delivery. Mainstreaming seeks to change the mindset of policymakers in order that equality becomes a central concern. If this approach works effectively, it is likely to prompt policymakers to consider taking positive action. For example, mainstreaming might mean that when a national museum seeks to raise its number of visitors, it takes into account whether certain groups are currently under-represented, such as Muslim women. Once this issue is placed on the agenda, then the museum might take the next step of designing positive action measures in response, such as a targeted outreach programme.

3.3.7. Distinguishing positive action from reasonable accommodation

At first glance it may seem that the obligation to provide for a 'reasonable accommodation'⁽³⁸⁾ is a particular form of positive action, as it provides for 'advantages' to individuals who fall within the group of persons with a disability. However, this impression is misleading and the obligation to provide for a reasonable accommodation can better be characterised as a particular kind of non-discrimination legislative provision, related to, but not synonymous with, the established forms of direct and indirect discrimination⁽³⁹⁾.

³⁸ As provided for in Article 5 of Directive 2000/78/EC.

³⁹ See Article 2 of both Directive 2000/78/EC and

The reasonable accommodation requirement obliges employers and other providers of social goods not to ignore disability, as is the case with regard to most elements of non-discrimination law⁽⁴⁰⁾, but specifically to take disability into account. A reasonable accommodation requirement prohibits, for example, an employer from denying an individual with a disability an employment opportunity, by failing to take account of the protected characteristic, if taking account of it — in terms of changing the job or physical environment of the workplace — would enable the individual to do the work.

Perceived in this way, the notion of reasonable accommodation can be regarded as based on a 'difference' model of discrimination. This model recognises that individuals who possess the relevant characteristic are different in a relevant respect from individuals who do not, and that treating them similarly can lead to discrimination. It requires that, for example, employers treat some individuals — persons with disabilities who would be qualified if the employer modified the job to enable them to perform it — differently from other individuals. This is an asymmetric notion and requires that some definition or classification of the covered group be included in the legislation.

Directive 2000/43/EC for a legal definition of the concepts of direct and indirect discrimination.

⁴⁰ Conventional employment non-discrimination legislation, including the long-standing EC gender-based directives and the Racial Equality Directive (2000/43/EC), is based on the premise that employers should not take into account certain characteristics such as gender or race. These characteristics are generally classified as irrelevant, and not pertinent to the employment decision. For this reason, non-discrimination legislation usually adopts a symmetric approach, meaning that both the dominant group (e.g. men, ethnic majority) and the disadvantaged group/minority group (e.g. women, ethnic minority) are protected by the discrimination prohibition. This can be regarded as a 'sameness' model of discrimination. Under this model, discrimination occurs when individuals who are fundamentally the same are treated differently for illegitimate reasons.

The obligation to provide for a reasonable accommodation can be distinguished from positive action from a procedural perspective as well. Unlike most forms of positive action which are aimed at members of socially or economically disadvantaged groups, reasonable accommodations generally possess an individualised character⁴¹. For this reason, statistical data revealing a numerical imbalance of a particular group of workers, such as women or ethnic minorities, in a particular employer's workforce are largely irrelevant for decisions concerning reasonable accommodation. Reasonable accommodation can also involve regular and ongoing expenditure, such as a provision of personal assistance, rather than a one-off decision to award a woman or a member of an ethnic minority a job or training. On this basis, the reasonable accommodation obligation is not susceptible to the problems of under-inclusiveness or over-inclusiveness which can dog classical positive action measures. Lastly, the requirement to make reasonable accommodation is generally mandated by law, as is the case in the Employment Equality Directive, whilst employers and providers of other social goods are generally left with a choice of whether or not to provide for positive action.

3.3.8. Distinguishing positive action from general policies to promote social inclusion

A final issue to consider is the difficult boundary between positive action and general policies to promote social inclusion. Some initiatives are easily categorised as positive action;

⁴¹ An exception to this is the notion of anticipatory reasonable accommodation, as is applied in the United Kingdom in the context of access to goods and services, which is targeted at the group of people with disabilities as a whole. This is not discussed further in this annotation.

take, for example, the Leeds hospital internship programme described in section 6.7.1, which was limited to people with black and minority ethnic backgrounds. At the other end of the spectrum, there are measures which loosely benefit disadvantaged groups but which are traditional elements of national social welfare policy, rather than positive action. Providing State pensions for older persons is a good example. Pensions seek to address the social reality that older people gradually leave the labour market and need an alternative means of income. Whilst this could be viewed as compensatory in nature, pensions are more typically regarded as a basic social entitlement which flows from the contribution to society (financial or otherwise) which individuals make during the earlier period of their lives. Moreover, pensions are not a temporary means of tackling disadvantage, but an indefinite feature of national welfare regimes. Finally, State pensions are often not targeted at overcoming disadvantage; indeed, those who have made more contributions through the taxation system may receive a higher pension than those who are more economically vulnerable. An alternative example would be the provision of free education for young people, which is preferential treatment in the sense that the same opportunities are not available to older persons, but it would be odd to construe the education system as an age-related form of positive action.

Between these two extremes, there are measures which fall on the boundary between social policy and positive action. For example, is State provision of financial assistance to persons with disabilities or single parents to encourage them to take up a low-paid employment a form of positive action (designed to compensate for disadvantages) or an element of the State social assistance regime? Given the variety of such measures, a complete inventory is impossible. Nevertheless,

those measures which are closer to positive action share some or all of the following characteristics. Firstly, they are targeted at a well-defined social group. Secondly, they seek to redress disadvantages in a specific setting, such as access to education or employment. Thirdly, the necessity for positive action will be subject to periodic review. As discussed earlier, this does not mean that positive action must be time-limited, but it is not automatically assumed to be indefinite.

3.3.9. Response to the working definition of positive

The legal definition developed for the current study was positively received by a wide range of professionals with experience in the field of diversity including an audience at an international conference on 'Gender and positive action' at the Izmir University of Economics in Turkey in June 2008. This is confirmed by the survey result which shows that 81 % of respondents felt that the definition was broad enough to cover their organisation's activities. The approval was strongest amongst the following groups: chief executive/managing director (CE/MD) (87 %) and voluntary sector/NGOs (86 %). No other group by country or any other descriptor was significantly below the overall response level.

When asked if the definition would be easy to apply in their organisation, 66 % of the respondents said that it would. The most positive sector was the voluntary sector/NGOs at 77 %, in particular those organisations in education and training, with a response of 86 %. Conversely, public sector respondents had a significantly lower rate of agreement that the definition would be easy to apply within their organisation at 48 %, with college/university education subcategory the lowest at 45 %. This was rather surprising considering that public sector organisations are more likely to be driven by legislative requirements

and would therefore be expected to feel more comfortable with the legal definition of positive action used in the study.

3.4. The legal framework in European and non-European countries

This section of the report provides a summary of the legal situation regarding positive action in the countries selected for case study within the EU⁽⁴²⁾ and outside the EU⁽⁴³⁾. The legal analysis in Hungary and Slovakia was limited to provisions for positive action targeting Roma, in line with the objectives of the overall study. The information provided below is based on the answers given by national experts to a legal questionnaire. For more detailed information on the relevant national legal provisions, please consult the country case-study reports⁽⁴⁴⁾.

Does legislation establish positive action measures?

This question sought information on situations where legislation directly established a positive action scheme, as opposed to situations where legislation encouraged or required organisations to create their own positive action schemes. Unsurprisingly, there were relatively few examples of positive action schemes designed by statute. Those which most clearly fell into this category related to disability and the creation of quotas for the employment of disabled persons. Both France and Austria have such quotas. In France, public authorities and private employers with more than 20 full-time workers must ensure that 6 % of the workforce consists of disabled persons⁽⁴⁵⁾. In Austria, all

employers of more than 25 persons must ensure that they employ one disabled person for every 25 employees⁽⁴⁶⁾. With both of these laws, however, the possibility exists for the employer to make a payment as an alternative to complying with the quota. In Ireland, the Disability Act 2005 requires public bodies to ensure that 3 % of their workforce is composed of disabled persons ‘unless there is a good reason to the contrary for not doing so’⁽⁴⁷⁾.

Aside from disability, the other main example of a positive action scheme whose terms are directly found within statute was in Northern Ireland. In order to overcome the historical underrepresentation of Catholics in the police, the Police (Northern Ireland) Act 2000 created a quota scheme based on the principle that one Catholic person should be recruited for each non-Catholic appointed.

Does legislation establish obligations on public or private sector organisations to take positive action?

Within the EU Member States under examination, there was a variety of practice regarding obligations to take positive action. In general, no statutory obligations were identified in relation to Ireland, the Netherlands and Slovakia. In contrast, several States had enacted legislation which required organisations to take steps to promote equality. In Sweden, various statutes required employers to take ‘goal-oriented work’ in order to promote gender equality and ethnic diversity⁽⁴⁸⁾. Similar duties applied in relation to universities, but these also covered the grounds

of religion, sexual orientation and disability⁽⁴⁹⁾. Universities must prepare annual plans reviewing the measures needed to promote equal rights for students. An equivalent duty to prepare annual plans exists in relation to educational authorities delivering schooling, preschooling and school-age childcare⁽⁵⁰⁾. This approach, which focuses on organisational plans, is also evident in the UK. Here public authorities are under a legal duty to promote equality on grounds of race, disability and gender⁽⁵¹⁾. This means that, inter alia, many public authorities have to prepare ‘equality schemes’ which set out their arrangements for promoting equality. In Hungary, there is less detail within the legislation, but public bodies and organisations with more than 50 employees must draw up an equal opportunities plan⁽⁵²⁾.

The examples discussed above set broad objectives for the organisations concerned, but there are also instances where more discrete measures are taken. In Northern Ireland, employers with more than 10 employees are under an obligation to monitor the religious composition of their workforce. If there is not ‘fair participation’ from both the Catholic and Protestant communities, then there is a legal duty to take ‘affirmative action’⁽⁵³⁾. In France, employers must take into account age and disability when selecting employees for redundancy⁽⁵⁴⁾. Where the firm employs more than 50 persons,

49 Equal Treatment of Students at Universities Act 2002.

50 Act Prohibiting Discriminatory and Other Degrading Treatment of Children and Pupils 2006.

51 In Northern Ireland, the duty applies to a longer list of grounds, including religion, age, sexual orientation and persons with dependents (s. 75 Northern Ireland Act 1998).

52 Article 63(4), Equal Treatment Act.

53 Article 55(2), Fair Employment and Treatment (Northern Ireland) Order 1998, SI 3162 (NI 21).

54 Article L1233-5, Labour Code.

42 Austria, France, Hungary, Ireland, Netherlands, Slovakia, Sweden, UK.

43 Canada, USA, South Africa.

44 These will be available from the Pamecus website: <http://www.brad.ac.uk/acad/health/research/cid/pamecus.php>

45 Article L5212-2, Labour Code.

46 Act on the Employment of People with Disabilities (*Behinderteneinstellungsgesetz*) BGBl. Nr. 22/1970, last amended by Federal Law Gazette I Nr. 82/2005.

47 s. 47(4).

48 Equal Opportunities Act 1991; Law on Measures against Ethnic Discrimination in Working Life 1999.

extra conditions must be met before employees over the age of 50 can be made redundant. Disabled workers are also exempted from the normal competition process for recruitment to the civil service, whilst special protections are in place regarding disabled workers who face dismissal.

In relation to Canada, the United States and South Africa, there seems to be a more extensive use of legislation to oblige organisations to take positive action⁵⁵. In Canada, the Federal Employment Equity Act 1995 aims to remedy past discrimination against women, persons with disabilities, Aboriginal peoples and members of visible minorities. It applies to federal public authorities and federally regulated employers with more than 100 employees. These organisations must draw up employment equity plans. In addition, those who receive a contract from the federal government for more than CAD 200 000 (around EUR 132 000), and who employ more than 100 employees, must sign a commitment to implement employment equity in line with the act. In Canada, there are also significant examples of obligations to take positive action within provincial legislation. These are not mentioned here for reasons of space, but more detail can be found in the Canadian case-study report.

A similar pattern of imposing obligations on federal contractors can be found in the United States. In 1961, Executive Order 10925 introduced a duty on federal contractors to 'take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin'. Executive Order 11246, introduced in 1964, obliges federal contractors to have a written affirmative action programme if they

have more than 50 employees and are bidding for contracts worth more than USD 50 000 (approximately EUR 38 750) (Hepple et al., 2000). Section 202(1) states: 'the contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin'⁵⁶.

In South Africa, the Employment Equity Act 1998 applies to public authorities and employers with more than 50 employees. This creates a legal duty on employers to ensure that their workforce is representative of the South African population, with specific reference to ethnic origin, gender and disability. Designated organisations are obliged to report annually or biannually on the composition of their workforce to the Commission for Employment Equity. They must also consult their workforce on the measures being taken to achieve employment equity. Section 15(1) refers to the goal of equitable representation in all occupational categories and levels of the organisation. The national expert reported that this is frequently interpreted as implying quotas, although this is not expressly provided for within the legislation. In addition, the Broad Based Black Economic Empowerment Act 2003 allows for quotas to be adopted in specific sectors via transformation charters and codes of practice.

What forms of positive action are permitted, but not required, by legislation?

There was considerable variation between the EU Member States in their approach to permitting positive action. Austria and Ireland had incorporated texts into their national

legislation which were very similar to the approach found in the EU directives. In the case of Ireland, there were additional provisions on positive action applying to areas outside employment. Section 14 of the Equal Status Acts 2000–04 permits 'preferential treatment or the taking of positive measures which are bona fide intended to: (i) promote equality of opportunity for persons who are, in relation to other persons, disadvantaged ...'. A comparable exception permitting positive action in fields outside employment can be found in the British Race Relations Act 1976, where Section 35 authorises measures aimed at particular racial groups in order to meet 'the special needs of persons of that group in regard to their education, training or welfare ...'.

There was some divergence between the Member States regarding the grounds of discrimination in respect of which positive action was permitted. In relation to employment, Austria, Ireland and the UK had provisions permitting positive action on all grounds. In the case of disability discrimination law in the UK, this was implicit; the Disability Discrimination Act 1995 only prohibits discrimination against disabled persons. Consequently, positive action for disabled persons could not be challenged as discrimination against non-disabled persons. The same legal approach regarding disability was also reported in Sweden.

In several countries, there was a tendency to permit positive action in relation to socio-economic disadvantage, with less emphasis on discrimination grounds. In the Netherlands, legislation only expressly permitted positive action in relation to gender, race and disability⁵⁷. In France,

55 'Positive action' is not the terminology used in these States, but it will be adopted here in order for consistency throughout the report.

56 The full text of Executive Order 11246 is available at: <http://www.dol.gov/esa/ofccp/reg/statutes/eo11246.htm>, accessed 28.11.2008.

