

POSITIVE ACTION AND EU LAW

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ABSTRACT

Conventional anti-discrimination law has often little impact upon structural and complex forms of discrimination. As a result, states throughout the EU are attempting to use various types of positive action strategies to address many of the inequalities experienced by disadvantaged groups. However, at both EU and national levels, the development of these positive action strategies has been stunted by the existence of two types of legal obstacles. Firstly, a lingering attachment to ‘formal’ equality concepts has resulted in a confusing, incoherent and complex case-law that has a ‘chilling effect’ on the use of positive action. Secondly, there are few effective and substantial legal requirements imposed upon public and private bodies to implement ‘mainstreaming’ and other positive action strategies. These deficiencies in both EC and national equality law mean that the use of positive action strategies has in practice often been half-hearted and lacking in real impact.

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§1. The Limits of the Anti-discrimination Model

1. EU equality law is largely based upon the ‘anti-discrimination’ model of combating prejudice: it focuses upon the elimination of differences of treatment which are based upon the prohibited grounds of race, gender, sexual orientation, age, religious belief and disability, frequently defines discriminatory behaviour by reference to comparator tests, and relies upon individuals bringing civil actions to ensure that the legislation is enforced. As applied throughout the member states of the Union, this ‘anti-discrimination’ approach has achieved considerable success in altering behaviour and preventing overt forms of discrimination, especially in the area of gender.¹ It also attracts wide political support throughout the EU, and has a firm foundation of support in mainstream liberal and social democratic political philosophies.²
2. However, the limitations of this approach have also been widely recognised. The use of the comparator test limits the applicability of anti-discrimination law, encourages assimilation to existing practices, and means that oppressive

¹ See Christopher McCrudden, ‘Theorising European Law’, in C. Costello and E. Barry (eds.), *Equality in Diversity: The New Equality Directives* (Dublin: Irish Centre for European Law, 2003), 1.

² Particular issues in anti-discrimination law may generate considerable disputes within and between different schools of political philosophy. However, a wide consensus exists that unjustified discrimination unacceptably restricts individual autonomy (from the perspective of liberal political philosophy) and denies access to essential social entitlements (from the perspective of social democratic political philosophy).

power relations often remain unchallenged and unaltered.³ It also encourages a perception that anti-discrimination law is only concerned with the abnormal behaviour of some bigoted individuals, rather than with achieving social transformation.⁴ The concept of indirect discrimination is intended to compensate for some of these limitations, by removing obstacles faced by disadvantaged groups. However, its impact is often limited, due to the complexity of applying indirect discrimination rules in practice, and the wide scope often given to the justification defence. Structural forms of discrimination, such as negative stereotyping, expectations of conformity to dominant social norms, or a lack of understanding of the specific needs and perspectives of disadvantaged groups, often remain untouched by anti-discrimination law.⁵

§2. Substantive Equality, Social Inclusion and Positive Action

3. These limitations have been described as the inevitable result of the way in which the anti-discrimination model is structured around what Fredman has labeled the principle of ‘equality as sameness’, whereby the primary focus is on ensuring that individuals are treated alike. This emphasis on ensuring

³ See Sandra Fredman, *Discrimination Law* (Oxford, OUP, 2001), 165.

⁴ See Nicola Lacey, ‘From Individual to Group’, in B. Hepple and E. Szyszczak, *Discrimination: The Limits of the Law* (London: Mansell, 1992), 102-3.

⁵ See Fredman, *Discrimination Law*, 22–23. The effect of equality legislation may often be to confine the expression of prejudice within certain tolerated spheres or within ‘coded’ language, rather than to shift social attitudes.

sameness of treatment can result in underlying structural forms of inequality being ignored.⁶

4. This criticism of the anti-discrimination model is now widely accepted in the academic literature.⁷ Attempts have been made to construct a more satisfactory model of equality law. In the United States, Owen Fiss, Jack Balkin and others have argued for a shift from an emphasis upon ‘anti-classification’ (i.e. using the law to prohibit any use of discriminatory criteria, even when used for benign purposes), to an ‘anti-subordination’ approach, which would place the need to eliminate the ‘subordinate’ or status of disadvantaged groups at the centre of equality law.⁸ Fredman has similarly called for the adoption of a ‘substantial equality’ approach, which would make the removal of obstacles faced by disadvantaged groups, and the empowering of these groups, the central guiding principle of equality law.⁹

5. Collins has suggested another alternative guiding rationale, arguing that equality law is best viewed as a tool to combat forms of ‘social exclusion’

⁶ See Fredman, *Discrimination Law*, 7–11. See also Judith Squires, *Gender in Political Theory*, (Cambridge: Polity Press, 1999).

