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EXPLORING THE BOUNDARIES OF POSITIVE ACTION UNDER EU LAW: A SEARCH FOR CONCEPTUAL CLARITY

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1. Introduction

Positive action is a well-established element of EU anti-discrimination legislation. Provisions authorizing Member States to adopt positive action measures can be found in a variety of Directives on gender equality and non-discrimination on grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation.[1] In addition, there have already been various notable judgments from the Court of Justice concerning the scope for, and limits to, positive action under the original 1976 Equal Treatment Directive.[2] Nevertheless, confusion often surrounds exactly what type of measures fall under the concept of positive action. This appears to be linked to the expansion in recent years of the range of tools used to combat discrimination and promote equality. Tools such as "reasonable accommodation" or "mainstreaming" risk being conflated with positive action, even though these are distinct and different.

The importance of clarifying the boundaries to the concept of positive action lies in the different legal rules and reasoning that may apply if a case concerns positive action or, for example, reasonable accommodation. While

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1. Art. 5, Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 180/22 (hereafter the Racial Equality Directive); Art. 7, Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16; Art. 6, Directive (EC) 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, O.J. 2004, L 373/37; Art. 3, Directive (EC) 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), O.J. 2006, L 204/23 (hereafter the Gender Recast Directive).

2. E.g. Case C-158/97, *Badeck*, [2000] ECR I-1875. See further, Ellis, *EU Anti-Discrimination Law* (OUP, 2006), pp. 297–313; Tobler, "Positive action under the revised second equal treatment Directive", in Association française des femmes juristes and European Women Lawyers Association (Eds.), *L'égalité entre les femmes et hommes et la vie professionnelle – le point sur les développements actuels en Europe* (Dalloz, 2003).

positive action is optional under the EU Directives, providing reasonable accommodation is a mandatory obligation. A rather loose approach to terminology was exposed in *Coleman* v. *Attridge Law and Law*.[3] The case concerned whether the mother of a disabled child could invoke the protection against disability discrimination found within Directive 2000/78 (the Employment Equality Directive). In the course of its judgment, the Court considered the provisions of the Directive on the duty to make reasonable accommodations for disabled persons and on positive action. It seemed to lump both together, referring to them as "provisions concerning positive discrimination measures".[4]

In this article, it will be argued that these instruments are conceptually and procedurally quite different, and that they should not be conflated with each other. It is further submitted that introducing additional labels in EU law, such as "positive discrimination", is unhelpful and may obscure the meaning of lawful positive action. This article begins with a brief resumé of the provisions on positive action within EU anti-discrimination Directives. It will then proceed to examine various dimensions to our understanding of what positive action is (and what it is not). Specifically, it will consider terminology, temporality and proportionality, reasonable accommodation, positive duties, and general policies to promote social inclusion.

2. Positive action and EU anti-discrimination directives

The legal foundations for positive action in relation to gender equality can be found in both the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights. Article 157(4) TFEU provides:

> "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 underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers".

This is complemented by Article 23 of the Charter, which states "the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex". Immediately, there are signs of tension between these two alternative

3. Case C-303/06, *Coleman* v. *Attridge Law and Law*, [2008] ECR I-5603. See also the case note by Waddington, 46 CML Rev. (2009), 665.

4. Ibid. para 42.

definitions. Whereas Article 157(4) TFEU (ex 141(4) EC) implies that positive action is a necessary element of "ensuring full equality in practice", Article 23 is equivocal in its characterization of positive action. The wording "shall not prevent" leaves an impression that positive action is a departure from, or derogation to, the principle of equality.

In the field of employment, the Gender Recast Directive permits positive action in accordance with Article 157(4) TFEU.[5] In relation to goods and services, Directive 2004/113 refers to Article 23 of the Charter in its preamble, but it also contains a specific article on positive action that adopts wording similar to that found in Article 157(4) TFEU.[6]

A slightly different approach can be found in the other anti-discrimination Directives. 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". Equivalent wording is included in the Employment Equality Directive, which deals with a range of discrimination grounds.[7] The distinction between Article 157(4) TFEU and the other anti-discrimination Directives lies in the absence (in the latter) of a reference to "adopting measures providing for specific advantages".

