A study on positive action in the European Union, Canada, United States and South Africa

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Introduction

This is a summary of research report for the study on positive action in the European Union. The Centre for Inclusion and Diversity at the University of Bradford was commissioned to lead this fifteen-month project in collaboration with the European Roma Rights Centre and the Ludwig Boltzmann Institute of Human Rights. The main aim of the study was to examine the role of positive action in preventing or remedying discrimination by comparing the legal frameworks, policies and practices of positive action in Europe, Canada, United States and South Africa.

Special thanks are due to the European Commission for funding this study and to all the participating organisations, government offices, companies and individuals who took part in all aspects of the study. I am beholden to all PAMECUS consortium members who took part in the original report from which this synopsis is a derivative. What follows is, of course, my own responsibility.

Background

There is widespread recognition that the problems of discrimination and inequality in employment and service provision will not disappear on their own and that appropriate strategies are required in order to nurture a workforce that comprises a variety of talents and reflects the diverse communities being served (Archibong, 2006; Archibong et. al., 2006; Dhami et. al., 2006). Barriers to recruiting people from diverse backgrounds into employment have been the subject of both theoretical and research literature (Darr and Archibong, 2004). Several authors have pointed out that there is frequently a gap between written policies and actual practices, particularly in health and educational provision (Baxter 1997, Ahmad 1993). In some
instances, deficiencies in relation to equal opportunities policies within organisations have been cited (Bagilhole and Stephens, 1999), and a reluctance to implement them where they are in place (Carter, 2000).

Even though the intention of equal opportunities policies has been to address the problems of discrimination and inequity, there is still a need to change institutional practice, as women, disabled workers and other minority groups continue to face discriminatory barriers in the workplace, which prevent them from enjoying equal opportunity (Povall, 1990; Crompton and Le Feuvre, 2000). Clearly there remains a vibrant debate about the most appropriate way to tackle inequality and promote diversity at work and in the delivery of services (Edwards and McAllister, 2002; Bagshaw, 2004; Stratigaki, 2005; Bajawa and Woodhall, 2006; Young, Mountford and Skrla, 2006).

In recent years there has been a significant expansion of legislation by the European Commission (EC) in the area of equal treatment, making the EC the dominant force setting the tone and content of national non-discrimination and equality laws across the 27 Member States. The year 2000 saw the adoption of two Directives prohibiting discrimination on the grounds of race and ethnic origin (EC Directive 2000a), and sexual orientation, religion or belief, disability and age (EC Directive 2000b). These were followed by amendments to the long-standing Directive 76/207 on equal treatment for men and women, the adoption of a “goods and services” gender non-discrimination Directive in 2004 (EC Directive 2004) and, more recently, the adoption of the “Recast” gender Directive (EC Directive 2006). 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 Rights5 (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 within employment and service development across Europe.

Summary of the Literature

Conceptualisations of positive action

The understanding of the term positive action and related terminology vary significantly across countries,

5 http://cridho.cpdr.ucl.ac.be/en/eu_experts_network/
sectors and equality 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). Other terminologies utilised include ‘constructive action’ (Cunningham 1997), 'reasonable accommodation' (Irving & Kleiner 1999), 'structural initiatives' (Fielding 1999), 'diversification strategies' (Groschi & Doherty 1999), 'mainstreaming projects' (Kingsley 2001) 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. More broadly, Iles & Hayers (1997) use the overarching ‘diversity competence approach’ to describe effective international team working, whereas Miller & Rowney (1999) prefer to use ‘managing diversity’.

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 apply this concept through workforce diversity measures, but above all positive action is embedded within a larger political context. Statutory equality bodies are charged with explaining the application of the legislative context, managers within organisations need to expand the concept of positive action into practical diversity measures, while communication of positive action through a variety of media may remain dependent on context and is often driven by the political agenda in question. The authors explain that these factors can impact on the nature of positive action and the initiatives that materialise in reality. In fact, there is clear evidence in the literature that misinterpretation of Positive Action does exist (Chater & Chater, 1992; Johns, 2005) and can often lead to lack of, or limited engagement with, positive action (Archibong et al. 2007).