⁷ However, at least in the UK, popular opinion tends to adhere to the formal equality perspective: see Melanie Howard and Sue Tibballs, *Talking Equality: What Men and Women Think About Equality in Britain Today* (London: The Future Foundation, 2003).

⁸ See Owen Fiss, ‘Groups and the Equal Protection Clause’, in M. Cohen, T. Nagel and T. Scanlon (eds.) *Equality and Preferential Treatment* (Princeton, NJ: Princeton University Press, 1977), 85; see also Jack M. Balkin and Reva B. Siegel, ‘The American Civil Rights Tradition: Anticlassification or Antisubordination?’ 58 *U. Miami L. Rev.* 9 (2004).

⁹ See Fredman, *Discrimination Law*, 21-22.

faced by particular social groups.¹⁰ Others have called for equality law to be structured around a central principle of the recognition of ‘diversity’. This approach is influenced by the work of Charles Taylor, Iris Marion Young and other proponents of ‘identity politics’, who argue for recognition of the equal worth of the diverse types of social and cultural group identities, and for the accommodation of difference and the elimination of social barriers that exclude particular groups.¹¹

6. These different approaches have much in common, even though some potentially significant differences between them also exist.¹² All share a common commitment to the use of ‘positive action’ to eliminate structural forms of discrimination, to ensure a fairer representation of disadvantaged groups in workplaces and institutions, and to promote full equality of access to goods and services.¹³

¹⁰ Hugh Collins, ‘Discrimination, Equality and Social Inclusion’, 66 *Modern Law Review* 16-43 (2003). See also Ronald J. Fiscus, *The Constitutional Logic of Affirmative Action* (Durham, N.C.: Duke University Press, 1992).

¹¹ See Charles Taylor, ‘The Politics of Recognition’, in A. Gutmann (ed.), *Multiculturalism and ‘The Politics of Recognition* (Princeton, NJ, Princeton University Press, 1992), 25-73; Iris-Marion Young, *Democracy and Inclusion*, (Princeton, N.J.: Princeton University Press, 2000). See also Anne Phillips, *Which Equalities Matter?* (Cambridge: Polity Press, 1999).

¹² See Nicholas Bamforth, ‘Conceptions of Anti-discrimination Law’, 24 *Oxford Journal of Legal Studies* 693 (2004).

¹³ Research has shown in a number of different public and private sector contexts that concentrating upon complying with anti-discrimination norms alone yields limited results: patterns of inequality and exclusion are extremely difficult to break down unless positive action is taken. See Harish C. Jain, Peter J. Sloane and Frank M. Horwitz, *Employment Equity and Affirmative Action: An International*

7. A popular perception exists that positive action automatically involves giving ‘preferential treatment’ to members of disadvantaged groups. Proponents of substantive equality approaches often do argue that the use of otherwise suspect classifications such as ethnicity, gender or age to identify groups who should receive special assistance is legitimate: the justification given is that such preferential treatment is necessary to redress patterns of systematic discrimination that particularly affect those groups.¹⁴ However, the term ‘positive action’ is best understood as including any form of proactive action designed to benefit a disadvantaged group, and therefore can cover a huge variety of policies and initiatives. It can extend from the taking of basic steps to eliminate prohibited discrimination to the use of ‘mainstreaming’

Comparison (London: M.E. Sharpe, 2003); Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital* (Washington D.C.: Printing Office, 1995).

¹⁴ See Elizabeth Anderson, ‘Integration, Affirmative Action and Strict Scrutiny’, *77 N.Y.U. L. Rev.* 1995 (2002).

initiatives,¹⁵ the provision of special welfare assistance and preferential treatment in certain employment contexts.¹⁶

8. Positive action strategies can therefore take a variety of forms, covering a wide range of measures and policies, including (but not just confined to) mainstreaming initiatives and possibly even preferential treatment.¹⁷ An effective positive action strategy may even make use of several different forms of positive action. Also, positive action strategies may use different forms of action at different times, depending upon the nature of the disadvantages at issue and the relevant socio-economic and political circumstances.

§3. Putting Positive Action into Practice

9. There is a wide diversity of approaches across the member states of the EU as to how best to make use of positive action strategies. Differences exist not alone between different member states, but also within member states in

¹⁵ Considerable uncertainty exists as to what ‘mainstreaming’ actually requires: the word is prone to a variety of interpretation. The basic aim of mainstreaming strategies is to make sure that public authorities identify forms of structural discrimination that may exist within existing systems and structures, and take action to eliminate these discriminatory factors and promote diversity. See Teresa Rees, ‘Mainstreaming Equality’ in S. Watson and L. Doyal (eds.), *Engendering Social Policy* (Buckingham: Open University Press, 2000); Teresa Rees, *Mainstreaming Equality in the European Union* (London: Routledge, 1998).