57 Article 2, Section 3, General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*); Article 5(1), Equal Treatment Act Women/Men and Article 7:646(4), Civil Code.

there is no general statutory provision on positive action by reference to discrimination grounds, although a wide range of measures tackling socio-economic disadvantage were reported. By focusing measures on disadvantaged neighbourhoods, such positive action schemes indirectly assist persons of migrant origin. In Slovakia, legislation passed in 2008 permits public authorities to take 'affirmative measures' where these are focused on socio-economic disadvantage and disadvantages linked to age and disability⁽⁵⁸⁾. In Hungary, it was also reported that positive action was mostly by reference to socially disadvantaged groups, rather than explicitly identifying Roma as the target group.

In relation to the non-EU countries under consideration, the main focus of their efforts was the statutory schemes for positive action discussed in the previous section. In Canada, it was noted that most provincial human rights statutes permitted special or affirmative programmes to improve the situation of disadvantaged persons. In South Africa, organisations not formally bound by the duties within the Employment Equity Act could, nevertheless, volunteer to accept its obligations and pursue positive action under this framework. In the United States, Section 706(g)(1) of Title VII of the Civil Rights Act 1964 allowed courts to impose positive action as a remedy where unlawful discrimination had occurred: 'if the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate'⁽⁵⁹⁾.

58 Article 8(a), Law Amendment 85/2008 to Law 365/2004 Act on Equal Treatment.

59 See further, Connolly, M. (2006), *Discrimination law*, London: Thomson Sweet & Maxwell, p. 365.

Are any forms of positive action prohibited by legislation?

In some EU Member States, the limits to positive action are expressly found within legislation. In Hungary, the Equal Treatment Act provides protection for measures which it calls 'preferential treatment', but only if these are based on an act, government decree or a collective agreement⁽⁶⁰⁾. Moreover, such measures must be time-limited or limited by reference to when a particular condition is achieved. Similarly, in Slovakia, the 2008 legislation provides a list of statutory restrictions determining when positive action can lawfully be taken, which includes the statement that positive action can only be taken by public authorities and only if 'there is existing provable inequality'⁽⁶¹⁾. In the Netherlands, there is no statutory protection for positive action on grounds of sexual orientation, religion or age⁽⁶²⁾. It should be noted though that policies to promote employment within certain age categories will not be considered as unlawful discrimination if such policies are laid down by or pursuant to the Act on Equal Treatment on the Ground of Age in Employment⁽⁶³⁾. As mentioned above, there is no express provision for positive action in French anti-discrimination legislation and it is clear that positive action which is overtly based on ethnic origin would be unlawful.

In Sweden, the limits to positive action have recently been the subject of

60 Article 11(1).

61 Article 8(a), Law Amendment 85/2008 to Law 365/2004 Act on Equal Treatment.

62 The absence of statutory protection means that measures providing benefits based on sexual orientation, religion or age are likely to be regarded as discrimination (against the groups that do not benefit) in the areas falling within the scope of non-discrimination laws. Conversely, where there is no applicable prohibition of discrimination, such as age discrimination in access to goods and services, positive action is, by default, permitted.

63 Article 7, Section 1a.

litigation. In 2006, the Supreme Court held that a programme by Uppsala Law School, which awarded 10 % of places to students with a foreign background, constituted unlawful discrimination on grounds of ethnic origin⁽⁶⁴⁾. As is well known, there has been extensive litigation in the United States on the legality of positive action and it is impossible to present in detail this rich body of case-law within the confines of this report. In brief, the US Supreme Court has held that any racial classification must be subject to 'strict scrutiny', in other words, the programme must pursue a compelling interest and it must be narrowly tailored⁽⁶⁵⁾. Considering some examples from recent case-law, in *Grutter v Bollinger* the Supreme Court accepted that race could be taken into account in law-school admissions in an effort to combat the under-representation of ethnic minorities⁽⁶⁶⁾. The Supreme Court was, though, unwilling to extend this to a scheme where race was used in the allocation of children to particular high schools⁽⁶⁷⁾.

In Canada, it was also reported that case-law requires a rational connection between the positive action programme and its ameliorative purpose. In South Africa, a recent decision from the Supreme Court has clarified that positive action cannot be used as a justification for otherwise arbitrary recruitment decisions⁽⁶⁸⁾.

64 *The State v Lönn and Midander*, Case T_400/06, 21 December 2006. See further: Numhauser-Henning, A. (2007), 'Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC, Country report: Sweden', p. 16, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/svrep07_en.pdf, accessed 28.11.2008.

65 Fredman, S. (2002), *Discrimination law*, Oxford: Oxford University Press, p. 147.

66 *Grutter v Bollinger* 539 USA; 306, 123 S Ct 2325 (2003).

67 *Parents involved in community schools v Seattle School District No 1 et al.*, 127 S Ct 2738 (2007).

68 Supreme Court of Appeal (17 September 2008) *Martin Gordon v Department of Health KwaZulu-Natal* (337/2007) [2008] ZASCA 99.

3.5. Summary

The predominant feature of positive action within EC legislation is its permissive nature. There do not appear to be any obligations to take positive action and consequently it is unsurprising to find that national practice varies greatly in this area. This diversity relates both to the grounds where positive action is permitted or required, as well as the extent to which national legislation imposes duties on organisations to engage in positive action.

The main restraint imposed by EC law has been in relation to gender equality, where the Court of Justice has not permitted measures which confer automatic and unconditional priority on the under-represented sex. In the absence of any other case-law, it is difficult to foresee whether the Court will adopt an identical line of reasoning in relation to positive action for other discrimination grounds, or positive action in areas outside the labour market (such as education). Directive 2000/78/EC indicates that more far-reaching measures are permitted in relation to disability. This corresponds with national practice; for the most part, disability is the only ground where Member States have taken measures such as quotas. The three non-EU case studies illustrated a greater willingness to oblige public and private sector organisations to promote equality and to take positive action. Significantly, there is evidence of comparable instruments emerging within the EU, most notably in Sweden and the UK.

4

Perceptions of positive action in the European Union



4. Perceptions of positive action in the European Union

This chapter presents a detailed analysis of the perceptions of positive action held in the European Union, in particular by study participants from the eight European countries that participated in the in-depth study. The analysis draws heavily upon data collected from the consensus workshop and interviews held in each country, in addition to the findings from the survey and analysis of the legal framework and relevant policy documentation relating to positive action in each country. However in France, the findings were drawn from secondary analysis of a French country report on measures to combat discrimination⁽⁶⁹⁾. The chapter begins by comparing understanding of positive action as practised in organisations within the European Union, particularly in the eight case-study countries, including the type of measures that individuals considered constituting positive action. Drivers for positive action are then discussed as well as factors which are considered to contribute to the effectiveness of positive action measures. As part of this discussion, we assess how organisations measure the impact of positive action projects and identify groups that appear to have benefited the most and least from targeted initiatives. Finally the chapter identifies the main barriers that have hindered progress in implementing positive action initiatives and outlines plans regarding positive action measures for the future.

4.1. Understanding of positive action

There was no consistent understanding of 'positive action' amongst members of the European countries taking part in the study. Participants representing countries in Europe displayed differing levels of familiarity with the term and varying levels of reluctance to use it to describe their activities. For countries such as Hungary, Ireland and the United Kingdom, positive action was understood as constituting specific measures to redress past discrimination directed towards a particular group and with the aim of equalising the position of that group with that of the majority society. There was a general consensus in these countries that positive action measures should equalise social inequalities, eliminate disadvantage and even compensate

for disadvantage. Participants in these countries made associations between positive action and the removal of barriers, social justice, global justice, advocacy and empowerment. Nevertheless, despite providing us with a clear definition for this term, not all participants considered positive action to adequately capture or reflect their understanding. In the UK, positive action was described as a 'conceptual mess' and suggestions were forwarded to replace it with the term 'balancing measures' as a definition that would make it more easily understood and acceptable to the general public.

In other European countries, the term positive action was seen in a different light. In the Netherlands, participants considered positive action measures to be an old-fashioned strategy and struggled with the concept. They preferred to see positive action as an important tool within a wider diversity management strategy which included all methods designed to counteract the effects of exclusion, discrimination and stereotyping of

specific groups, with the aim of creating a more equitable society. For the Dutch participants, this included legislation, training, organisational development and coaching. There was common agreement that positive action measures had to be implemented as part of a multi-angled strategy in order to be successful and effective in the long run. If not supported by the whole society, any measurements aiming at more equality were considered useless. According to the participants, in order to make a difference, the application of positive action measures needs a critical mass. They considered positive action measures had to be part of a coherent permanent procedure following a target-oriented strategy open to change. This was in line with their argument that positive action measures should never be implemented within one department or one hierarchy level only, but that they should be implemented in all business areas.

Similarly in Sweden, positive action was not a commonly used term and

⁶⁹ See Latraverse, S. (2007), Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report France, available at: http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm

nor was it found in the relevant legislation, which speaks about 'active measures'. Confusion arose in relation to the concept as Swedish legislation and policy stress the need to take active measures, yet on the other hand impose a number of bans and restrictions, including a restrictive case-law. Most of the people interviewed in Sweden were unable to provide a definition of positive action because of its perceived complexity.

In Austria, workshop and interview participants placed greater emphasis upon the benefits of positive action measures. Participants stressed that positive action measures were a gain for everybody and should therefore be taken into account in all sectors of society and for all groups needing it. There was opposition expressed to the prospect of positive action simply providing opportunities for preferential treatment for one or two groups. Rather the approach preferred was to adopt an attitude of openness to who needs which kind of empowerment and at what time. For this process to be effective, creating awareness about difference and discrimination in its structural dimension was considered essential.

In some respects this resonated with attitudes held towards positive action in France. As was highlighted in Chapter 2, positive action was not widely employed or commonly understood in France as a measure for tackling inequality. The lack of familiarity with the concept, we believe, explained why we were unable to attract sufficient interest from individuals working in the French public, private and third sector to attend a consensus workshop. Consequently, in the absence of data collated from individuals about positive action in France, we compared data collated from consensus workshops and interviews held in other European countries with our analysis of positive action in France as drawn from existing literature. As such, the principle of

equality for all within French society and the understanding that, in law, no section of the French population can claim rights as a minority seems to have worked against policies targeting specific ethnic groups designated in term of their origin (see legal analysis of France). Relevant categories for positive action are accepted only to the extent that they rely on neutral criteria devoid of identity content, such as socio-economic considerations. Consequently there are only policies targeting the Roma population — who are not designated by their ethnic group — aimed at accommodating their way of life in terms of housing and education. Positive action for disabled people is permitted, but at present similar action cannot be undertaken for lesbian, gay, bisexual and transgender (LGBT) individuals.

In France, a number of initiatives could be seen as constituting positive action, although they may not have been packaged using this terminology. For example, in 2005, there were plans to introduce large-scale vocational training and support to integrate unemployed people into the workforce, creating regional centres of employment and focusing many programmes and services to the benefit of the long-term unemployed. In addition, under the umbrella of social cohesion, attempts were made to target unemployed, disadvantaged youth and long-term elderly unemployed through apprenticeship and vocational training in the private and public sector. Plans were also made for massive investment in public housing in order to benefit disadvantaged neighbourhoods and provide emergency housing. Similarly, in terms of education, there were plans to concentrate on children in serious difficulty in order to improve equality of opportunity by offering specific support to identified children in disadvantaged sectors and the allotment of specific budgets for schools in designated geographical

sectors. Finally, in the face of de facto inaccessibility of higher specialised elite schools to children of disadvantaged neighbourhoods, one of these schools — the Institut d'Etudes Politiques — has entered into partnership with schools in these neighbourhoods in order to select their best students and create a parallel recruiting system. Since its inception, this scheme has been replicated elsewhere.

Amongst the European countries, Slovakia showed the least understanding of the concept of positive action and issues around equality and equal opportunities were also discussed in very abstract terms. Most workshop participants and interviewees did not possess an in-depth understanding of positive action, in that almost any initiative could be understood or labelled as such, regardless of its goals. Some participants understood positive action as any initiative helping Roma, and identified initiatives such as targeted training, recruitment, scholarships, housing projects and language support. The participants admitted that such measures could address all Roma as an ethnic group, but when talking about concrete examples, the discussion tended to focus on measures which in other contexts would be considered tools for overcoming social exclusion. On the other hand, the participants realised that not only poor or socially excluded Roma face discrimination and that greater attention should be paid to other groups of Roma as well. Slovak organisations felt that the lack of legal provisions on positive action in the past had contributed to this lack of common understanding of the term. They also indicated a need for the government to clarify some limitations in the current legislation and raise awareness of positive action. The fact that it was only introduced in law in 2008 may explain why Slovakia was one of the countries with the lowest number of responses in the survey. It is also important that, for both Hungary

and Slovakia, most programmes which may be considered positive action for Roma are linked to social inclusion policy and general strategies to address this group's situation.

In some of these countries, a negative consequence of introducing positive action within organisations was backlash from individuals who did not fully understand the rationale behind positive action and saw it as 'favouritism' towards particular groups. In the Netherlands, it was felt that positive action was very much connected with quotas and other forms of preferential treatment. As such, preferential treatment aiming to increase the representation of specific groups attracted a mixed response. The importance of the quota system in making women more visible in public services was considered a positive outcome of preferential treatment but, at the same time, it was recognised that there were prejudices towards people who were suspected of having been employed according to a quota system leading to a certain reluctance to come forward amongst people who would be employed preferentially within this system. Some Swedish participants also linked their understanding of positive action to quotas or preferential treatment as a way of reducing disadvantage. Many of the interviewees thought that positive action was often seen as working against the principle of equality and the need to 'treat everyone in the same way' was raised frequently by its opponents. It was pointed out that, in Slovakia, there was a failure to distinguish between positive action and positive discrimination, with some participants admitting to the legitimacy of quotas, even though serious doubts were expressed about their effectiveness. This accords with findings from the survey which show significant confusion about positive action. Overall, 19 % of respondents confused positive action with positive discrimina-

tion. But this level of confusion was particularly high in Austria (48 %), Greece (42 %), Hungary (33 %), Bulgaria (32 %) and the combined eight EU case-study countries (23 %).

4.2. Drivers for positive action

For European countries, a number of factors served as an impetus to implement positive action, some of which were common to several countries. The survey showed that legislation (47 %) featured as the most important driver. In countries such as the UK and Ireland, the legislative provision for positive action had been a powerful incentive to make changes, particularly in relation to disability in Ireland, where the law guarantees the use of quotas. The legislative framework in these countries placed specific duties on employers and service providers to be proactive in ensuring equal treatment to everyone, regardless of difference. In Ireland, nine grounds (gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community) are covered by this legislation, whilst six are covered in the UK (age, disability gender, race, religion and sexual orientation). The survey also showed that, amongst the EU countries, the UK (84 %) and Ireland (83 %) had the significantly highest proportion of respondents with a written equality and diversity policy. Analysis of the documents provided by organisations based in both of these countries, such as mission statements and annual reports, also reflected a commitment to equality beyond rhetoric. At the lowest end, we had Slovakia (29 %), Greece (25 %), Bulgaria (24 %) and Poland (13 %) with equality and diversity policies. Overall, 59 % of the eight EU countries involved in the comparative study had a written policy on equality and diversity.