**Measurement of impact / success of positive action**

The literature shows considerable differences in the types of initiatives implemented, as they are normally developed with local issues in mind (Iganski et al., 1998; Alexander, 2000). Consequently, this 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 (i.e. its aims and objectives) and this is not as coherent as one might suspect, but depends on the way positive action is modelled. 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 positive outcomes following positive action initiatives in the health and education sectors (e.g. NHS, 2005, Payne & Huffman, 2005, Baxter et al 2008). It is absolutely 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 this observation, as they describe measurement of the effectiveness of affirmative action policies in the USA 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 Stephanopolous and Edley’s (1995) review of the effectiveness of affirmative action in the USA 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 Ihlanfeldt (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 ‘diversity contracts’, establishing a Centre for Management of Diversity and extending voluntary ‘covenants’. In 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 & 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 (Osborne and Shuttleworth, 2004), 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, Neale and Bagilhole (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’, but also about improving skills so that the candidates can get the jobs for which they apply (Shifrin, 2004). However, research into positive action in the aviation industry, (Davey and Davidson, 2000) 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.

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: 22). Other studies have reported improved beliefs and attitudes amongst those who have taken part (Brew and Garavan, 1995; Band and Parker, 2002). The University of Warwick (Band and Parker, 2002) carried out some research to evaluate its ethnic minority undergraduate mentoring scheme. 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. They also measured success in terms of the enthusiasm and commitment of mentors and their satisfaction with the level of benefit provided to their students and discussed the benefits in terms of building relationships between organisations and the wider community (especially the police force). However, all of the measures were subjective and dependent on self-ratings. None of the outcomes were correlated with ratings by third parties, or other objective criteria such as the increased likelihood of getting an interview, job offers or promotion. Several initiatives have reported that participants ‘enjoyed’ the initiative (e.g. Brew and Garavan, 1995; Band and Parker, 2002), 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). Similarly, just because the individual’s attitudes have changed, they do not necessarily behave any differently.

All of the ‘success’ factors discussed have been associated with changes in the individuals themselves. However, several authors have noted that individuals do not operate within a vacuum at work, 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 (e.g. Brew and Garavan, 1995; 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 (e.g. Barnes et al., 1998; Arksey, 2003; Anderson, 2004). Nevertheless, it did find encouragement in one study by Payne and Huffman (2005) which found that mentoring of USA 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 ten years later.

The Present Study

The research sought to help the European Commission develop a framework for better understanding the role of positive action measures in preventing or remedying discrimination, building on the knowledge of the existing legal framework set out in other studies. It also sought to help the Commission gain a better insight into the kind of practical positive action measures 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 examined how legal frameworks, policies and practices of positive action in the European Union compare with Canada, United States and South Africa.

The study involved those responsible for designing and implementing positive action measures. These include Human Resources personnel, Equality and Diversity Leads, Cohesion and Service Development Managers, Chief Executives and other Senior Managers with responsibility for equality. Specific objectives included exploring the:
• historical, social and political context within which positive action measures have been developed across both employment and service provision.

• perceptions, understanding and the rationale for developing and implementing strategies for positive action, covering the equality grounds of age, disability, race, religion and belief and sexual orientation. Aspects of gender which intersect with other grounds were also considered.

• outcomes and impact of positive action measures in participating organisations.

• perceived effectiveness of the actions undertaken and how this could be improved.

**Methods**

A mixed methodology using both qualitative and quantitative methods was employed, in order to measure the success of these measures from the viewpoint of different stakeholders responsible for designing positive action measures. For example, workshop participants consisted of chief executives, diversity officers, human resource managers and service development workers. 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; on-line survey in 27 European member states; the EFTA-EEA countries and in third countries and 3 non-EC countries participating in the study and comparative in-depth study.

**Literature review and development of the working definition of positive action**

An initial in depth literature review was conducted in order to explore the wider theoretical and practice debates in relation to positive action. The findings of this review helped identify key themes and informed the development of a definition of positive action that was used in subsequent phases of the study. This was necessary given the confusion and inconsistency surrounding the use of the term ‘positive action’ and its perceived synonymity with terms such as ‘affirmative action’, ‘reverse discrimination’ and ‘positive discrimination’ (Archibong* et al.*, 2006; Groschi and Doherty, 1999; Adam, 1997).