¹⁶ For example, eliminating a height requirement, or modifying an assessment process might be necessary to avoid a finding of indirect discrimination, but would also be an effective step in a positive action strategy.

¹⁷ See Christopher McCrudden, ‘Rethinking Positive Action’, 15 *Industrial Law Journal* 219 (1986).

respect of the types of positive action permitted across the different equality grounds or even in respect of a particular equality ground.¹⁸ Certain very general cross-European trends can be detected. Greater latitude is usually permitted for positive action to benefit disabled persons than for other grounds, including the use of quotas and ‘set-aside’ posts for disabled individuals.¹⁹ In contrast, positive action in the ethnic/race context is much less developed, and in particular there exists wide resistance to the use of any forms of preferential treatment. In the age context, widespread uncertainty and lack of analysis exists as to the extent to which positive action on the grounds of age is desirable.²⁰ In general, the use of ‘mainstreaming’ initiatives appears to be less controversial and more acceptable than other ‘harder’ forms of positive action. However, considerable differences even exist between how mainstreaming is implemented across the different equality grounds. Attempts to implement gender mainstreaming are becoming relatively common: however, other forms of equality mainstreaming are much less advanced, with some exceptions.²¹

¹⁸ See Colm O’Cinneide and Meg Russell, ‘Positive Action to Promote Women in Politics: Some European Comparisons’, 53 *International Comparative Law Quarterly* 587 (2003).

¹⁹ For an account of the use of quotas for disabled persons, and the problems inherent in such schemes, see Lisa Waddington, ‘Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws’, 18 *Comparative Labour Law Review* 62 (1996).

²⁰ See Colm O’Cinneide, *Age Discrimination and European Law* (Brussels: European Commission, 2005), 38-41.

²¹ See Fiona Mackay and Kay Bilton, *Learning From Experience: Lessons in Mainstreaming Equal Opportunities* (Edinburgh: Scottish Executive Social Research, 2003).

10. However, attempting to make use of positive action mechanisms will only work if an appropriate legal framework makes their use possible and practicable. National and EC law control what forms of positive action are possible: at both levels, it appears that lingering attachment to the formal equality approach is tending to block the development of effective positive action policies, by generating complexity and uncertainty. Furthermore, problems persist with mainstreaming initiatives, which often lack substance.

§4. The Scope for Positive Action in EU Law

11. Ultimately, the approach taken by the European Court of Justice (ECJ) to the interpretation of the EC Equality Directives will determine what scope for positive action is permitted within the Union. As McCrudden has argued, trace elements of all the different theoretical frameworks identified above can be detected in the case-law of the ECJ, along with a strong residue of affection for the ‘equality as sameness’ approach.²² The ECJ therefore appears to oscillate between approaches rooted in formal equality, and others that are based to some degree on substantial equality, social inclusion or group rights theories.²³ This oscillation causes problems for member states in attempting to

²² McCrudden, ‘Theorising European Law’, 36.

²³ Mark Bell has argued that a ‘patchwork of models’ of equality has developed within EU equality law and policy, made up of three main strands: the standard anti-discrimination approach, a newer attachment to substantive equality, and a desire to manage diversity. See Mark Bell, ‘The Right to Equality and Non-Discrimination’, in T. Hervey and J. Kenner (eds.), *Economic and Social Rights under the EC Charter of Fundamental Rights: A Legal Perspective* (Oxford: Hart Publishing, 2003),

devise positive action strategies. Particular problems are caused by the ECJ's position on the use of preferential treatment, which in turn can have a "chilling effect" on other forms of positive action.

12. There has been a gradual yet definite re-positioning by the Court since its *Kalanke* judgment indicated a firm attachment to a formalist 'anti-classification' approach and sharply restricted the circumstances in which preferential treatment could be used to promote greater equality.²⁴ Wider scope has been given to the use of positive action in the Race, Employment Equality and revised Gender Equality Directives, and in particular the provisions of Article 141(4) EC as inserted by the Treaty of Amsterdam. These legislative developments have resulted in the development by the ECJ of its new proportionality approach in *Marschall*²⁵ and *Badeck*.²⁶ Preferential treatment on the grounds of gender is now permissible when used to distinguish between similarly qualified candidates, provided that an opportunity for individual merit assessment is always available.²⁷

91. See also Gillian More, 'Equal Treatment of the Sexes in European Community Law: What Does 'Equal' Mean?', 1 *Feminist Legal Studies* 45 (1993).