In Austria, equality legislation was classed as a positive measure per se, owing to its underlying aim of achieving equality of opportunities, remedying deficits and recognising everyone's rights. In contrast to these countries, legislation was not considered to have played an important role in promoting positive action in countries such as the Netherlands, where organisations did not agree with moves towards introducing positive measures and openly disobeyed laws to collect data on the ethnic background of their employees with no sanctions imposed by the government (see legal analysis for the Netherlands).

To a certain extent, participants in the Netherlands believed that, rather than legal pressures, the desire to help others was a more compelling rationale for implementing positive action measures. This was mentioned in line with the ambition to attain a good image and avoid social shame. This was considered to be relevant for public bodies and government departments to a higher extent than for private companies, as they need to represent the diversity in society in the organisation to be legitimised, considering it part of their public duty to act as role models. Recent initiatives in the judiciary to raise the number of judges with a migrant background was motivated by the awareness that *allochtoon* (minorities) were not represented in the judiciary and that this factor could lead to failures in perception, lack of knowledge about structural discrimination and to prejudice influencing attitudes towards clients and even court rulings.

As in the Netherlands, the moral case for positive action was also a major impetus for the implementation of positive action in Hungary, particularly in improving the disadvantaged situation of the Roma community. Similarly, in Slovakia, it was apparent that projects targeting Roma were not designed

under any legal provision or justified from a human rights perspective, but were rather based on an understanding of the poor social conditions which exist within Roma communities.

In addition to legislative requirements, the prospect of improving organisational business performance was seen as a major driving force for the implementation of positive action measures. In response to changes in the population, organisations were increasingly using such measures to create workplaces that represented local communities through targeted recruitment and retention practices. In countries such as Austria, Ireland, the Netherlands and Sweden, participants talked about positive action in the context of good business practice and saw promoting equality through positive action as giving businesses a competitive advantage. The relevance of public image and the public relations aspect of positive action measures were also mentioned. For Sweden and the Netherlands, there was greater emphasis upon the business case in relation to the private sector organisations, where it was felt to be no longer acceptable to present a 'white male team' or to perpetuate a workforce made up of 'blue eyed, blond haired Swedes'. Employing a multi-ethnic workforce was also seen as a way of capturing new markets by attracting a diverse clientele. In contrast, countries such as the UK discussed the need for public sector organisations to become more representative in order to better meet the needs of existing service users, particularly in the health sector. In addition, businesses were driven to comply by the fear of litigation and compensation claims.

In Hungary and Slovakia, positive action measures for Roma were less clear in terms of their incentives and tended to be characterised by mixed motivations. Most positive action measures by private and civil organisations ad-

dressed Roma in general, while some addressed specific concerns of Roma women and many educational and employment training programmes targeted young Roma. Demand for an increasing labour force was compelling enterprises to be much more open to employing Roma, as was the availability of funding for Roma programmes that motivated some organisations to start working with them. It is notable from the survey that many of the organisations based in Bulgaria (84 %) and Hungary (75 %) had set themselves specific targets for service use/customer profile and service delivery in relation to disadvantaged groups. However, the significantly lowest responses for setting specific targets were recorded in the UK (45 %) and Ireland (33 %). This is interesting considering these countries' long histories of equality legislation, particularly in the UK with its positive duty requirements. In terms of equality and diversity targets in service delivery, the highest significant proportions in the EC countries were found in organisations based in Bulgaria (76 %), Hungary (75 %) and Italy (66 %) and with the lowest being Germany at 24 %.

Participants in Slovakia and Hungary talked about the need to combat unemployment, low education attainment levels and the overall substandard housing conditions prevailing in many Roma communities. Again, positive action in relation to Roma involved a similarly strange combination of motives (including perceived budgetary and other threats due to demographic development) meaning that due to higher birth rates amongst Roma families, social inclusion costs will continue to grow unless real change happens (the same high cost of failure to take action).

Participants from the different EU countries also explained how positive action enabled them to imple-

ment their equality policies in order to achieve real practical outcomes. Considerable stress was placed upon the need to implement positive action in order to 'practice what we preach' and 'ensure public confidence in the service'. Further, organisations had established diversity policies and a strong corporate image promoting fairness and equality, which the use of positive action measures helped to reinforce in different ways. Within the UK health sector, positive action strategies were seen as a useful way to build up greater trust in local communities through targeting recruitment strategies and employment accreditation around issues relating to disability ('two ticks'⁷⁰), lesbian, gay, bisexual and transgender people ('Stonewall Diversity Champions'⁷¹), age ('Age Positive'⁷²) and people with mental health problems ('Mindful Employer'). In Sweden, within the higher education sector, increased diversity was seen to 'improve the quality of education' and due to the requirements for policy documents on action measures set by Swedish law, most interviewees spoke about the wealth of policy evidence in support of diversity initiatives. Within Ireland, for some private sector businesses, commitment to their equal opportunities policy was part of their larger institutional strategic goal. In Austria, where acknowledgement of the rising relevance of social responsibility was considered to be high, positive action was used as a tool by management for raising employee satisfaction and efficiency, leading to benefits and opportunities for both management and employees.

Organisations in most countries talked about the close alignment of positive action with their organisational mission and how it enabled

70 http://www.direct.gov.uk/en/DisabledPeople/Employmentsupport/LookingForWork/DG_4000314

71 <http://www.stonewall.org.uk/workplace/>

72 www.agepositive.gov.uk

them to fulfil their objectives more effectively. For example, in Ireland, a number of projects had been set up to meet the specific needs of Traveller communities. In Sweden, companies spoke about equality and diversity as part of their mission and saw clear connections between positive action and their specific work duties, for example the police service. In Hungary, participants also made links between positive action measures, the existence of their organisation and more widely to governmental policy on Roma integration in Hungary.

Having a sense of ownership of a project was also a strong factor that determined its success. In Ireland, commitment or buy-in from senior management was perceived as an added incentive for positive action to succeed. Similarly, in Sweden senior-level management support was felt to be crucial and involvement at the outset from the target group itself was equally important. It was only in the UK, however, that we found evidence of community groups and grassroots organisations who, fuelled by dissatisfaction with the existing status quo, had lobbied for positive action measures and succeeded in setting up specialised services to meet their own needs.

4.3. Support for positive action

Despite some confusion and considerable variation in people's understanding of positive action, the concept received overwhelming support from participants in all the European countries taking part in the study. Nevertheless, this was not unconditional support; it was felt that positive action would only be effective in certain conditions and there appeared to be a considerable amount of consensus between countries as to the nature of these success factors.

For participants from most countries, the availability of resources, including financial resources, were considered to be very important in putting positive action measures into operation. Participants from Austria and the Netherlands were most vocal in identifying a range of success factors and the circumstances in which positive action measures would work most effectively. For them, success would require a positive attitude from those leading the initiative, as well as the development of tailor-made strategies that would vary depending on the target group, the sector and the organisational culture. Reviewing changes of the initial situation in relation to the formulated goal was essential. Empowerment of staff members and a strong commitment of senior managers and other leaders within the organisation were key in driving initiatives. Alongside this, there would need to be awareness of the relevance of discrimination and structural barriers for certain groups in society incorporated within the organisation, which would have to include a clear commitment and awareness at all hierarchy levels, and explicitly at the level of top management, an involvement of all departments of an organisation in the development and implementation of these measurements. To be effective, there would need to be constant discussion about the benefits of diversity which must be an ongoing practice. Otherwise the risk of losing the basic requirement of overall commitment was considered high.

For countries such as Sweden, the Netherlands and the UK, the importance of evaluation for measuring effectiveness was stressed, as well as the need to adopt a learning attitude. Whatever the scale of the initiative, it was felt that positive action could not be undertaken in an ad hoc manner but required careful planning,

critical reflection and realistic outcome measures. Sweden in particular emphasised the importance of producing practical plans, the need for setting certain goals, as well as continual education and training in this field.

Both in Slovakia and Ireland, it was felt that the effectiveness of positive action measures for Roma and Traveller communities respectively was dependent upon a range of factors which had hitherto been inadequately addressed. Although the nature of the projects were not identical, feedback from projects targeting Roma and Traveller communities in both countries highlighted issues which need to be given more attention in planning such projects. These can be summarised as the participation of the communities in the development of positive action initiatives and motivation to improve their position as necessary for positive action measures. This resonates with the general negative attitude towards displayed towards members of the Roma community in Hungary. Similarly, the development of positive action initiatives posed a series of moral questions in Hungary, where Roma projects were being developed by organisations who were attracted by the availability of funding for positive action but did not necessarily understand the needs of Roma communities.

The survey shows that initiatives such as creating networks and forums, training and leadership programmes and confidence/communication-building programmes were most likely to be monitored, particularly with regard to gender, disability and ethnicity. The European country with the significantly highest response above the overall 72 % responses describing the measures instituted as positive action was Austria at 89 %.

4.4. Outcomes and impacts

Despite strong rhetoric about the importance of having evidence-based strategies, it was quite clear that most of the positive action projects based in European countries did not have systematic monitoring systems and output measures in place. Only over a third of the respondents surveyed from the eight case-study European countries stated that they utilised external assessment, and almost half of them relied on anecdotal evidence for assessing the results/impact/effectiveness of their positive action. Despite this, participants were able to provide some sort of evaluation of the success of projects that had been implemented and the kind of improvements they had witnessed.

In Austria, it was felt that positive action had heralded a modified approach to women and disabled people, with specific reference made to a growth of equality policies for these groups. More generally, societal awareness and sensitivity to cultural differences appeared to have heightened in a positive sense. Furthermore, a change of attitudes within organisations was observed, concrete actions had led to a greater understanding of the needs of employees, interaction between employees and channels of communication within the organisations.

In the Netherlands, reflections on the period of ethnic monitoring suggested that this did not seem to have been effective in improving the representation of minority ethnic people in the workplace. However, it was admitted that some benefits had arisen in that the obligation to collect data on the ethnic background of employees had contributed to awareness-raising on diverse backgrounds and on the reality of unequal representation of people with different ethnic backgrounds in companies, in the labour market and in society. Furthermore, it was ar-

gued that implementing strategies to change the recruitment rates within a company would have been and is a time-consuming procedure, so success could have been assessed only after a longer period.

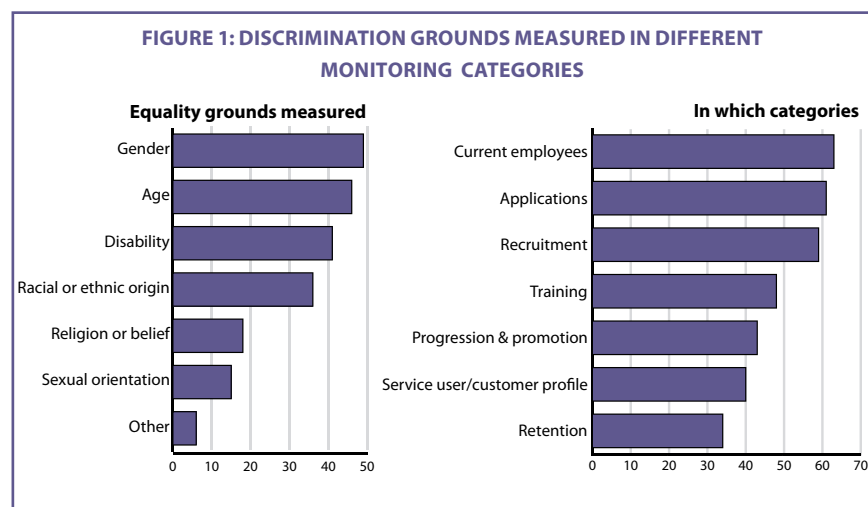
In addition, the practice of positive discrimination in the 1990s, i.e. employing people because of their cultural background with the aim of better understanding the needs and interests of that group, had not proved beneficial. The efforts of Dutch police forces over two decades to recruit members of ethnic minorities led to changes in the ethnic composition of the workforce but also to the creation of the Moroccan, the Turkish and the Antilles brigade, responsible for solving conflicts within their own communities. Unfortunately, this did little to change the culture of the Dutch police service, which had been very much shaped by white male Dutch citizens and served to perpetuate stereotypes and barriers within the organisation. The subsequent high level of attrition led to the conclusion that a better way to promote the attractiveness of an employer for all was to promote the organisation as one that celebrated diversity and equality.

Since then, the capacity to find qualified people from groups that previously were not attracted was considered

to be the most important and most desirable impact of positive action for companies and organisations in the Netherlands. Changes in recruitment procedures have been crucial for reducing barriers and for creating more equal access to employment. Culturally biased tests, traditions to hire people via specific students associations, language barriers or simply prejudice had been influencing the engagement of personnel. Analysis of these procedures, followed by the development and implementation of adapted procedures had changed the scene completely and had led to a more heterogeneous workforce. The creation of networks of certain groups targeted by positive action measures have become independent from their founding objectives and have developed their own agendas, representing company identity in diversity.

Mirroring findings from the workshops and interviews, the survey (Figure 1) also showed that gender, ethnicity and disability were the most likely grounds to be monitored. The survey also indicated that age was being monitored by organisations to a lesser extent but there was little evidence of activities around age in the workshop discussions and interviews.

In the UK, a number of groups were considered to have benefited from



positive action, namely disabled people, black and minority ethnic groups and women (particularly South Asian women). The prescriptive nature of the statutory legislation in relation to disability, coupled with widespread acceptance within society of the disadvantage faced by disabled people, were felt to be significant factors in improving their position. By the same token, it was thought that society would be less likely to challenge positive action set up for this group. Other groups identified as benefiting from positive action were women and black and minority ethnic groups, who were thought to be more visible in non-traditional areas of work. Targeting of these groups was driven mainly by local community needs, government grants geared toward under-represented groups within organisations or internal audit within organisations. For representatives from the voluntary sector, nevertheless, the worry remained that positive action schemes signalled no long-term commitment towards achieving equality. Few individuals felt that the position of lesbian, gay and bisexuals had improved greatly through positive action programmes and transgender individuals were thought to have benefited the least.