**On-line survey**

An online questionnaire was undertaken in order to provide an overview of the nature and extent of positive action activities taking place both at a country level and Europe wide. The survey was made
accessible within the 27 European member states, two European Fair Trade Association countries (Iceland and Norway) and three non-EU countries (United States, Canada and South Africa) participating in the study. Using a Likert scale to record responses, the survey elicited information from organisations about their implementation of equality and diversity policies, their understanding and perceptions of positive action and their use of positive action measures, including outcome measures. It also asked organisations to identify possible barriers to positive action and any future plans to conduct positive action. Respondents were provided with the option of completing the questionnaire in English, French or German initially. The questionnaire was first sent to native speakers of the translated version to ensure that its content was translated appropriately for national contexts and to ensure that the original meaning of questions was maintained (Atkin and Chattoo, 2006). The need to achieve conceptual equivalence was considered to be particularly vital given the potential for misunderstanding and misinterpretation of terms such as ‘positive action’, ‘targeted recruitment’ and ‘championing schemes’ in countries where English was not the native language (Herdman et al., 1998). Once amendments were made to the few translation errors identified, the questionnaire was further piloted on six people in the UK, in order to identify any other difficulties with the content and context of the tool. Feedback from these participants resulted in minor modifications being made to the questionnaire.

**Comparative study on positive action**

A comparative case study approach was adopted, exploring practical applications of positive action measures in selected non-European (South Africa, Canada and the United States) and European Union countries (Austria, France, Hungary, Ireland, the Netherlands, Slovakia, Sweden and the UK). The non-European countries were selected because of their history regarding anti-discrimination laws and affirmative action measures. For Canada and the United States, the measures are well established, but in South Africa the measures and legal framework were more recent. The European 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. 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.

The comparative case study data were collected by means of participatory methods, including: a consensus workshop which encouraged maximum participation of all stakeholders (Spencer 1989; Stanfield 2002), interviews conducted with key actors in order to generate more feedback and guide ongoing research; and the analysis of policy documents of participating organisations. Consensus workshops were undertaken in
nine of the eleven case study countries. It was not possible to conduct workshops in France and Sweden for logistical and political reasons, respectively. In France, conflicting interpretations of positive action held by different stakeholders made it difficult to organise a workshop, whilst in Sweden the changes in working arrangements with our contacts proved untenable.

Excepting France and Sweden, half-day consensus workshops were held in each country. 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 trades unions. A total of 272 people took part in 18 heterogeneous small group discussions. Themes elicited from workshops were further validated by conducting targeted follow-on face-to-face or telephone interviews with 141 individuals identified from consensus workshops who were willing to discuss their views in more detail. The interviews lasted approximately 30 to 60 minutes and were semi-structured in nature.

**Findings**

**The legal context of positive action**

The literature review involved a detailed analysis of organisational policies / legal frameworks underpinning positive action measures in each of the eleven countries. Based on this literature review, the legal team produced a working definition of positive action. Evidence from previous studies (e.g. Archibong et al., 2006) 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. The understanding of the term positive action and related terminology vary significantly across countries, sectors and equality 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 a myriad of contexts (Adam 1997, Archibong et al. 2006). It was therefore crucial to identify a detailed definition of positive action for the purposes of this project. This definition was based on the prevailing position in EC law. In summary, it provided that:

‘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.’

The legal definition was positively received by a wide range of professionals with experience in the field of diversity. This is confirmed by the results of the on-line survey of 635 respondents drawn from 32 countries. The survey was directed at individuals who are responsible for designing and implementing positive action measures, e.g. human resources personnel equality and diversity leads. 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 Directors (87%) and voluntary sector/NGOs at 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/NGO 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 sub category 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.

**European Community Law**

Given that all positive action must be adopted and implemented under the auspices of 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 (Waddington and Bell 2001). 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 study, the limitations on 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 there is no 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.

For many years EC 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, racial or ethnic origin, religion or belief, sexual orientation, age and disability, and with the subsequent adoption of the Racial Equality and Employment Equality Directives. 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 (EC Directive, 1976) and related case law. To date, no European Court of Justice (ECJ) (henceforth: Court) case law has arisen on positive action with regard to the other grounds covered by Article 13 EC.

The original Equal Treatment Directive, which addressed employment discrimination in the context of gender, 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.

The Court had various opportunities to consider the meaning of Article 2(4) of the Directive (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). In its 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.” 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. 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. 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.

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 …”. The Court regarded this measure as forming “part of the restricted concept of equality of opportunity”, which was allowed under Article 2(4).

In the meantime, the original Equal Treatment Directive has been replaced by the “Recast” Directive, (EC Directive 2006) which codifies most 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 (See Article 3 of the ‘Recaset’ Directive).

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. 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.