²⁴ Case 450/93 *Kalanke v Bremen* [1995] ECR I-3051. See Christine Tobler, 'Positive Action under the Revised Second Equal Treatment Directive', in AFFA and EWLA (ed.), *L'égalité entre femmes et hommes et la vie professionnelle; Le point sur les développements actuels en Europe* (Paris: Dalloz, 2003), 59-92, for an excellent analysis of this gradual shift in position.

²⁵ Case 409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363.

²⁶ Case 158/97 *Badeck v Hessischer Ministerpräsident* [2000] ECR I-1875.

²⁷ Considerable scope for positive action, including preferential treatment, has also been permitted at initial stages of recruitment prior to the actual hiring decision, including the reservation of places at interview for a disadvantaged group: see *Badeck* [2000] ECR I-1875.

13. This shift away from a formal approach towards a greater embrace of substantive equality thinking is also seen in *Schnorbus*,²⁸ where the Court gave considerable leeway in applying the justification test to positive action measures which were neutral on their face but could constitute indirect discrimination in favour of particular groups. In *Briheche*,²⁹ the Court adopted the language of substantive equality, recognising that considerable scope should be granted for measures designed to remedy disadvantage against women.

14. Notwithstanding this welcome shift in position, and despite the views of Koukoulis-Spiliotopoulos that the ‘apple of discord’ initially produced by *Kalanke* is now a thing of the past,³⁰ problems remain. The ghost of *Kalanke* still haunts the Court’s case-law. In both the *Abrahamsson* decision³¹, and that of the EFTA Court in *EFTA Surveillance Authority v Norway*³², it was held that forms of positive action that give automatic preference to women will not survive challenge. It remains uncertain whether this approach can or will be

²⁸ Case 79/99 *Julia Schnorbus v Land Hessen* [2000] ECR I-10997.

²⁹ Case 319/03 *Briheche v Ministre de l’Intérieur* [2004] ECR I-8807.

³⁰ Sophia Koukoulis-Spiliotopoulos, *From Formal to Substantive Gender Equality: The Proposed Amendment of Directive 76/207 Comments and Suggestions*, (Brussels: Bruylant, 2001).

³¹ Case 407/98, *Abrahamsson and Andersson v Fogelqvist* [2000] ECR I-5539.

³² Case E-1/02, 24 January 2003. See the annotation on this case by Christine Tobler, 41 *Common Market Law Review* 245 (2004).

applied across the different equality grounds.³³ In addition, the lack of definition of what exactly constitutes an automatic preference ensures that the *Abrahamsson* test remains ambiguous and uncertain.

15. This lack of clarity can have a ‘chilling-effect’ on the use of any form of preferential treatment or merit re-definition in member states that could be reclassified as involving some element of ‘automatic preference’. Also, it remains uncertain whether the Court has worked out a consistent and rigorous conceptual framework to provide a backbone for its rhetorical commitment to a substantive equality approach.³⁴ It remains unclear even after *Schnorbus* how much scope member states will be permitted in using other forms of positive action that could be classified as forms of indirect ‘preferential treatment’.

16. Given these persisting problems, Caruso has argued that, in the ethnicity/race context at least, the ECJ should instead classify group identity-based positive action measures as coming within the category of member state welfare provision, and therefore outside the competency of the Court to review.³⁵

³³ Note that Article 7(2) of the Framework Employment Directive appears to give more scope for positive action in favour of disabled people than it does for positive action in favour of other groups. This reflects the fact that the use of automatic preferences in the context of disability, such as ‘set-aside’ places for disabled persons, is common and widely accepted.

³⁴ See Cathryn Costello in ‘Positive Action’, in C. Costello and E. Barry (eds.) *Equality in Diversity: The New Equality Directives* (Dublin: Irish Centre for European Law, 2003), 177-212.

³⁵ Daniela Caruso, ‘Limits of the Classic Method: Positive Action in the European Union after the new Equality Directives’, 44 *Harvard International Law Journal* 331 (2003).

Caruso's argument is attractive, as this would grant leeway to member states to develop their own context-specific positive action approaches without having to worry about the uncertain status of the ECJ case-law. However, it is very questionable whether this approach could or should be adopted across all the equality grounds. Skidmore has warned that the general exception for security and welfare measures contained in Article 2(5) of the Employment Equality Directive and the religious ethos exception in Article 4(2) could be used to justify unfairly discriminatory practices under a cloak of positive action.³⁶ Even in the ethnicity/race context, if the Court had no capacity to review positive action measures at all, this could leave room for member states to maintain some questionable practices. Even well-meaning positive action measures designed to remedy disadvantage may lack any real rational basis, or be distorted to benefit special interests, or may excessively penalise non-members of the beneficiary groups. There may also be circumstances where the use of particular forms of group classification may encourage 'group essentialism'³⁷, stereotyping or patterns of social segregation.³⁸

³⁶ See Paul Skidmore, 'The EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?', 30 *Industrial Law Journal* **1** [is this the starting page? It is the edition number – delete it if you think best!] (2001) 126-132, 129-30.