On the whole, individuals were not able to provide a lot of information about the monitoring systems they used in relation to positive action. It was apparent that not all organisations felt confident about discussing the impact of their initiatives, owing to a lack of clarity about what their expectations had been from the outset in relation to their respective project outcomes. Within the public sector, there was greater appreciation of the need to provide evidence for the effectiveness of positive action initiatives; without this evidence, there was a danger that organisations would lose momentum to continue using this approach. Hence, positive action ini-

tiatives related to employment were generally perceived to have had a beneficial impact in terms of improving peoples' chances of finding a job (albeit at lower levels) and within organisations, helping to increase their promotion prospects, establishing staff networks and creating opportunities for mentoring. Similarly, in relation to service provision, changes to patients' lifestyles, well-being and access to healthcare services were considered to provide sufficient evidence for the success of patient education through outreach work with black and minority ethnic patients (including recent immigrant communities from East Africa) in the Midlands. These projects tended to be short-term and health-related, targeting specific black and minority ethnic groups. In addition, the possibility of using positive action to introduce alternative psychological therapeutic approaches to treat minority ethnic groups was also being considered as a positive spin-off.

The overall response to positive action in Ireland was favourable but at the same time cautious in light of the absence of evaluation tools and the fact that many projects were in the early stages of implementation. The main beneficiaries of positive action in Ireland were identified as women, the Traveller community, disabled people, minority ethnic groups and the long-term unemployed.

In Sweden, as in the UK, disabled people, minority ethnic groups and women were considered to be the main beneficiaries of positive action through initiatives such as employment training, targeted recruitment and mentoring schemes. Less work had been conducted with lesbian, gay, bisexual and transgender individuals although recognition of these groups was improving through the establishment of networks and forums in the public sector. Concerns have also

been raised with the Roma population in Sweden, especially in relation to employment and education.

In terms of improvements, it was felt that positive action measures had brought about higher levels of sensitivity to the relevance of difference and its implications for inequalities, a change of attitudes and a redefinition of roles within organisations. In addition, there was increased representation of specific groups, lowering of communication barriers and high levels of internal promotion and opportunities for training. Of all the European countries, Sweden appeared to undertake the most established monitoring system for positive action, resulting in detailed evaluations for specific positive action projects. Other types of evaluation included Internet-based evaluation forms that had to be filled by all employees affected, and their results were compiled within the information database. Only a few initiatives did not include an evaluation component.

As noted earlier, positive action programmes in Hungary and Slovakia have targeted Roma communities in both countries and it is possible to draw conclusions on similarities between them. In both Hungary and Slovakia, there was significant focus during discussions on data protection issues, and their impact on the ability to undertake positive action on behalf of Roma. In both Hungary and Slovakia, the collection of ethnic data is only allowed according to strict legal provisions, which are often perceived as making it illegal (this is not the case, but the conditions are strict). Problems are created because positive action measures specifically targeting Roma could be perceived as illegal, and government policy reflects this, with policies on Roma inclusion often referring to specific actions aimed at 'disadvantaged groups' rather than at Roma as an ethnic group. This dis-

counts the historical discrimination which has created the need for positive action measures. In Slovakia, even positive action provisions in the Anti-Discrimination Act refer to positive action allowed on the basis of social disadvantage. Data protection concerns make it difficult to officially monitor and evaluate the impact of positive action measures for Roma.

Positive action measures targeting Roma in Hungary and Slovakia can be clearly and overwhelmingly linked to social policy on Roma inclusion, and only very recently to law-enabling positive action. Most programmes are housed within the government strategy on the Decade of Roma Inclusion. The early national strategies for improving the situation of Roma and their financing are also linked to this government strategy. Thus, government policy can be seen to drive positive action affecting Roma in both Hungary and Slovakia, while at the same time strangely limiting it.

The linking of positive action for Roma to government policy also clearly leads to discontinuity in programmes, which end before the overall goals have been achieved. This reflects the negative impact of changing government policy on real improvement resulting from positive action measures (especially those implemented by the public and voluntary sectors). Most measures considered to be positive action for Roma in Hungary and Slovakia are explicitly linked to tenders and projects, which are time-limited and not necessarily renewed (in fact, often not). Many are financed by the government (and these sources also change with policy shifts), but also by private foundations, which also have changing priorities driving the types of programmes implemented. This is true to a lesser extent in the private sector, where positive action measures are supported by company resources, although positive action in

the private sector appeared to be less prevalent.

In both Hungary and Slovakia, there was significant discussion on the negative reaction by non-Roma to these programmes, which are perceived to benefit Roma only (as opposed to wider society). This reflects both widespread negative and prejudiced attitudes towards Roma in both countries, but also a lack of understanding of positive action in general. The negativity can be linked to severe deficiencies in information campaigns and awareness-raising on positive action in both countries (which is also a quite new concept in both countries).

In both Hungary and Slovakia, it can be seen that while complex programmes are needed to make adequate improvements in the situation of Roma, this is not what is implemented in reality. Isolated programmes exist which may bring improvement in one area, but which in the end bring negative results in other areas (see case study for housing schemes in the country report for Hungary) because the full consequences of the programme were not thought through adequately.

In terms of monitoring of these projects, many implementers of positive action for Roma in Hungary were unclear how to measure their impact. Indeed, a number of programmes were not measured in any systematic way, except where specifically required by the fact that many programmes implemented by local authorities in Hungary target socially disadvantaged groups rather than Roma specifically. The most successful positive action measure in Slovakia so far was thought to be the programme of Roma teaching assistants, which received the highest support in terms of being a successful programme, mainly because it has existed for several years and some progress in the area of education is visible.

The majority of countries did not discuss future plans for positive action, which might in part be explained by the fact that within the workshops we did not ask them explicitly about their intentions to continue or develop. Findings from the interviews, however, suggested that organisations were keen to learn about best practices and to receive suggestions on evaluation of positive action measures initiatives already in existence. Notably, in Sweden, some organisations talked about enlarging the scale of their activities and expanding them to other fields and other disadvantaged groups. Some Swedish universities were keen to include social class and sexual orientation as part of their positive action work but were prevented from doing so because of resource limitations. A number of institutions also mentioned that, as of 2009, there was a need to include age as an area of concern, because of the new anti-discrimination law, yet admitted not to knowing how to deal with it.

In the survey, participants from the European country with the significantly highest response above the overall 55 % of the study sample planning future positive action activities were the French at 78 %. This is surprising considering the difficulty faced in attempting to arrange a workshop in France as a result of the different perceptions of the utility of positive action in different constituencies. The European countries with responses lower than the overall value in terms of future planning for positive action initiatives were the UK (47 %) and the Netherlands (35 %).

To conclude, there was clear joint opinion that only well-designed, complex, adequately financed and participative initiatives would bring some significant impact to Roma populations. Unfortunately, in reality this is still far from the case, particularly in Slovakia.

4.5. Barriers to positive action

A number of barriers were identified as inhibiting the impact of positive action, some of which were common to several countries, whilst others were more specific to a particular situation.

Disclosure of potentially sensitive information was one such issue that arose in relation to different grounds, for example, in Ireland in relation to disability and in the UK concerning sexual orientation. The survey also suggested that there was reluctance on the part of organisations to ask questions about these issues both to potential and current employees. Disability monitoring was undertaken by only 26 % of organisations whilst sexual orientation was monitored by a mere 10 %.

Negative attitudes held by mainstream society as well as stereotypes and prejudices perpetuated by the media were thought to problematise positive action and render any positive action outcomes as tokenistic. In this respect, whilst Swedish society appeared to be relatively enlightened when it came to gender equality and measures promoting it, Africans and Middle Eastern Muslims, as well as persons with disabilities, were often relegated to the bottom of this hierarchy among disadvantaged groups. Additionally, in Sweden, positive action was not understood as bringing any benefits, and an awareness of its worth was lacking. Sometimes the interviewees had no support from colleagues, or met opposition from the management, who regarded their equality obligations as mere formalities and preferred efforts only to the level of satisfying the legislation. Some employees are reported to believe that they only need to fill up diversity quotas to have the 'immigrant alibi'; there is also a problem of closed structures such as the police force, where there is no external re-

ruitment and which makes little or no allowance for change. On the other hand, there was also little trust in Swedish institutions by some communities, such as Roma or immigrants, whose past experiences made them mistrust the police and the judiciary, or who had had negative experiences with police in their own countries.

Swedish legislation was also mentioned by study participants as an obstacle, as it bans data collection, making the assessment for positive action more difficult, unlike some other countries. Lack of resources in terms of personnel, finances and time were perceived as another important stumbling block. Positive action is sometimes observed as an additional obligation; while many universities and large companies have designated staff members in charge of equality issues, this is not the case with many smaller companies and institutions, where staff members are often additionally burdened with diversity or equality issues. In the field of recruitment, some interviewees complained that their companies 'fire more than hire', creating an environment in which it is very hard to recruit more women or minorities. It was also emphasised that most positive action measures are undertaken as projects, and that there is a need for long-term commitment, as achievements take time and effort. Money was also often a factor, as positive action is also considered costly; in the case of positive action for persons with disabilities, for instance, enabling physical access was perceived as involving significant investment.

In France, progress in the field of positive action has been hampered by the failure to collect monitoring data on a routine basis. It has been pointed out that although there is no general principle forbidding the collection of data based on ethnic origin, religion, age, disability or sexual orientation, authorisation for this is required in most

cases. National governmental statistical agencies refuse to collect data on race and ethnic origin in the national census except where it concerns the nationality and the origin of first-degree ascendants. Therefore, racial and ethnic statistical indicators allowing evaluation of the impact of policies, or created for monitoring purposes, were not available.

In the Netherlands, barriers were identified that related more closely to behaviours of the target group rather than those involved with targeting. It was felt that advertisements addressing preferential treatment were not effective, since people did not want to be defined as 'quota people'. Participants felt that actively approaching specific target groups discouraged people from applying for jobs to avoid the stigma of being labelled the 'affirmative action candidate'. To counteract these responses, it was deemed necessary to create a climate of approval within an organisation where people felt welcome and acknowledged regardless of their background and indeed because of their various backgrounds.

In relation to positive action schemes targeting Roma in Slovakia, a number of problems were identified that limited their effectiveness in improving training and employment opportunities and in some instances possibly even reinforced segregation. The spontaneous and short-term nature of projects has done little to promote the progress of initiatives and advance the position of Roma at the national, regional and local level. The dearth of monitoring and evaluation prevents efficient public policy cycles, in which lessons learned influence future policies. From the perspective of NGO participants, discontinuity was grounded in the system of fundraising. It was made almost impossible to develop programmes and activities with longer-term goals because of the requirement of funders for more

innovative programmes, and at the same time they were rather reluctant to support existing services (for example, Roma health assistants or Roma teaching assistants).

As was seen in Hungary, attitudes of the majority population towards the

Roma population have not helped to foster positive relations between them. Roma clients have often been blamed for not wanting to collaborate with service providers who have been quick to label Roma as unreliable. A number of well-intended programmes were blocked by a very high level of rejection

of the majority population in Slovakia. This was notably most visible at a local level, where the actions of a mayor or an NGO have been opposed by the local non-Roma population. However, even at the national level, there is evidence of low levels of political will to engage effectively in Roma issues.

4.6. Summary

The comparative analysis of positive action as understood and implemented within the European Union has highlighted a number of significant issues. To varying degrees, positive action has been welcomed as an effective means of redressing disadvantage suffered by specific groups within society. Participants from many countries were opposed to the prospect of preferential treatment and the notion had clearly caused resentment and hostility, rightly or wrongly, towards the use of positive action initiatives. For those who were supposed to benefit from positive action, the perception that they were being given an unfair advantage was also a cause for concern. In response to these kinds of tensions some countries, such as Austria and the Netherlands, emphasised the importance of positive action measures as part of a broader equality strategy rather than as a stand-alone measure.

Across the eight countries, positive action measures in existence tended to focus upon providing training and improving employment opportunities rather than service delivery. In terms of outcomes, disabled people, women and minority ethnic groups appear to have benefited the most from positive action, with legislation and social attitudes playing an important role in promoting initiatives to benefit these groups. Increasingly though, in countries facing demographic change, there were strong financial pressures and policy drivers forcing organisations to modify the way in which they recruited staff and delivered services. In the case of some groups, this was helped by the availability of grants but, generally, limited resources constitute a major barrier to implementation.

Despite support for positive action measures, progress in this area has been hindered by failure amongst organisations to collect information to inform further work. For example, the fact that not all organisations are monitoring their workforce by the different discrimination grounds means that the evidence base to underpin any strategy will be weak. This is not helped by the fact that, as we have seen with grounds such as disability and sexual orientation, some individuals might not be willing to disclose information in an environment where they might be subjected to discrimination and made to feel different. This inability to collect and monitor data systematically was also noticeable amongst organisations in which positive action schemes were operational. As a result of this, although organisations were clear about the outcome measures needed for the success of their project, most of them were unable to provide any quantitative evidence to reflect the level or indeed lack of progress made. Instead, organisations tended to rely upon 'soft' measures, which indicated a general sense of improvement, greater sensitivity towards the needs of marginalised groups and improved understanding of difference.

5 Perceptions of positive action in Canada, the United States and South Africa



5. Perceptions of positive action in Canada, the United States and South Africa

In this chapter we use evidence from the online survey, documentary analysis, consensus workshop and individual interviews to present an analysis of positive action measures in Canada, the United States and South Africa. We provide a detailed analysis of the perceptions of positive action as practised in organisations within these countries, including the type of measures that individuals considered constituting positive action, drivers for positive action as well as factors deemed to contribute to the effectiveness of positive action measures. We also examine how organisations measure the impact of positive action projects and identify groups that appear to have benefited the most and least from targeted initiatives, and the main barriers that have hindered progress in implementing positive action initiatives and outline plans regarding positive action measures for the future. In these countries, the term affirmative action is used to refer to programmes designed to remedy past and present injustices targeted at marginalised groups in society. We will therefore use the term affirmative action interchangeably with positive action in this chapter.

5.1. Understanding of positive action

While the conceptualisation of positive action varies widely across countries, some broad generalisations can be made. Most participants in the country workshops generally agreed that affirmative action constitutes a set of specific measures to redress past or present discrimination targeted at particular groups that have been marginalised within society. There were differences, however, in terms of the perception and implementation of positive action measures, and the legislative and policy basis for these measures across countries. Unlike Canada and the United States, which have a long history of affirmative action, in South Africa it has a very nascent history; hence it presents an interesting contrast with the North American countries. Participants in South Africa described their experiences with intense emotion, which was reflected in the language used to explain their understanding and engagement with affirmative action.

In South Africa, owing to the legacy of apartheid and segregation among different racial groups, affirmative action is well received as a policy, though there were misgivings about its implementation. Support for affirmative action is mirrored in the legal framework of South Africa. Affirmative action was introduced after the dismantling of apartheid, by the subsequent government of South Africa, to redress the injustices and racial imbalances perceived to have been the result of the systematic impact of apartheid in the country. It was believed that affirmative action would ensure that the formerly disadvantaged population (also regarded as designated groups in Section 1 of the Employment Equity Act No.55 of 1998 (Department of Labour Republic of South Africa, 2008)) of South Africa enjoyed the same benefits and opportunities guaranteed for all racial groups in the post-apartheid Constitution.