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 size fits all” approach, 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 EC 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? (For example, this is permitted under s. 37 and s. 38 of the British Race Relations Act 1976).

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 provide for some form of (obligatory) quotas (Waddington, 1996) 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.”

**Analysis of the Legal Framework in European and Non-European Countries**

This section of the paper provides a summary of the legal situation regarding positive action in the countries selected for case study within the EU and outside the EU. 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. More detailed information on the relevant national legal provisions can be accessed from the individual country reports6.

6 http://www.brad.ac.uk/health/pamecus/
Legislation establishing positive action measures

This describes 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 [Art L5212-2 Labour Code]. In Austria, all employers of more than 25 persons must ensure that they employ one disabled person for every 25 employees (Act on the Employment of People with Disabilities 2005). 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’ (s. 47(4).

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 under-representation 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.

Legislation establishing 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 [Equal Opportunities Act 1991; Law on Measures against Ethnic Discrimination in Working Life 1999]. Similar duties applied in relation to universities, but these also covered the grounds of religion, sexual orientation and disability [Equal Treatment of Students at Universities Act 2002]. 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 child care [Act Prohibiting Discriminatory and Other Degrading Treatment of Children and Pupils 2006]. 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 (which will now be extended to cover 9
protected characteristics as detailed in the New Equality Act (2010). 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). 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 (Art 63(4), Equal Treatment Act).

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’ [Art 55(2), Fair Employment and Treatment (Northern Ireland) Order 1998, SI 3162 (NI 21)]. In France, employers must take into account age and disability when selecting employees for redundancy [Art L1233-5 Labour Code]. Where the firm employs more than 50 persons, 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, South Africa and the USA, there seems to be a more extensive use of legislation to oblige organisations to take positive action (Positive action’ is not the terminology used in these states, but it will be adopted here in order for consistency throughout the paper). 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 $200,000, and who employ more than 100 employees, must sign a commitment to implement employment equity in line with the Act.

A similar pattern of imposing obligations on federal contractors can be found in the USA. 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 (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.\textsuperscript{17}

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.

\textit{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 2000-2004 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 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 states, there was a tendency to permit positive action in relation to socio-economic disadvantage,

\textsuperscript{7} The full text of Executive Order 11246 is available on: http://www.dol.gov/ofccp/regs/statutes/eqo11246.htm.
with less emphasis on discrimination grounds. In France, 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 [Art 8(a), Law Amendment 85/2008 to Law 365/2004 Act on Equal Treatment]. 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 states 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 USA, 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’ (Connolly, 2006).

**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 [Art 11(1)]. 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’[Art 8(a), Law Amendment 85/2008 to Law 365/2004 Act on Equal Treatment]. 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 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 [The State v Lönn and Midander, Case T_400/06, 21 December 2006]. As is well known, there has been extensive litigation in the USA 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 paper. 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 (Fredman, 2002). 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 [Grutter v Bollinger 539 USA ;306, 123 S Ct 2325 (2003)]. 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 [Parents involved in community schools v Seattle School District No 1 et al, 127 S Ct 2738 (2007)].

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 decision from the Supreme Court has clarified that positive action cannot be used as a justification for otherwise arbitrary recruitment decisions [Supreme Court of Appeal (17 September 2008)].

Perceptions of positive action

Understanding of Positive Action

The study highlights confusion and inconsistency in the terminologies used to describe positive action 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.

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 some countries such as UK, Ireland and Hungary, 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 that positive action measures should equalise social inequalities, eliminate disadvantage and even compensate for disadvantage. Participants 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. For example, 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 terminology 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. For example 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. There was common agreement that positive action measures had to be implemented as part of a multi-angled, coherent strategy in order to be successful and effective in the long run. If not supported by the whole society, any measures aiming at increasing equality were considered useless.

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’ described positive action. The variations between groups that confused positive action with positive discrimination were mainly on a country basis as discussed.

In Sweden, ‘positive action’ was not a commonly used term nor was it found in the relevant legislation, which speaks about ‘active measures’ and ‘positive discrimination’. Confusion arose 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, participants placed greater emphasis upon the benefits of positive action measures and 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.

While the conceptualisation of positive action varies widely across non European countries involved in the
study, some broad generalisations can be made. Most participants 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 affirmative action measures, and the legislative and policy basis for these measures across countries. Unlike Canada and the USA, that 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. Owing to the legacy of apartheid and segregation among different racial groups, affirmative action in South Africa is well received as a policy, though there were misgivings about its implementation.