³⁷ See Amy Guttman, 'Responding to Racial Injustice' in K. A. Appiah and A. Guttman (eds.) *Color Conscious* (Princeton NJ: 1996), 355.

³⁸ I am grateful to Cathryn Costello for converting me to the logic of this position, and to whose views on this issue I am indebted. For a discussion of how 'quota' measures designed to assist disabled persons often proved to be stereotyping and to reinforce segregation, see Waddington, 'Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws'.

17. Retaining a legal requirement that some objective and proportionate justification has to be demonstrated to support the use of positive action measures involving preferential treatment therefore has appeal. This could also focus attention on the need to diagnose the existence of disadvantage and to identify with due care and precision the appropriate remedial steps. However, in applying such a proportionality test, it would be important to avoid the automatic assumption that the use of positive action measures is inherently questionable.

18. In general, it is obvious that the Court needs to clarify its approach, develop a reasonably rigorous concept of substantive equality, and apply a loose proportionality test to all forms of positive action measures, permitting considerable leeway to member states to develop their own context-appropriate positive action strategies. Otherwise, the risk remains that a lack of clarity at the level of EC law could continue to hinder seriously the development of comprehensive positive action measures at national level.

19. This can be illustrated by reference to the positive action provisions set out in the UK's new Equality Act 2010. Previous to this, UK anti-discrimination statutes had in general adopted a symmetrical and formal model of equality. For example, all forms of differentiation on the basis of gender and race are prohibited in the Sex Discrimination Act and Race Relations Act, subject to specific genuine occupational requirement exceptions and the odd positive action exemption for training and 'encouragement', which had been given

narrow interpretations by courts and tribunals.³⁹ The Sex Discrimination (Election Candidates) Act 2002 permitted parties to take positive action, including the use of preferential treatment, to reduce inequalities on the grounds of gender in candidate numbers.⁴⁰ However, outside of this specific exception, the formal equality approach embodied in the UK legislation exercised a chilling effect on positive action initiatives, whether introduced by public or private bodies.⁴¹ Now, ss. 158-159 of the 2010 Act are intended to free up space for employers to make use of positive action on a voluntary basis, by giving legislative expression to the tests set out in the case-law of the ECJ. In other words, it gives employers the option, when faced with two or more candidates who are ‘as qualified’ as each other, to choose a candidate from a group that is under-represented in the workforce, as long as individual consideration is given to each candidate and no fixed policy of preferring one gender to the other is in place. However, as Barmes has argued, these restrictions will make it difficult for employers to implement positive action policies without fear of legal challenges: in particular, the uncertainty in the case-law of the ECJ as to what constitutes ‘individual consideration’ and the question of what will qualify as a fixed policy cast a long shadow of uncertainty in this context.⁴²

³⁹ See e.g. *Hughes v Hackney LBC*, Employment Tribunal 6 Feb 1986, unreported; *Lambeth L.B.C. v Commission for Racial Equality* [1990] IRLR 231.

⁴⁰ See O’Cinneide and Russell, ‘Positive Action to Promote Women in Politics: Some European Comparisons’.

⁴¹ See Lizzie Barmes, ‘Promoting Diversity and the Definition of Direct Discrimination’, 32 *Industrial Law Journal* 200 (2003). Similar problems apply in Ireland: see Costello, ‘Positive Action’, 199-206.

⁴² L Barmes, ‘Equality Law and Experimentation: The positive action challenge’ (2009) 68:3 *Cambridge Law Journal*, 623-654.

20. Both at UK and EU levels, there is therefore a lack of a clear legal framework in both judicial decisions and legislative provisions when it comes to considering what scope is available for positive action measures. This lack can be traced back to an uncertain and fluctuating commitment to substantive equality principles. This failure to fully embrace substantive equality principles is also evident when it comes to assessing the effectiveness of mainstreaming initiatives at both national and EC levels.

§5. Mainstreaming and Positive Duties

21. Almost all of the EU states have implemented gender mainstreaming programmes of varying degrees of effectiveness and ambition.⁴³ At the level of the EC institutions, the European Commission has introduced policy guidelines specifying that equality concerns be taken into account at every level of policy formation, impact assessment and decision-making.⁴⁴ Gender mainstreaming has similarly been made a legal requirement in respect of the

⁴³ See Final Report of Activities of the Group of Specialists on Mainstreaming, *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices*, EG-S-MS (98), (Strasbourg: Council of Europe, May 1998); Mackay and Bilton, *Learning From Experience: Lessons in Mainstreaming Equal Opportunities*.