Similarly, there is a stronger legal backing for affirmative action in Canada in comparison with the United States. In

Canada, the term ‘employment equity’ is used in an attempt to distance its positive measures from the hard-core affirmative action reform (e.g. quotas) in the United States, which in effect is synonymous with positive discrimination (Bacchi, 2004). In Canada, affirmative action is enshrined in the constitution, which confers equal rights on every individual as explicitly stated in the Canadian Charter of Rights and Freedoms that ‘Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national and ethnic origin, colour, religion, sex, age or mental or physical disability’⁽⁷³⁾.

In the United States, there is a close association of affirmative action with quotas and other forms of preferential treatment within the consciousness

⁷³ *Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c.11*

of the population. As such, preferential treatment aimed at increasing the representation of specific groups has often attracted a negative response in the United States. Here, the majority of the participants expressed their understanding of affirmative action as a set of strategies used, mostly by employers and educational institutions, particularly institutions of higher education, to provide equal opportunities and fairness related to obtaining employment or admission to universities and colleges. In the United States in particular, affirmative action is negatively portrayed in the media as a means of giving opportunities to undeserving and unqualified people. This perception is rife and literature supports the claim that affirmative action is exploited politically in the media to undermine its value.

Although the understanding of affirmative action in Canada is based on experience within a work or organisational context, there was a general consensus that 'positive action is ensuring equal access, full participation and advancement in all aspects of Canadian society: social, political, economic and cultural'. In addition, there were other sentiments, involving the need for a strategic, thoughtful approach to overcome historic barriers and address systemic change. There was some discussion about the confusion around the terms 'affirmative action' and 'positive action', as there are several different governing bodies, policies and legislative documents that impact on requirements and expectations around these issues. Some of the various legal groups and documents outlined in the legal analysis include the Employment Equity Act, the Ontario Human Rights Code, municipal legislation and organisational policies. There was also some discussion about the fact that in Canada there are no quotas, but there are goals set for specific minority groups and in relation to the difference between the terms

'equal' (treating people the same) and 'equity' (treating people fairly). Whilst participants in the Canadian workshop frowned at any reference to reverse discrimination, workshop participants in South Africa and the United States described affirmative action as measures to reverse discrimination.

In response to questions around understanding of positive action, the survey suggests that respondents from all non-EU countries combined were significantly less (9 %) likely to confuse positive action with positive discrimination. Interestingly, none of the 18 survey respondents from the United States evidenced this confusion. This finding contradicts the literature (Bacchi, 2004) which automatically links positive discrimination to affirmative action in the United States and participants' views during the workshops. It is to be noted that the contrast between the survey and workshop findings is indicative rather than summative, owing to the vastly different context and variations in numbers of participants from the non-EU countries who participated in the survey; 70 of the total respondents, representing Canada 35 (5.5 %), the United States 18 (2.8 %) and South Africa 17 (2.7 %), respectively.

5.2. Drivers for positive action

There was a general consensus during the workshops in most countries that legislation was the key driver for positive action measures and, not surprisingly, legislation was ranked the highest driver in the survey responses. Legislative provision is a powerful driver for affirmative action, particularly in Canada and South Africa, and to a lesser extent in the United States. As shown in the survey data, 71 % of respondents from these non-EU countries reported having a written equality and diversity policy.

Other drivers included business case, corporate social responsibility, moral/ethical consideration, leadership and policy. It needs to be emphasised that these drivers differed in priority according to the following dynamics: participant pool, context, sector and country. In Canada, the main impetus for affirmative action is business case. This consensus was discussed in the context of addressing the talent shortage that is developing in the Canadian labour market and ensuring that staff reflect the racial and ethnic complexity of society. In addition, policy response to regulations emerged as another driver for implementing positive action. Whereas in large organisations, employers are mandated to employ positive measures under the Employment Equity Act, in smaller organisations, policies such as anti-racist and mission statements which embed the business case are utilised.

The impetus for affirmative action that emerged from the United States workshop range from the demographic imperative, grassroots efforts, civil rights law aimed at combating segregation and business case. While legislation played a role, it was not significant compared to Canada and South Africa and, to a large extent, this may be due to the flexibility in the way affirmative action programmes are implemented across institutions and sectors. Many described changing contexts, such as the 'changing complexion' of the nation, in other words that the United States was becoming more diverse and the 'old ways' were not working as well as in the past. They stated that 'grassroots' efforts from the surrounding communities could be driving affirmative action, so that organisations represented the surrounding communities that they served. Organisations that appeared more diverse or hiring diverse people would also attract more customers from the local community. Others discussed the historical context as a driver of affirmative action

or positive action. An educator stated that, previously, African Americans had been excluded from schools and higher education.

Leadership also emerged in Canada as a key driver, as evident in the quote from a workshop participant: 'People will say that it's one of the most diverse teams they've ever worked on. The two top leaders [interviewee and her supervisor] both come from a place of advocacy and a professional knowledge and experience, background in this work, so a very different, deliberate and conscious effort to enhance diversity. There is a difference between having mandates and goals. The only thing that works is if the leadership is walking the talk'. Besides legislation as the key driver in South Africa, a number of moral/ethical considerations were identified as essential drivers. These included justice, fairness, inclusiveness, emancipation and grassroots agitations as the impetus for affirmative action.

In terms of the drivers for positive action among survey respondents, not surprisingly legislation ranked the highest. This is quite similar to the responses in the workshop where legislation was the greatest driver predominantly across countries. However, a closer look at the survey data suggest that factors such as 'internal consultation', 'good exemplar' and 'work with stakeholders' ranked equally highly. Business benefit ranked quite low in the survey responses. On the other hand, the workshop responses included business case as a high lever for positive action programmes, in addition to a core of other drivers such as organisational mission/vision, ethical/moral dimension and corporate social responsibility. Whilst the findings in the survey and workshop might have yielded different and sometimes overlapping results, we need to emphasise that methodological nuances potentially influenced the responses. In the

survey, a finite list of options was given and respondents had to align their responses with the choice given. As will become apparent in the analyses below, this is a recurrent dynamic, again mainly resulting from sample size.

5.3. Support for positive action

Findings from the survey responses and workshop yielded divergent and sometimes overlapping results. The following factors were ranked in the order of priority as providing support for positive action activities amongst survey respondents: strong individual commitment from participants; leadership and senior management support; positive feedback from services users/customers; broad support from employees; and support from line managers. For the workshop participants, support for positive action included all the survey responses as well as legislative support, corporate responsibility and financial resources, amongst others. In Canada, the United States and South Africa, support ranged from legislation, leadership, demographic imperative, corporate social responsibility, statutory agency and mission of organisations. Whilst the findings in the survey and workshop might yield different and sometimes overlapping results, we need to emphasise that methodological nuances potentially influenced the responses (similar to the above question on drivers for positive action). For instance, with this particular question, the survey respondents were given a list of finite options to choose from; by contrast, the workshop participants had to identify support without being limited as to the choice of responses to tick.

5.4. Outcomes and impacts

Many participants believed affirmative action to be effective in providing opportunities for groups who have

previously been discriminated against or treated unfairly. However, there were problems associated with implementation of affirmative action. In the United States, the problems ranged from unintended consequences of the affirmative measures, negative attitudes towards affirmative action, hostile political climate and misinformation to media manipulation. In South Africa meanwhile, implementation had been fraught with negative stereotypes, stigmatisation, lack of proper oversight and malpractice. A poignant reminder of the problems associated with affirmative action was captured by a participant who compared the consequences of affirmative action with the apartheid system. In both cases, casualties were left behind as a consequence.

In Canada, some participants recommended that in order for affirmative action to be effective it needed to be done alongside broader normative change and supported by institutions; affirmative action required buy-in from leaders (senior management) within organisations and in some cases compensatory incentives for it to be successful. Affirmative action also needed to be part of the organisation's larger corporate strategy in order to work. In cases where positive action had been a success, one participant said, 'It means commitment from the top. Unless the CEO and top executives get it as their project it won't happen. If you don't have that, it's very difficult to go further.'

Findings in the survey suggest a surprisingly different dynamic in terms of the outcome and impact of positive action. While the measures used in the workshop to evaluate outcomes are mostly qualitative, the measures used in the survey are quantitative and measured by the number of respondents. However, findings from the workshop can be quantified from the consensus statements arrived at

by participants. The survey findings revealed that intangible factors such as 'raising awareness of equality issues in the organisation', 'improving the reputation of the organisation' and 'enhancing the confidence of the participants' ranked highly amongst the outcome and impact measures; other factors that ranked highly among workshop participants, such as 'workforce representation or demographic imperative', 'better financial results' or 'business case' did not rank highly among survey respondents.

When asked which groups benefited the most from affirmative action in the three countries, the responses were consistent across the non-European countries in so far as ethnic/racial minorities and women were concerned. In the United States, the impact is mostly felt by women and all minority ethnic groups, particularly in terms of job progression to leadership roles within organisations, enrolment numbers of Hispanics and African Americans in higher education and further education institutions. In South Africa, the participants were keen to stress the benefit derived from affirmative action by 'the kingmakers' further described by the participants as the dynasties, politically affiliated members or families of managers. In South Africa and the United States, LGBT and disabled people were seen to have benefited the least from affirmative action, as they are still poorly represented in the working population. This was rather surprising given the robust disability legislation, in particular Americans with Disabilities Act (ADA) and Individuals with Disabilities Education Act (IDEA). However, in Canada affirmative action measures were deemed to have had a positive impact on these groups due to 'a gay senior manager championing the cause internally' and systematic implementation of accessibility strategies for disabled people.

5.5. Barriers to positive action

A number of barriers were identified by participants as hampering their efforts to implement positive action. In general it was felt that lack of proper education on the wider benefit of affirmative action in society and misinformation from the media led to negative attitudes about affirmative action as is the case in the United States.

A lack of clarity and ambiguity in legislation was also thought to undermine the success of affirmative action programmes. Exploitation of the benefits and rationale of affirmative action for political gains were seen as serious challenges for affirmative action programmes and in some cases resulted in unnecessary litigation.

There was consensus that affirmative action needed to be part of an organisation's larger corporate strategy in order to work. Some argued that if affirmative action was not mainstreamed as part of a broader normative change and supported by institutions with proper mentoring and training, it could even be counter-productive. Lack of buy-in from senior management within organisations and in some cases lack of compensatory incentives also had the potential to affect the success of affirmative action. As illustrated in South Africa, participants felt that some beneficiaries were not well equipped or qualified to assume responsibilities for jobs. This resulted in a 'brain drain' and allegations of reverse discrimination, as former post-holders were expected to take on jobs that should have been undertaken by unqualified colleagues.

The role of targeted groups was also thought to play an important role in terms of the success of projects. Self-advocacy and visibility by members within targeted groups was seen as advantageous in furthering the aim

of affirmative action programmes. Hence, in Canada we saw examples of the LGBT community taking active ownership of specific schemes. However, the survey results show that organisations from non-EU countries were significantly less likely (36 %) than overall (51 %) to have equality and diversity targets in service delivery, with an even lower likelihood in Canada at 26 %.

In contrast to the barriers identified in the country workshops, the survey found a strikingly high percentage of total respondents citing factors such as lack of money and time as the major barriers to positive action measures. Legislation, support from line managers and resistance from employees also ranked quite low in terms of barriers to positive action. These differences between workshop and survey findings have to be treated cautiously, owing to sample size issues discussed in the methodology section.

5.6. Summary

While the term 'affirmative action' had very divergent meanings depending on national contexts, there was an overwhelming consensus that such a programme was designed to remedy past and present injustices. To a large extent, the different meanings were informed by national legislative and policy underpinning. For example, in Canada affirmative action is very human-rights centred. In spite of the consensus around the meanings of the term, there were some instances in South Africa where inappropriate behaviour and malpractice seriously undermined the effectiveness of affirmative action programmes. The vast majority of participants agreed that legislation was the key driver for affirmative action programmes. Other drivers in close competition were business case (particularly in Canada), demographic imperative, policy and leadership. In spite of its benefits, implementation was fraught with problems, such as negative attitudes towards affirmative action initiatives, media manipulation, legislative ambiguity, lack of self-advocacy, lack of adequate finance, negative stereotypes/stigma and lack of proper oversight.

6

Positive action measures across different discrimination grounds, organisations and sectors



6. Positive action measures across different discrimination grounds, organisations and sectors

In this chapter we present an analysis of the perceptions of positive action held by respondents from all the countries participating in the survey, focusing specifically upon differences across discrimination grounds, sectors and organisation types. This chapter will also make reference to workshop findings and policy analysis. The chapter begins by describing the context of equality and diversity in the participating organisations, understanding of positive action, factors influencing its practice, the support available to sustain it and the barriers to its successful practice. We report on how organisations measure the impact of positive action projects and provide examples of positive action being applied in participating case-study countries.

6.1. The context of equality and diversity

As evidenced in the earlier sections, participants emphasised the need for positive action measures to be part of an overarching equality and diversity strategy in any organisation. We considered by way of context whether organisations had a written equality and diversity policy and what variations might exist between sector and organisation type. The survey data showed that almost half (49 %) of the organisations contacted had a written equal opportunities policy, though this varied considerably between demographic groups. Organisations with 5 000 employees and over and representing the public sector were significantly more likely to have a written equality and diversity policy (81 %) than those with fewer than 10 staff (24 %) and that represented voluntary sector organisations. Whilst respondents from the public sector reported more likelihood (59 %) of having a written policy, there were variations between areas of work, with health organisations (79 %) and colleges/universities (64 %) more likely than voluntary sector social-care organisations (38 %) to have a written equality and diversity

policy. To some extent, these distributions were not surprising, as they mirrored the trend that public sector organisations will have an obligation to produce a written policy.

It was widely agreed by participants in the study that equality and diversity monitoring enabled employers to check the effectiveness of their policies and procedures and was required as a precursor to the development and implementation of targeted strategies. The centrality of monitoring in the successful implementation of positive action reflected a clear hierarchy with gender being the most widely monitored (49 %) and sexual orientation (15 %) the least monitored ground. Those who did monitor their equality and diversity activities did so primarily for current employees, followed by monitoring of job applicants. Almost half (48 %) of organisations that actively monitored these diversity areas published some or all of this information.