In the USA, there was a perception of close association of affirmative action with quotas and other forms of preferential treatment within the consciousness of the population. As such, preferential treatment aimed at increasing the representation of specific groups has often attracted a negative response. This was not helped by the negative media portrayal of affirmative action as a means of giving opportunities to undeserving and unqualified people, which serves to undermine its value. However the majority of the participants in the USA expressed their understanding of affirmative action as a set of strategies used, mostly by employers and educational institutions, to provide equal opportunities and fairness related to obtaining employment or admission to universities and colleges.

Although the understanding of affirmative action in Canada is based on experience within work or in an 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 historical barriers and to address systemic change. 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 USA described affirmative action as measures to reverse discrimination.

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. Survey findings show 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. 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] recognized 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) was rated by Chief executives at 82% before and 88% afterwards. Voluntary organisations and NGOs also tended to give slightly higher ratings.

**Drivers for Positive Action**

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. The 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.

The legislative framework in most EC 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). 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.

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 the Netherlands, Austria, Sweden and Ireland, 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 addressed Roma in general, while some addressed specific concerns of Roma women and many educational and employment training programmes targeted young Roma.

The nature of the impetus for affirmative action that emerged from the USA workshop included the demographic imperative, grassroots efforts, and 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 USA 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.

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 addition, 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.

Support for Positive Action

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 and constant discussion about the benefits of diversity.

The survey results show differences in relation to support for positive action in different sectors. Whilst the great majority of participants (85%) agreed that there was Strong individual commitment from participants, the figure was a little higher for NGOs and voluntary organisations, at 88%, but lower in the public sector (78%) and in large organisations with between one and five thousand employees (73%). Seventy eight percent agreed that there was Leadership and senior management support; those at CE or MG 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 voluntary/NGO 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 voluntary/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 & universities were again lower than average at 62% and 35% respectively. People working in equality and diversity also rated this lower at 59%.

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 study countries did not have systematic monitoring systems and output measures in place. 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. The survey findings show 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.

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 focussed on measurable outcomes.

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 and improvement in the interaction between employees and in the 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 argued 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.

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 initiatives 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.

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 USA, the problems ranged from unintended consequences of the affirmative measures, negative attitudes towards affirmative action, hostile political climate and misinformation to media manipulation. Whilst in South Africa, 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.*
**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. 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.

Disclosure of potentially sensitive information was an issue that arose in relation to different grounds, for example, in Ireland in relation to disability and in the UK concerning sexual orientation. 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 recruitment 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 negative experiences with the police in their own countries.

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 adverts 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.

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 USA. 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.

**Positive action in practice**

Overall, 72% of survey 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 A, 50% or more respondents were implementing measures in the areas of age, disability, racial or ethnic origin and gender, with a quarter addressing the 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 equality grounds. When asked when positive action measures were first introduced, almost half of the respondents (48%) had introduced such measures more than 5 years previously, 40% between 1 and 5 years, and 8% under a year before the survey.

The overall picture regarding the types of measures introduced in organisations mirror the findings from the workshops and interviews. 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.

**Examples of positive action**

In order to provide further insight into the kinds of measures which have been applied in the European Union, Canada, South Africa and the United States of America. Drawn from the current study, these examples reflect localised interpretations of positive/affirmative action. Detailed description of the examples are available in the country reports8, 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

8 [http://www.brad.ac.uk/health/pamecus/](http://www.brad.ac.uk/health/pamecus/)
action to cover the diversity ground of religion and belief.

**Black and Ethnic Minorities and Vocational Training in 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 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 child care 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 inter-cultural 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 substandard 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 co-operates 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 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 USA:** As part of the University’s strategy to increase diversity among ranked faculty from under-represented ethnic groups, from May 2008 $1million 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 normalize 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 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.

Conclusions

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 the business case, corporate social responsibility, moral-ethical consideration, 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’, ‘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.

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

**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.

**Key messages**

A number of key messages can be drawn from this research study 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 consideration, 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 -are 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 who 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 go 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.

**Recommendations**

**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, health care, etc. relating to these different grounds. This research should be carried out at the national level, as it can also be expected that the situation with regard to different equality grounds or 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.

**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.

**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 organizations 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

- Positive action needs to be mainstreamed as part of a broader normative change and 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. 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.

- 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 co-ordinated 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 USA is to encourage organizations 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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