⁴⁴ See Commission Communication, *Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities*, COM (96) 67, 2. For a comprehensive examination of mainstreaming at EU level, see Jo Shaw, 'Mainstreaming Equality and Diversity in European Union Law and Policy', 58 *Current Legal Problems* 255 (2005).

allocation of European Structural Funds⁴⁵, has been adopted as part of the EU Guidelines for Member States Employment Practices⁴⁶, and has been given a constitutional basis in Article 3(2) of the EC Treaty and Article 23 of the Charter of Fundamental Rights. However, mainstreaming initiatives across the other equality grounds have been considerably less advanced. Shaw has suggested that initial positive developments in the field of race equality in the late 1990s have been ‘watered-down’ in recent years.⁴⁷ There have been some limited attempts to mainstream disability issues into EU law and policy⁴⁸, but no comprehensive cross-ground programme of equality mainstreaming.⁴⁹ This reflects the similar position in the bulk of the member states.

22. Mainstreaming does clearly offer great potential for encouraging a greater focus upon the need to develop positive action strategies, and has been seen as a major tool for encouraging institutions to adopt a substantive equality approach in their policies and practices. However, a major problem with mainstreaming policies is that they are ‘soft law’ initiatives. This means that the implementation of effective mainstreaming often only happens when all

⁴⁵ See Siobhán Mullally, *Gender Proofing in the Context of the European Structural Funds: Outline Guidelines* (Dublin: Government Stationery Office, 1999).

⁴⁶ Decision 2001/63/EC of 19 January 2001 on Guidelines for Member States’ Employment Policies for the Year 2001, [2001] O.J. L22/18.

⁴⁷ See Shaw, ‘Mainstreaming Equality and Diversity’, 235. See also European Commission, *Action Plan against Racism*, COM(1998) 183, 25 March 1998; Commission Report on the Implementation of the Action Plan against Racism, *Mainstreaming the Fight Against Racism*, January 2000.

⁴⁸ Shaw, ‘Mainstreaming Equality and Diversity’, 264.

⁴⁹ See Jo Shaw, *Mainstreaming Equality in European Union Law and Policy-Making* (Brussels: European Network Against Racism, 2004).

the necessary ingredients of political good-will, organisational capacity, sustained leadership and expert advice are in place.⁵⁰ Rees suggests that many mainstreaming initiatives across Europe have been under-resourced, that an emphasis on procedure and ‘tick-boxing’ at the expense of outcomes has been prevalent, and that sustaining attention and support for mainstreaming has proved difficult.⁵¹ This reflects a recurring experience in discrimination law: pious equality initiatives have little or no real impact without strong enforcement provisions and a clear set of legal requirements that compel action.⁵²

23. In addition, Verloo has suggested that mainstreaming has to ‘resonate’ with the existing assumptions, rhetoric and practices within which public authorities work.⁵³ This carries with it the danger that mainstreaming may become no more than a technocratic tool in policymaking and can be co-opted

⁵⁰ For example, criticism has been expressed that gender equality considerations have been noticeably absent from the development of the European Employment Strategy. See Jill Rubery, ‘Gender Mainstreaming and Gender Equality in the EU: The Impact of the EU Employment Strategy’, 33 *Industrial Relations Journal* 500 (2002); Jill Rubery *et al.*, ‘Gender Equality Still on the European Agenda – But For How Long?’, 34 *Industrial Relations Journal* 477 (2003) 477; Jill Rubery *et al.*, ‘The Ups and Downs of European Gender Equality Policy’, 35 *Industrial Relations Journal* 603 (2004).

⁵¹ See Teresa Rees, *Mainstreaming Equality in the European Union* (London: Routledge, 1998).

⁵² See Christopher McCrudden, ‘Equality’ in C.J. Harvey (ed.), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford: Hart, 2001) for a comprehensive discussion of these limitations in the Northern Irish context.

⁵³ Mieke Verloo, ‘Another Velvet Revolution? Gender Mainstreaming and the Politics of Implementation’, *IWM Working Paper*, no.5/2001 (2001), 9-10; available at: <http://www.iwm.at/publ-wp/wp-01-05.pdf> (last accessed 5 October 2005).

to maintain existing practices. Stratigaki has argued that the adoption of mainstreaming measures is often used to neutralise or defer the adoption of other forms of positive action measures.⁵⁴ It certainly is apparent that mainstreaming initiatives are often not introduced in ‘difficult’ areas, such as ethnicity/race, as the record at national and EC levels demonstrates.