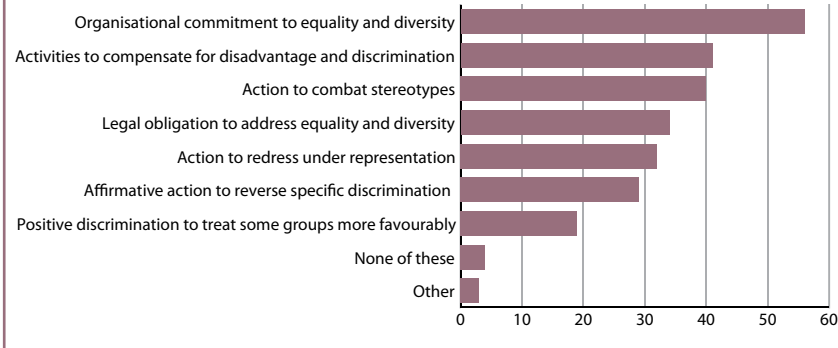
Whilst 55 % of organisations in the survey had specific targets on service user/customer profile with respect to equality groups, local authority (75 %) and social-care organisations were significantly more likely to have

these targets. It was rather surprising to note that organisations with a smaller employee base (11–25) were more likely to have specific targets on service delivery at 81 %, above an overall 51 % response rate by surveyed organisations, as compared to organisations with a large number of staff (5 000+) at 37 %.

6.2. Understanding of positive action

As illustrated in Figure 2, when asked which statement they thought best described ‘positive action’ as understood in their organisation, the only statement which over half (56 %) of the sample agreed upon was ‘organisational commitment to equality and diversity’. Around 40 % agreed on ‘activities to combat disadvantage and discrimination’ and ‘action to combat stereotypes’ and over a third chose ‘legal obligation to address equality and diversity’; ‘action to redress under-representation’ and ‘affirmative action to reverse specific discrimination’ to describe positive action. The variations between groups that confused positive action with positive discrimination were mainly on a country basis and this has been discussed in Chapters 4 and 5.

FIGURE 2: DESCRIPTION OF POSITIVE ACTION AS UNDERSTOOD IN ORGANISATIONS



Overall perception of the benefits of positive action was assessed at the beginning and at the end of the survey; the second time, the wording of the question asked respondents to rate the statement ‘taking into account the definition of positive action used in this survey.’ Figure 3 shows that all of the ratings increased the second time, with an overall increase of about 3 % in the proportion agreeing. The ordering of the responses were the same. This indicates that a clarification of the nature and purpose of positive action led to a better understanding of its actual nature. This may have generated a more positive response or attitude to positive action and helped respondents to a clearer perception of its utility. Despite the apparent confusion over the nature of positive action, clearly the majority of the respondents have a favourable attitude towards it. If clarification increases a positive response amongst respondents, it is at least plausible that awareness-raising amongst those who currently have little understanding of positive action would have an even greater effect. A consistent finding was that respondents at the chief executive/managing director (CE/MD) level or equivalent gave higher ratings to certain of the items: positive action [would be/is] [can be] recognised as valuable by this organisation

(average 76 % before and 85 % after completing the survey) was rated by CE/MDs at 90 % before and 94 % afterwards. Positive action is one of the strategic aims and objectives of the organisation (average 69 % before and 73 % afterwards) and was rated by chief executives at 82 % before and 88 % afterwards. Voluntary organisations and NGOs also tended to give slightly higher ratings.

6.3. Drivers for positive action

In the general sample, the most significant driver for their positive action initiative was legislation (47 %). There was a reasonably even response covering the other identified drivers ranging from 17 % for influence from funding bodies to 36 % for internal consultation (see Figure 4). Any action targeted towards encouraging organisations to develop positive action initiatives needs to consider a wide range of potential influences whose relevance may differ according to organisation type.

FIGURE 3: PERCEPTIONS OF BENEFITS OF POSITIVE ACTION AT EARLY AND LATER STAGES OF THE SURVEY

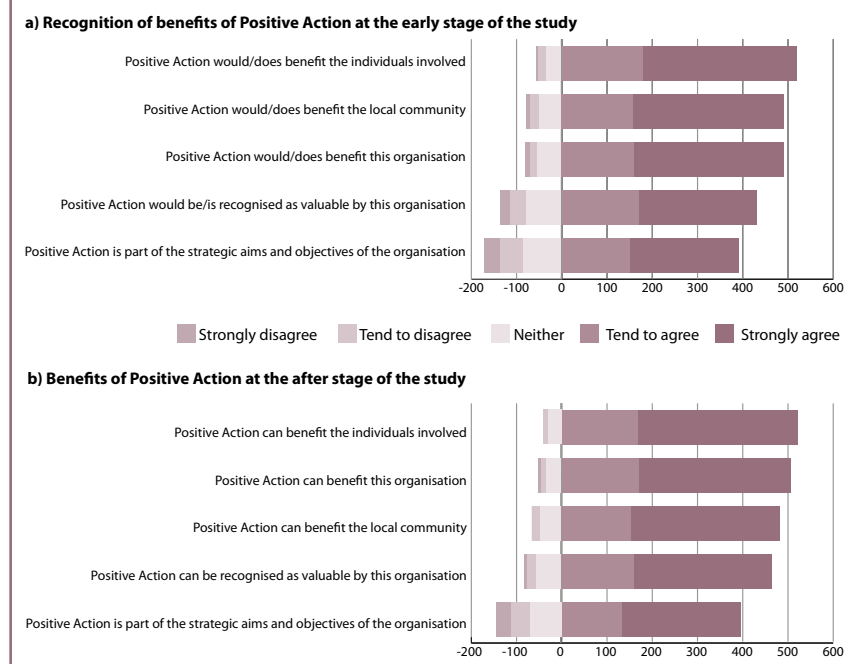
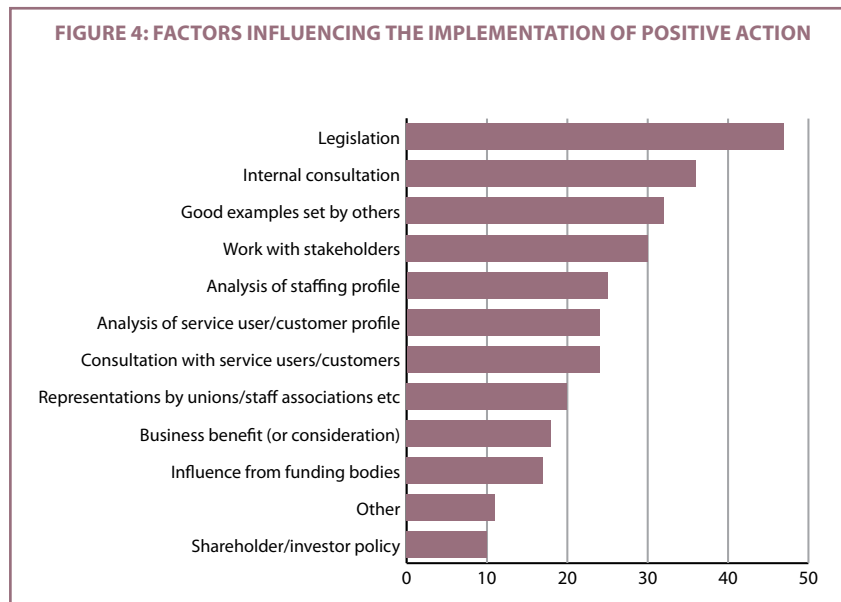


FIGURE 4: FACTORS INFLUENCING THE IMPLEMENTATION OF POSITIVE ACTION



6.4. Support for positive action

Figure 5 shows that the great majority of participants (85 %) agreed that there was ‘strong individual commitment from participants’. This figure was a little higher for voluntary organisations and NGOs, at 88 %, but lower in the public sector (78 %) and in large organisations with between 1 000 and 5 000 employees (73 %). Some 78 % agreed that there was ‘leadership and senior management support’; those at CE or MD level were more optimistic about this at 90 %, those in the public sector were lower at 70 % and colleges and universities lower still at 60 %. Those who gave their current role as working in equality and diversity were also less sure of support from leaders, rating this at 64 %. Three quarters (76 %) agreed they received ‘positive feedback from services users/customers’. The only significant difference in this rating was between sectors: with the voluntary sector/NGOs rating it higher at 81 % and the public sector lower at 70 %. Slightly lower numbers (72 %) thought there was ‘broad support from employees’. Again, this was higher for the voluntary sector/NGOs (80 %) and lower in the public sector (60 %), but also markedly

lower for colleges and universities at 48 %. The lowest rating was for ‘support from line managers’ at 69 %. If this is a problem, those at CE or MD level seemed unaware of it since their rating was 82 %. Public sector organisations, and colleges and universities were again lower than average at 62 % and 35 % respectively. People working in equality and diversity also rated this lower at 59 %.

6.5. Barriers to positive action

Lack of money and lack of time were the most frequently cited barriers to positive action (46 % and 37 %

respectively). Reluctance of target groups to participate, lack of support from line managers and resistance among employees were cited by fewer than 20 % of respondents. A relatively low proportion (13 %) of respondents thought that substantial resistance or cynicism among employees was a significant barrier. Given the selective nature of the sample, we could speculate that this potential barrier may be more significant in the wider population. Based on previous discussion around the definition/understanding of positive action, this problem could be tackled by providing better information and explanation to the general public regarding the nature of positive action.

6.6. Outcomes and impact

Figure 6 below shows how effective positive action is seen to be in various areas. It is of note that the highest ratings are given to more intangible items such as awareness of issues, the organisation’s reputation and people’s self-confidence, all of these being endorsed by more than three quarters of respondents. Positive action’s potential contribution to business success was less well recognised, with only a third (32 %) agreeing that it translated into ‘better financial results’. There were generally higher ratings by those at CE/MD level, and lower in the public sector, especially colleges and universities.

FIGURE 5: SUPPORT RECEIVED FOR POSITIVE ACTION

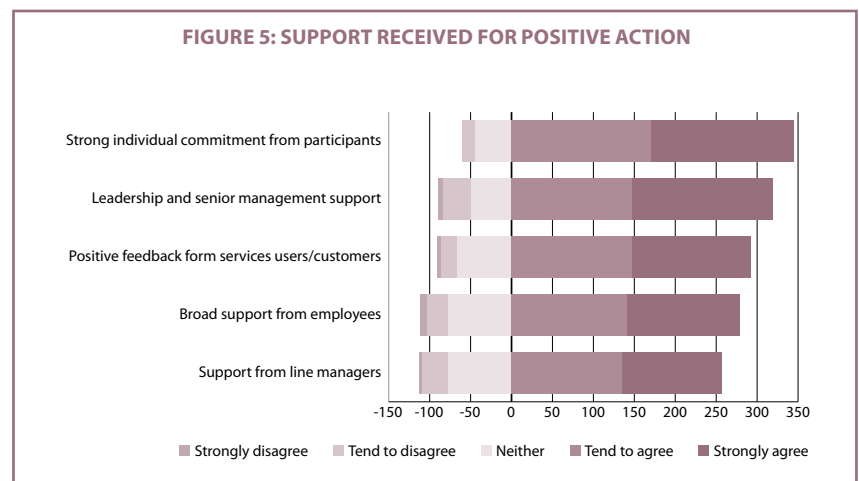
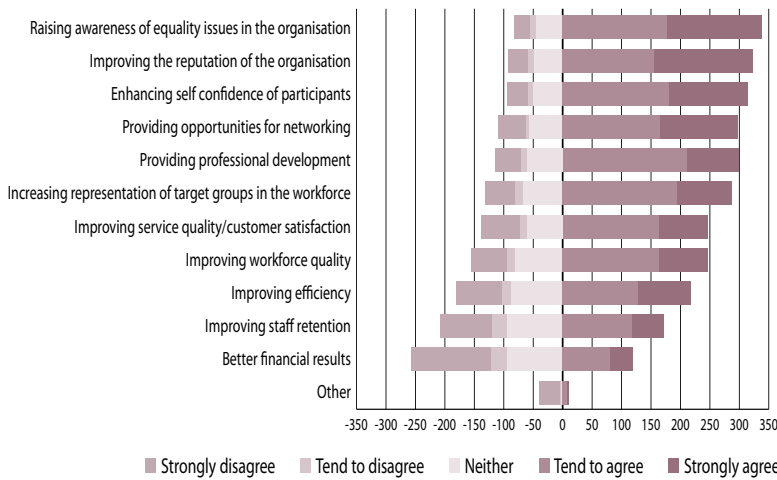


FIGURE 6: EFFECTIVENESS OF POSITIVE ACTION



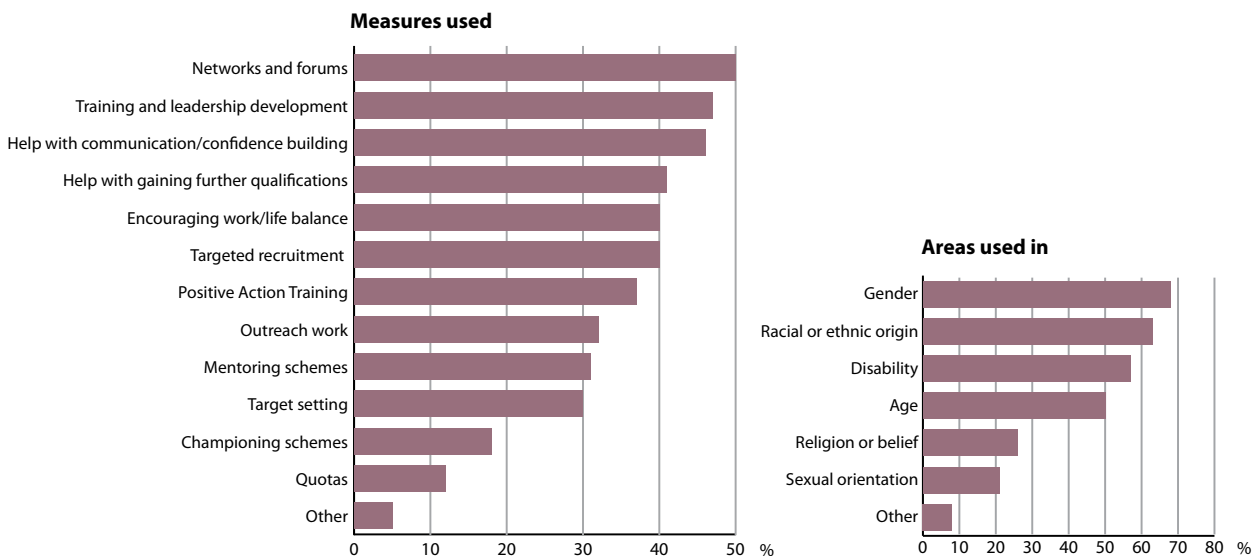
area of religion or belief and one fifth addressing sexual orientation. Of the types of positive action identified in the questionnaire, there was a fairly even spread of responses indicating that multiple measures were commonly used across the discrimination grounds. When asked when positive action measures were first introduced, almost half of the respondents (48 %) had introduced such measures more than five years previously, 40 % between one and five years, and 8 % under a year before the survey. The overall picture mirrors the findings from the workshops and interviews as shown in Figure 7. However, the only discrepancy arises in relation to the creation of networks and forums which did not appear to be widely cited examples of positive action in the case-study countries. This may have been because only 10 countries participated in the consensus workshops and interviews compared to 32 countries that took part in the survey. That said, we were surprised to note that no country offered examples of positive action based around religion or belief.

A broad range of measures were reported to be used by respondents, and no single measure showed a response greater than 40 %. Only 16 % had an external assessment and only 26 % employ targets/performance indicators. The other measures involved periodic or ad hoc reviews, staff and user consultation and anecdotal evidence, which by their nature are likely to be attitudinal rather than focused on measurable outcomes.

6.7. Positive action in practice

Overall, 72 % of the respondents said that their organisation had some kind of initiative or programme which they thought could be described as positive action. As shown in Figure 7, 50 % or more respondents were implementing measures in the areas of age, disability, racial or ethnic origin and gender, with a quarter addressing the

FIGURE 7: POSITIVE ACTION MEASURES USED IN RELATION TO DIFFERENT DISCRIMINATION GROUNDS



6.7.1. Examples of positive action

In order to provide further insight into the kinds of measures that can be regarded as positive action, we give concrete examples of positive action measures which have been applied in the European Union, Canada, the United States and South Africa. Figure 8 presents a breakdown of the total number of positive action measures identified by study participants within the case-study countries. These examples are drawn from the current study and reflect localised interpretations of positive/affirmative action. Detailed description of these examples are available in the country reports, where analyses confirm the considerable misunderstanding about what constitutes positive action and the overlap with other complementary measures, such as equality and diversity monitoring and impact assessment. In addition, there was no example of positive action to cover the diversity ground of religion and belief.

The following examples of positive action are drawn from the case-study countries:

Black and ethnic minorities and vocational training in the UK

Leeds Mental Health Teaching National Health Service Trust (a hospital) in the United Kingdom encourages people who are black or from ethnic minority backgrounds to take up a range of internships. The aim is for the internees to gain confidence and skills, and to remain employed in the National Health Service after the internships have come to an end.

Asylum-seekers and employment in Austria

A scheme financed through the ESF (EQUAL), FluEQUAL, increases opportunities for asylum-seekers in the labour market, by providing them with access to German-language courses and vocational training and encouraging them to enter the labour market.

Disability and higher education in the UK

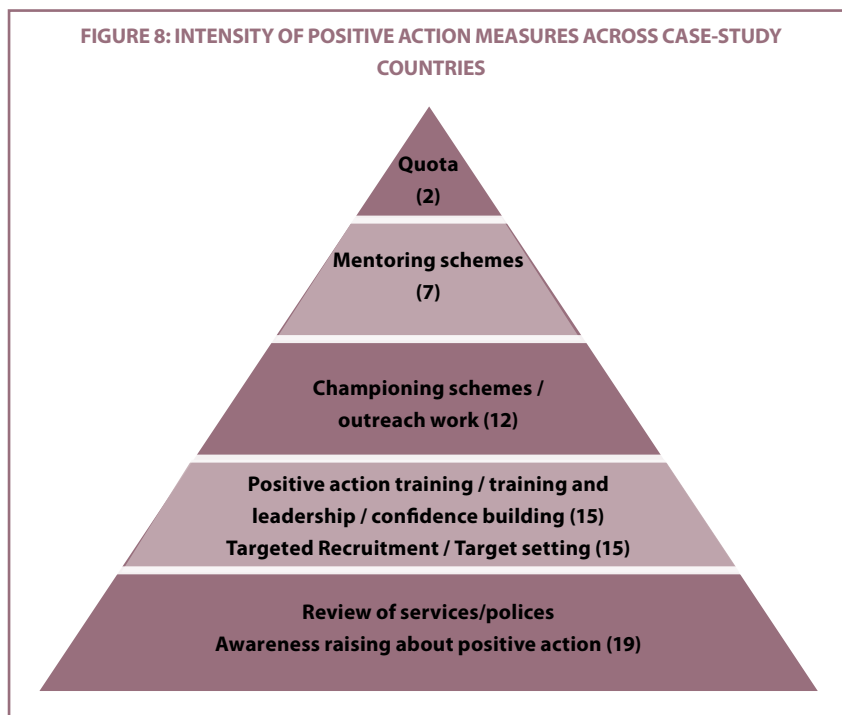
Birmingham University has established a scheme which provides financial awards to students with disabilities, including students who have dyslexia, to help them with their studies. The money does not have to be spent on specific disability aids. Instead, the award recognises that students with a disability often find it difficult to supplement their income through part-time work whilst they are studying.

Ethnic minority parents and education in Austria

The City of Vienna, in cooperation with various organisations representing ethnic minorities, has a project (MA 17) which is designed to promote greater involvement of ethnic minority parents in their children's education. The project involves information events, translation services and childcare services and also provides German-language classes for mothers of ethnic minority children. These take place at the child's school.

Various groups and housing

The City of Vienna housing department has established a scheme to address intercultural conflict amongst residents of the city's public housing. The city employs a group of intercultural mediators who work in mixed teams to provide support that is easy to access and accept for as many people as possible. The concept of 'culture' as used in the scheme covers not only people of different origins and customs, but also addresses conflicts between young and old people, and accommodates sign-language users.



Ethnic minorities and academia

The Netherlands Organisation for Scientific Research (NWO) has established a grant scheme (Mozaic) to increase the number of researchers from ethnic minorities who are carrying out PhD research at Dutch universities. The scheme is only open to applicants from an ethnic minority background.

Socially disadvantaged groups and university admission

In Hungary, Article 19/A of Government Decree 268/2000 on the general rules of admission procedures of universities provides that a socially disadvantaged applicant shall be admitted to a university faculty if he/she reaches 80 % of the admission threshold determined for the given faculty. The category of 'socially disadvantaged' persons includes, inter alia, those whose parents only completed elementary school. The number of students admitted on the basis of this measure shall not exceed 3 % of the maximum number of students determined for the given faculty.

Integrated education for Roma

Since 2004, the Hungarian Ministry of Education and Culture has been implementing programmes to reduce the segregation of Roma children in sub-standard schools/classes, as well as in schools/classes for children with mental disabilities, and foster the integration of Roma children in mainstream education. The government programmes included measures such as providing an integration payment to schools which included children with special educational needs, a programme entitled 'Last Bench' aiming

to integrate Roma children unjustly categorised as disabled back into mainstream classes, and the creation of a requirement that schools adopt and implement concrete equal opportunity policies in order to be eligible for Structural Funds.

Roma and access to employment

A special employment programme at USA Steel in Kosice targeting the Roma community exists in Slovakia. Within this programme, USA Steel cooperates closely with municipal authorities in three surrounding areas (Vel'ka Ida, Saca and Kosice's Lunik IX district) to identify Roma candidates for employment at its factory. Through this programme, USA Steel subcontracts Roma candidates through the municipal office for a period of one year, after which time the individuals concerned may be considered for regular employment.

Accessibility project in Canada

An under-representation of disabled people within the employer's workforce led to a review of potential barriers. As a result, the accommodation policy was enhanced and streamlined to help provide a better experience for employees and managers to assess and request adaptive technology solutions.

'Ability Edge' project in Canada

An initiative which involved several banks getting together and creating internship opportunities for people with disabilities. In addition, students with disabilities were provided with a scholarship towards post-secondary education.

Internship programme for Aboriginal students in Canada

Within the Bank of Montreal, students of Aboriginal origin were provided with the opportunity to gain experience working in the bank, which also offered them a scholarship towards post-secondary education.

Vienna needs you — police officers with a migrant background

In order to increase the number of police officers with a migrant background into the police force in Vienna, a recruitment campaign was set up in November 2007 targeting Austrian nationals of migrant background. A 'tandem-couple' made up of a police officer with migrant background and a representative of the Viennese Municipal Department for Diversity visit schools and migrant community associations to present the initiative as well as to act as a role model. There are no quotas implemented and there is no explicit preferential treatment of applicants with a migrant background.

Mingo migrant enterprises in Austria

In May 2008, an office was set up which offers free information and counselling in different languages to minority ethnic businesses, which often face difficulties in accessing mainstream support due to linguistic barriers and cultural differences. The assistance entails provision of information and help with implementing operational steps to innovation as well as support in dealing with agencies and authorities.

Roma internship programme for reporters and editors in Hungary

The aim of this initiative was to increase the positive presence of Roma in the media. The public television and public radio each facilitate 10-month internships for five individuals, during which the time the interns attend professional skills classes, are provided with tools to address psychologically harmful situations they may encounter, paired with a professional mentor, provided with a scholarship and receive a certificate upon completion.

Equal chances against breast cancer for socially underprivileged women in Hungary

In cooperation with Roma NGOs and representatives, the organisers reached out to Roma women with the aim of encouraging a wider provision of breast cancer screening. This included providing transport to screening sites and mobile screening units in isolated settlements. In addition, through cooperation with Roma representatives and health service providers, the scheme tried to facilitate sustainability by encouraging open lines of communication and cooperation.

Accepting working place model in Hungary

In order to address the high attrition rates within a poultry processing plant, the company worked with the local employment centre and vocational training centre to set up a project providing on-the-job training for employers and employees, many of whom were unskilled with low levels of education.

Roze in the Netherlands

The problems faced by LGBT people in terms of accessing employment and working in hostile environments prompted the formation of a network of LGBT people within the Roze trade union. A website and a web-based forum were set up to facilitate exchange of experience and has also served as a platform for the organisation of public events and campaigns to enhance the visibility of LGBT people in employment.

Social fieldwork in Slovakia

The main purpose of this project is to provide Roma people living in socially excluded environments and Roma settlements with quality social counselling and assistance. The programme is managed by the Social Development Fund and is open to municipalities which have a Roma community. Based on its size, the village or city can apply for funding for one or several social fieldworkers. The workload is clearly defined and the fieldworkers serve individual clients or families.

Targeted recruitment for management and supervisory level in South Africa

In 1993, as a means to increase the number of black people at management and supervisory level, an electricity company owned by the government, instituted targeted recruitment of black people within the organisation. Formal mentorship programmes were set up for lower-level personnel to be able to move into management positions, where existing white post-holders were encouraged to serve as mentors. Opportunities were also made available for sponsorship of black people to study at appropriate universities within and

outside of South Africa, to enable them to take over from white post-holders.

Improving the recruitment of people of Chinese and mixed ethnic background into the health service in the UK

A primary care trust introduced a number of initiatives to improve the representation of under-represented groups into the workforce, including specific ethnic groups. In order to attract more applicants of Chinese and mixed ethnic background, job vacancies were emailed to 300 community organisations and also distributed through the organisation's weekly bulletin. A national website 'Ethnic Britain' was also used to advertise 80 posts. In addition, guidance for potential applicants on how to access NHS jobs was translated into different languages.

Mosaic initiative in the United States

From May 2008, as part of the university's strategy to increase diversity among ranked faculty from under-represented ethnic groups, USD 1 million has been made available to fund the Mosaic initiative. As part of this venture, departments are able to apply for funds to the dean or director of its division to cover the cost of items such as salary, research support and laboratory equipment.

'Open Up' in Sweden

This development project created a working scheme for young persons with functional disabilities by SEKO tele Stockholm, with the goal of finding them jobs in the IT/telecom sector. The project also helped companies recruit from this group, as well as generally supporting them to get in touch with persons with disabilities who were users of their services.

Drugs project in Ireland

A drugs awareness project was set up targeting Traveller parents as a result of research highlighting the problem of drug use in this community. The aim of the project was to reduce the number of people using drugs as well as to try to normalise discussion about drugs by engaging the community about the problems of drug use. To date, the 10-session course has run five times in less than two years.

Teaching assistant in Slovakia

A programme was implemented in schools to fund teaching assistants in providing language and individual learning support for socially disadvantaged children in order to help them overcome existing barriers in the education system. Whilst it began as an NGO initiative, this programme is now funded by the Ministry of Education through the regional school offices.

6.8. Summary

This chapter presented limited evidence of private sector activity in relation to positive action. Organisations were more likely to introduce positive action measures to address imbalances in the workforce as opposed to service delivery. The contexts for positive action practice were more favourable in third sector organisations, where individuals were more likely to adopt a broader understanding of positive action in order to build confidence, empower individuals and ensure sustainability. Overall understanding of positive action improved with awareness-raising and required sustained support from leaders and managers.

7 Conclusions and recommendations



7. Conclusions and recommendations

This chapter presents the conclusions of the present study. A comparison of positive action practice between European and non-European countries is then presented, together with the comparison of practice across different discrimination grounds, sectors and organisations, and key messages will be drawn from these comparisons. These are then followed by recommendations and implications for research, policy and practice.

7.1. Conclusions

7.1.1. Comparisons between EU and non-EU countries

A general conclusion of the research is that whilst the **conceptualisation of positive action** varies widely across countries, some broad generalisations can be made. Terminology to describe remedial action to address past and present injustices targeted at marginalised groups differs. In the non-EU countries, the term ‘affirmative action’ is widely used. In Europe, however, the concept of ‘positive action’ is more commonly employed. The legal definition used throughout this study was presented in Chapter 4 and describes positive action as ‘consisting of proportionate measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are socially or economically disadvantaged, or otherwise face the consequences of past or present discrimination or disadvantage.’

Evidence from the study shows a general agreement that positive action constitutes specific measures to redress discrimination experienced by particular groups within society. Whilst particular emphasis is laid upon the definition of positive action in different countries, it is apparent that there is considerable variation in participants’ level of familiarity and understanding of the concept. The qualitative aspect of the study reveals a more divergent interpretation of

positive action, whilst findings from the survey show greater uniformity in terms of respondents’ descriptions.

There are differences in terms of the **application of positive action** measures, and the legislative and policy basis for these measures across countries. In some countries, participants consider positive action measures to be an ‘old-fashioned’ strategy and struggled with applying these concepts to measures within their local contexts. For example, the Dutch study participants view positive action as an important tool within a wider diversity management strategy, which includes all measures designed to counteract the effects of exclusion, discrimination and stereotyping of specific groups, with the aim of creating a more equitable society. In South Africa, however, due to the legacy of apartheid and segregation among different racial groups, what is termed ‘affirmative action’ is well received as a ‘stand-alone’ strategy.

These differences in perception and attitude towards positive action are mirrored in the legal frameworks of both countries. Whilst in some countries, there is the general tendency to move away from enforcing positive action through legislation (for example the Netherlands), there is a stronger legal backing for affirmative action in countries such as Canada and South Africa. Overall there was very limited use of quotas and their strong association with preferential treatment attracted a negative response.