24. As Shaw has argued, Article 3(2) of the EC Treaty read with the provisions of the Charter and Constitutional Treaty may give a more firm foundation and impetus to mainstreaming at the EC level, which may then ‘trickle-down’ to the member states. However, this will not solve the problem of the tendency for mainstreaming initiatives to be ineffectual and even counter-productive. There is a need for a much more precise legal basis for mainstreaming to be introduced, and much greater precision in identifying what steps are required.

25. The UK is now increasingly utilising a new legal mechanism, positive equality duties, to achieve this enhanced focus upon the needs of disadvantaged groups. Positive duties are closely related to mainstreaming initiatives, as they are designed to make public authorities adopt substantive equality approach. This relatively new form of positive action strategy involves the imposition of a statutory duty on public authorities to a) eliminate unlawful discrimination, and b) to promote equality of opportunity in the performance of their

⁵⁴ Maria Stratigaki, ‘Gender Mainstreaming Vs Positive Action’, 12 *European Journal of Women’s Studies* 165 (2005). She argues that a ‘conflict’ exists between mainstreaming and positive action, but mainstreaming in ideal conditions should complement and make possible other positive action measures, by encouraging the inclusion of the perspectives of disadvantaged groups within policy formation.

functions.⁵⁵ In discharging this duty, public authorities are supposed to assess the impact that their practices and policies are having upon the goal of promoting equality of opportunity, and to take remedial action when necessary. Consultation with affected groups should also form a central part of this assessment process.⁵⁶

26. The introduction of such positive duties will not automatically solve all the problems that have arisen with mainstreaming initiatives. Duties are potentially as vulnerable as mainstreaming initiatives to problems such as the lack of political will, a lack of resources and the possibility of formal equality approaches slipping back into place under the guise of formal compliance with the duties. Much will depend upon the effectiveness of the enforcement measures for the duties. In the UK, the equality commissions, inspectorates and the courts are given roles in enforcing compliance, with the equality commissions also given a role in providing guidance to public authorities, in the hope that this guidance will steer the authorities towards some sort of substantive equality approach.⁵⁷ Much will also depend upon the willingness

⁵⁵ See Fredman, *Discrimination Law*, 176-195. See also Colm O’Cinneide, ‘Positive Duties and Gender Equality’, *International Journal of Discrimination and the Law* 91 (2005); by the same author: ‘A New Generation of Equality Legislation? Positive Duties and Disability Rights’, in A. Lawson and C. Gooding (eds.), *Disability Rights in Europe* (Oxford: Hart, 2005), 219-247; *Taking Equal Opportunities Seriously: The Extension of Positive Duties to Promote Equality* (London: Equality and Diversity Forum/Equal Opportunities Commission, December 2003).

⁵⁶ Fredman, *Discrimination Law*, 181-182.

⁵⁷ See Commission for Racial Equality, *Statutory Code of Practice on the Duty to Promote Race Equality*, (London: Commission for Racial Equality, 2002).

and ability of disadvantaged groups to use the duties to put pressure on public authorities to adopt meaningful substantive equality approaches. The duty approach does nevertheless have real potential, and due consideration should be given to the EU institutions adopting a similar set of obligations to steer their work.

§6. Conclusion

27. Rees has called for the use in equality law and policy of what she describes as a combination of ‘tinkering’, ‘tailoring’ and ‘transforming’ approaches: the use of equal treatment laws to prohibit unjust forms of unequal treatment, the introduction of targeted measures to help disadvantaged groups overcome obstacles to full equality of participation, and the implementation of ‘mainstreaming’ strategies to identify how existing systems and structures create patterns of structural discrimination and ‘altering or redesigning them as appropriate’.⁵⁸ At present, the lack of clarity as to the permissible scope of positive action, and the lack of meaningful implementation of mainstreaming initiatives all mean that the ‘tailoring’ and ‘transforming’ approaches remain chronically underdeveloped at both member state and EU levels. There is a pressing need for greater scope to be given to positive action measures, greater clarity in legislation and the case-law, and reinforcement of mainstreaming initiatives by the use of positive duty requirements. Taken together, these

⁵⁸ Teresa Rees, ‘The Politics of ‘Mainstreaming’ Gender Equality’, in E. Breitenbach *et. al* (eds), *The Changing Politics of Gender Equality in Britain* (Basingstoke: Palgrave, 2002), 45, 46-48.

measures would be a significant step in giving effect to a meaningful substantive equality approach.

28. It is also perhaps time to consider whether additional approaches could be adopted at national and EU level. Positive duties could also be imposed upon private companies, in the form of legislative duties requiring proactive action to promote equality of opportunity by private employers with a sufficiently sizeable workforce.⁵⁹ This approach has been adopted with some success in Canada⁶⁰, and in the particular context of Northern Ireland.⁶¹ Other possibilities exists: for example, the legislative obligation to make reasonable accommodation for disabled persons could be extended across all the other equality grounds, as is done with Canadian anti-discrimination legislation.⁶²

29. Space prevents a detailed analysis of the merits and possible defects of these strategies. Much depends upon how such obligations would be designed and

⁵⁹ See the *Hepple Report*, para. 3.3, 56-57.