The findings of this study show legislation to be a key **driver for positive action**. However, many participants felt strongly that the legislation needs to be backed up by enforcement mechanisms and less bureaucracy to ensure that organisations fully engage with it. Other drivers that emerged from the study include business case, corporate social responsibility, moral/ethical considerations, leadership and organisational policy. It is noteworthy that where there was no direct legislative backing for positive action, the moral case was a major impetus. This was most noticeable where particular communities (for example Roma) were living in poor socio-economic conditions.

Findings from the present study yielded divergent results regarding support for positive action. Whilst strong individual commitment and senior management support are identified as the most important factors, the finding that participants received relatively less support from line managers is worrying and needs to be addressed. This, coupled with a number of barriers relating to human and financial resources, may militate against successful implementation of positive action.

There are some differential **outcomes of positive action** in qualitative compared to quantitative components of this study. The survey findings reveal that intangible factors such as ‘raising awareness of equality issues in the organisation’, ‘improving the reputation

of the organisation' and 'enhancing the confidence of the participants' are important parameters amongst the outcome and impact measures; whilst other factors relating to workforce representation and the need for better financial results were more significant for workshop participants.

Whilst this study has highlighted clear **benefits of positive action**, at the same time there are reports of negative impacts. Some of the adverse consequences, including skills shortage resulting from 'brain drain' and 'ghettoisation' within the workforce as a result of targeted recruitment, were seen in some countries. Exploitation of the benefits and rationale of affirmative action for political gains were seen as serious challenges for programmes to be sustained. There is a danger that this could invite unnecessary litigation which may in turn discourage (other) institutions from implementing positive action programmes.

It is evident that organisations are struggling to develop a robust evidence base for positive action. For some countries, like Sweden, this process is hindered by legislative barriers (e.g. legislation barring data monitoring by ethnicity) whilst others, such as South Africa and UK, had not worked out fully how to obtain information on grounds such as disability and sexual orientation.

Across EU and non-EU countries, similar attempts could be witnessed by those with little genuine interest in the ethos of positive action, to use the situation to their advantage. This was evident in some countries where positive action had given rise to dishonest behaviours and malpractice.

In this study, there was evident lack of awareness both within the workforce and in the wider society about the benefits of positive action, and misinformation from the media. This was

particularly strong in some countries where the media was thought to problematise positive action and render any outcomes as tokenistic. Similarly whilst participants from Sweden felt their society appeared to be relatively enlightened when it came to gender equality and measures promoting it, groups such as Africans and Middle Eastern Muslims, as well as persons with disabilities, were not considered to be in need of positive action.

In terms of formulating **positive action strategies**, there is a concern in some countries about the need for the target group to be involved in the positive action initiative from its inception. In Canada, it was felt that a lack of self-advocacy and visibility by members within targeted groups could undermine the success of affirmative action programmes. Consequently we saw examples of the LGBT community taking ownership of programmes. Similarly, in the UK, we found evidence of community groups and grassroots organisations themselves who, fuelled by dissatisfaction with the existing status quo, had lobbied for positive action measures and succeeded in setting up specialised services to meet their own needs.

Our findings show that the **future for positive action** is hopeful and many organisations have plans to introduce positive action initiatives or programmes in the future.

7.1.2. Differences across organisations and sectors

It was widely agreed by participants in the study that equality and diversity monitoring provides a tool to enable employers to check the effectiveness of their policies and procedures and is required as a precursor to the development and implementation of targeted strategies. The centrality of monitoring in the successful implementation of positive action revealed a pattern

with gender, age, disability and racial or ethnic origin being the most widely monitored grounds and sexual orientation and religion or belief being the least monitored grounds.

There were variations in the extent to which sectors provided an enabling environment for the development of positive action. Whilst a good number of organisations had a written policy on equality and diversity, larger organisations were not as effective in setting appropriate targets for employment and service delivery. Monitoring is an important aid to implementing positive action since it provides a basis for identifying evidence of under-representation. Whilst some organisations recognise the value of monitoring, the absence of relevant data may have hampered efforts to formulate appropriate positive action measures.

A clarification of the nature and purpose of positive action led to a better understanding of the actual nature of positive action. There was a reasonably even distribution of responses in relation to the drivers of positive action with legislation featuring highly. Therefore any action targeted towards encouraging organisations to develop positions or initiatives needs to consider a wide range of potential influences whose relevance may differ according to the type of organisation concerned.

There was widespread consensus about the need for organisational support for positive action, especially management buy-in. However, there were disparities in different sectors, with third sector organisations more likely to support positive action than public and private sectors. It was noteworthy that a relatively low proportion of respondents thought that substantial resistance or cynicism among employees was a significant barrier.

A broad range of methods were utilised to assess the outcomes of positive action. However, there was a tendency to rely upon 'softer' approaches to evaluation including ad

hoc reviews and anecdotal evidence. Whilst the quantitative evidence from the survey suggests a spread of positive action initiatives covering different grounds, albeit following the

traditional hierarchy of application, the qualitative data from consensus workshops and interviews did not provide any examples of measures related to religion or belief.

7.2. Key messages

A number of key messages can be drawn from the research presented in this report which in turn can be summarised under the main headings corresponding with the findings of the study discussed in earlier chapters.

Context of equality and diversity

- Positive action is generally undertaken within the framework of written equality policies, mission statements and annual reports, which reflect a commitment to equality.
- Monitoring and specific target setting relating to equality and diversity are widespread, with gender being the most widely monitored and sexual orientation the least monitored ground.
- Lack of disaggregated data in key sectoral fields means effective positive programmes cannot be comprehensively developed and implemented.
- Attracting diverse communities into the organisation may not necessarily mean a change of culture and attitude towards positive action.
- Definition and understanding of positive action
- There is confusion and inconsistency in the terminologies used to describe positive measures across the study countries.
- There is a lack of common understanding in Europe, within countries and across sectors on the meaning of positive action.
- A clarification of the nature and purpose of positive action measures can promote a better understanding of the actual nature of the measures and in turn generate a more positive attitude and perception of the utility of positive action.
- The historical and political context of the respective countries influences the formulation and adaptation of positive action.

Drivers for positive action

- Legislation remains the main driver for positive action. Other key drivers include altruistic reasons, moral/ethical considerations, business reasons, demographic changes, corporate social responsibility, organisational policy and grassroots efforts.
- Negative factors are seen to drive positive action in some instances where organisations set up programmes for political and financial gains with little genuine interest in the essence of positive action.

Barriers to positive action

- Lack of resources (human, financial and time) is the most frequently cited barriers to positive action, particularly in the European countries. Lack of senior management buy-in, continued support and commitment remain major impediments to successful and sustained positive action.
- Legal frameworks on positive action lag far behind social policy, and conflicting data protection arrangements in some countries create serious barriers to implementing positive action.
- There are difficulties in ensuring that the legislative framework is consistently applied in practice. Furthermore, there are differences among countries in implementing sanctions against organisations that do not implement positive action or achieve equitable practice.
- Lack of awareness of the benefits of positive action measures within the workforce and in the wider society, and the role of the media in problematising these measures and rendering outcomes as tokenistic, are seen as major barriers to the acceptability of positive action.

Support for positive action

- Support of the wider society is essential for the success of positive action programmes. Strong individual commitment, support from colleagues, leadership and senior management buy-in are necessary to sustain positive action activities.
- There are differences between all sectors in their enthusiasm and implementation of positive actions. There is evidence of commitment of some public sector organisations to push the boundaries of policy, to develop a much broader application of positive action.
- Positive action programmes are most successful with the inclusion of meaningful involvement of the target groups in design, planning, implementation and evaluation

Outcomes and impacts

- There is lack of systematic monitoring of the effectiveness of positive action in terms of outputs and outcomes. Organisations are struggling to develop robust evidence, and tend to rely on 'soft' measures to assess the impact of positive action.
- Whilst on the whole, positive action measures are seen to be effective in raising awareness of equality issues in organisations, having real impact on minority groups, and improving an organisation's image and reputation, their potential contribution to business success is less well recognised and is not always deemed to translate into better financial results.
- Positive action initiatives are largely time limited and not seen as long-term measures. Generally, the groups that benefit most from positive action initiatives are minority ethnic groups and women, and the least likely to be beneficiaries are LGBT and disabled people.

Positive action in practice

- Examples of practice in organisations confirm confusion about the scope of positive action measures and the overlap with other complementary measures such as equality and diversity monitoring and impact assessment.

- There is an incredibly diverse range of activities that fall under the heading of positive action. Many countries focus on specific groups, perhaps at the expense of others, which might be a reflection of the particular context or ‘politics’ of that country.
- In practice, positive action measures tend to focus more on training and improving employment opportunities rather than service delivery.
- The introduction of positive action within organisations can produce some negative consequences or backlashes such as negative stereotypes, stigmatisation, lack of proper oversight, dishonest behaviour and malpractice.

7.3. Recommendations

7.3.1. Research on positive action

- Research should be undertaken in an attempt to map the current situation of ‘disadvantage’ with regard to the different fields in which positive action can be applied, e.g. employment, education, housing, healthcare, etc. relating to these different grounds. This is essential and may need to use tools established in one field or ground of equality/discrimination, to examine parallel effects caused by a different ground of social exclusion.
- This research should be carried out at the national level, as it can also be expected that the situation with regard to different discrimination grounds will also vary across the Member States. These national mapping studies should provide the basis for any further policy review focusing on where (which fields and grounds) to allow positive action, and what (public) resources to direct towards particular forms of positive action.
- There needs to be research to assist courts which are called upon to establish whether a prior situation of disadvantage justifies the use of a particular positive action measure. The research should assist courts to identify the relevant questions or issues which should be resolved, and could result in a series of model questions (which could be adapted on a case-by-case basis) which the court would need to address. This research should be carried out on a European basis. The model questions could then provide a basic EC law framework for assessing ‘disadvantage’, but could also be added to in light of further national law requirements. An approach analogous to ‘cost-benefit analysis’ based on some measure of justice might be developed.
- Given that an organisation’s equality and diversity objectives can be hampered by a lack of understanding of the rationale for positive action (and the need to continue to make the case for and measure the impact of positive action), undertaking research around the economic advantages of positive action may prove beneficial.
- A comprehensive intervention study is necessary to develop a coherent model/theory for measuring success which would guide the type of positive action measures implemented.
- In fact, there is so little evaluation of ‘good practice’ in positive action, that development of a model for identification, evaluation and dissemination of ‘best practice’ would be advantageous.
- In light of the centrality of monitoring in promoting sustained positive action measures, organisations need to gather disaggregated data in key sectoral fields on all grounds of discrimination. This may not appear to be a radical or innovative suggestion, but in the light of the poverty of practice, we feel that while listed last in this catalogue of actions, it is of primary importance and would, for the majority of organisations and agencies, be innovative in practice.

7.3.2. Law and policy development

- In order to foster a shared understanding of what is meant by positive action within the European Union, the European Commission should promote dialogue with civil society organisations and the social partners.
- Based on such dialogue, EU-level guidance on the meaning of positive action should be developed. This could be in the form of a non-binding legislative instrument, such as a Commission recommendation or a Council resolution. Alternative mechanisms could include a joint declaration by the social partners.
- In the introduction and revision of EC anti-discrimination legislation, it should be ensured that public, private or voluntary organisations who wish to engage in positive action are entitled to do so.
- Member States should revise national legislation where this prohibits or restricts the opportunity for public, private or voluntary organisations to take positive action.
- In order to evaluate the need for, and effectiveness of, positive action, data collection is required. Whilst respecting data protection legislation, Member States should ensure that organisations may engage in data collection where this is designed to facilitate and analyse positive action measures.
- The EU institutions and Member States are recommended to introduce legal duties to implement positive action measures where necessary to achieve full equality in practice.

7.3.3. Practice

European and national levels

- Create a European-level framework of understanding of positive action measures and define specific indicators of success in the implementation of these measures. The EC needs best-practice networks to support Member States in dealing with uncertainties and ensure parallel translation and application of the EU approach to positive action. These networks should operate at national and cross-sector levels to enable the sharing of ideas, approaches and activities, and encourage organisations to move from intention to action. This may help to move the focus from rhetoric to outcomes.
- Governments should undertake to educate the general public through ‘social marketing’ about positive action, in order to address widespread misunderstandings that appear to exist, and to facilitate the linking up of various stakeholders already engaged in such measures. Widespread awareness-raising campaigns of both the need for positive action measures for disadvantaged groups and the benefits of such measures for wider society will promote a wider acceptance and positive attitudes towards positive action.
- Develop clear strategies for identifying and managing the negative consequences of positive action (or its misuse and abuse). The role of the media and other robust communication approaches should be considered. Establish educational forums and networks to promote understanding and dialogue in relation to positive action.
- Government bodies at all levels should actively be encouraged to implement positive action programmes for disadvantaged groups in order to set an example for the rest of society in overall attitude and approach to such measures. Minimum operating standards for positive action application should be set by the EC with appropriate arrangements for reporting successes and challenges on an EC-wide basis. This might be underpinned by selective punitive or enforcement action against bodies failing to meet existing minimum targets for compliance with equality and human rights duties.

- Make available adequate financing through national government or EU funds to support complex programmes required to ensure effective implementation and evaluation of positive action. Such programmes might include those that promote intersectional and intersectoral approaches to non-discrimination.
- Develop tools to assist organisations to establish baseline data to facilitate positive action implementation and design robust strategies to support the evaluation of the effectiveness of measures taken. Adoption of an EU and a national action plan that identifies systems that need to be in place to ensure efficient and robust monitoring. Impact assessment tools may be deployed for this purpose.

Organisational level

- Maintain positive action as part of a broader normative change, supported by institutions with proper mentoring and training. Increase internal and external acceptability of positive action by raising awareness of the nature and benefits of positive action. Increase knowledge and practice of positive action, its benefits and its role within diversity strategies through a programme of education and training including seminars and events.
- Address positive action as an integral part of a wider organisational corporate mission, workforce planning and service development, working closely with the relevant governmental bodies. Integrate positive action within talent management, succession planning frameworks and wider employment and service development practices. This may require cross-departmental working in order to ensure a more coordinated approach.
- Adopt a more coherent and collaborative approach to the introduction of positive action between organisations. This collaboration will not only help to increase the acceptability of the programmes but may also help convince managers of the likely benefits of positive action, not least if other organisations are competitors. A strategy found effective in the United States is to encourage organisations to compete for recognition in equality and diversity ('justice') fields: if bodies are competing to excel in positive action, this creates healthy competition. Awards might be created and publicly presented to encourage this.
- Ensure involvement of members of minority groups in the development and evaluation of positive action measures. Individuals who have benefited from various positive action initiatives should be encouraged to work within the extension of such programmes, in order to increase representation amongst positive action implementers.

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