⁶⁰ See Jain, Sloane and Horwitz, *Employment Equity and Affirmative Action: An International Comparison*, 22-27.

⁶¹ See Christopher McCrudden, 'The Evolution of the Fair Employment (Northern Ireland) Act 1989 in Parliament' in R.J. Cormack and R.D. Osborne (eds.), *Discrimination and Public Policy in Northern Ireland* (Oxford, OUP, 1991); Christopher McCrudden, Robert Ford and Anthony Heath, 'Legal Regulation of Affirmative Action in Northern Ireland An Empirical Assessment', 24 *Oxford Journal of Legal Studies* 364(2004).

⁶² For the Canadian approach, see *British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.* (1999), 35 C.H.R.R. D/257 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* (1999), 36 C.H.R.R. D/129; *Central Okanagan School Dist. No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425 (S.C.C.).

enforced, whether sufficient political will exists to support their introduction, and whether such measures would be deemed in many European countries to be an excessive interference with private and commercial autonomy.⁶³ However, given the limits of the anti-discrimination model, it is time that serious thought was given to developing new and more effective ways of combating structural discrimination across the EU.

APPENDIX

What follows is a useful summary of the legal position adopted in various EU member states on the issue of when the use of positive action is subject to legal constraints, taken from S. Prechel and S. Berri, *EU Rules on Gender Equality: How are they transposed into national law?* (Office of the European Commission, 2009):

The concept of *positive action*, although often a controversial issue, has been transposed in most of the countries. As a rule, it may apply in the various areas covered by EU law, such as employment, occupational pension schemes and access to and the provision of goods and services. The most important area for positive action has, up until now, been access to employment and working conditions...But now it is appropriate to make some general observations on positive action.

⁶³ For a discussion of the lack of success of Dutch attempts to place duties upon private bodies, which lacked strong political support and an effective enforcement mechanism, see Folke J. Glastra et al, 'Between Public Controversy and Market Initiative: The Politics of Employment Equity and Diversity in the Netherlands', in C Agocs (ed.), *Workplace Equality: International Perspectives on Legislation, Policy and Practice* (London, Kluwer, 2003), Ch 8.

The provisions on positive action can be laid down in the Constitution as has been done, for instance, in Greece, Malta, Portugal and Spain. In Spain, positive action is allowed as a result of an interpretation of two provisions of the Constitution by the Constitutional Court. It would appear that only in Greece and Portugal are positive action measures qualified by the Constitution not as a derogation from the principle of equal treatment, but rather as a means by which to achieve equality. In other countries the provisions are of a legislative nature. They are often contained in legislation aiming at equality of opportunity between men and women or in more general anti-discrimination legislation (e.g. Austria, Denmark, Finland, Germany, Norway, Slovenia, Spain and Sweden). In some countries, like Lithuania, a special law has been necessary to allow for positive action.

Positive action is often conditional, i.e. it is only allowed under certain conditions. For instance in the Dutch Equal Treatment Act the following conditions apply: (a) a positive measure must be aimed at diminishing or cancelling disadvantages for women, (b) the disadvantages must be linked to sex, and (c) the measure must be proportionate to the aim. There is no obligation or requirement to introduce and effectuate positive action programmes. Also in other countries, like for instance Portugal, the temporary basis is very important.

In principle, positive action provisions are, like in EU law, permissive in nature, i.e. it is allowed, but it is not laid down as an obligation. However, in some countries – e.g. Austria, Bulgaria and Germany – a positive action is framed as an obligation, at least in the public sector. In Austria, for instance, all ministries have to pass affirmative action plans for their respective ministries and set binding targets in order to increase women's representation. In Germany public institutions are under an obligation to adopt equality plans to increase women's representation. In Italy positive actions are promoted and supported by special funding. In the case of collective discrimination, the court can even order the adoption of a positive action plan. In Greece positive measures, in particular in favour of women, are an obligation for all state authorities by virtue of the Constitution.

In other countries, positive actions are much less welcome. In Belgium, for instance, the lawfulness of positive actions remains uncertain. In France, there is no reference to positive action in the Anti-Discrimination Act; there are only some provisions in the Labour Code. Positive measures can in any case not take the form of quotas. In Latvian law, there are no provisions on positive action at all. Furthermore, the description of the concept of positive action is problematic in Slovakia. In the United Kingdom, positive action is only allowed in a very limited number of cases. In Romania, positive action is provided for in the law, but is not applied or welcomed in practice.