In respect of disability, there are several sources that imply a broader scope for positive action. Article 7(2) in the Employment Equality Directive states that "the principle of equal treatment shall be without prejudice … to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their [disabled persons] integration into the working environment". Article 26 of the Charter also refers to "the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community". While both Article 7(2) and Article 26 are fairly open-ended, they provide an endorsement of the legitimacy of targeted measures that aim to advance equality for disabled persons.

In summary, a number of points emerge from the legislative definitions of positive action. First, with the possible exception of the Charter, all the legislative definitions firmly construct positive action as consistent with the realization of equality. This reveals a willingness on the part of the legislature to move beyond a narrow pursuit of formal equal treatment, and recognition of

5. Art. 3, Directive 2006/54, *supra* note 1.

6. "With a view to ensuring full equality in practice between men and women, 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 sex", Art. 6, Directive 2004/113, *supra* note 1.

7. Art. 7(1), Directive 2000/78, *supra* note 1.

the need to tackle underlying barriers that perpetuate disadvantage. This tallies with the direction of the case law of the Court of Justice, which has, over time, tentatively embraced the idea that the law aims to further "substantive" equality.[8] Secondly, the outlook on positive action is facilitative rather than mandatory. None of the provisions *requires* Member States to engage in positive action; indeed, Member States remain free to impose domestic restrictions on positive action under EU law. It is, therefore, apparently compatible with the directives for a Member State to prohibit at domestic level any recourse to positive action. Thirdly, the legislation leaves considerable flexibility with regard to which measures fit within the definition of positive action. The references to prevention, compensation and, in relation to gender equality, "specific advantages", provide few clues as to where the boundary lies between (lawful) positive action and (unlawful) discrimination.

In relation to gender equality, the Court of Justice has had to fill in the gaps through a well-established body of case law on positive action in the sphere of employment. This has coalesced around two main principles. First, positive action must be proportionate in order to be permissible.[9] This demands that "derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued".[10] Secondly, the Court has held on several occasions that lawful positive action does not extend to measures that automatically and unconditionally provide preferential treatment between equally qualified women and men at the point of selection for employment.[11]

There has not yet been any significant decision of the Court of Justice concerning positive action outside employment or in relation to the discrimination grounds found in the other anti-discrimination Directives. It cannot be said with any certainty whether the Court will simply "read across" the principles in the gender equality case law or whether it may distinguish different factual contexts.[12] Consequently, the legislative framework leaves a degree of uncertainty over both what constitutes positive action and the appropriate legal standard by which such measures will be scrutinized.

8. E.g. Case C-407/98, *Abrahamsson*, *Anderson and Fogelqvist*, [2000] ECR I-5539, para 48.

9. Barmes, "Navigating multi-layered uncertainty: EU, Member State and organizational perspectives on positive action", in Healy, Kirton and Noon (Eds.), *Equality, inequalities and diversity – contemporary challenges and strategies* (Palgrave MacMillan, 2010), p. 67.

10. Case C-476/99, *H. Lommers* v. *Minister van Landbouw, Natuurbeheer en Visserij*, [2002] ECR I-2891, para 39.

11. E.g. Case C-409/95, *Marschall* v. *Land Nordrhein-Westfalen*, [1997] ECR I-6363, para 32; *Abrahamsson*, cited *supra* note 8, para 52.

12. E.g. some have argued for more flexibility in the range of positive action measures permitted in respect of Roma communities in response to educational segregation: De Schutter

Clarifying the meaning of positive action is necessary in order to determine which measures need to be consistent with the legislative (and judicial) pre-requisites, as well as those that fall outside this scrutiny.

3. Talking terminology: Positive action and related labels

One of the perennial problems that besets any discussion of "positive action" is the proliferation of competing terminology that can confuse and obscure. Amongst the labels that are commonly used are "affirmative action", "positive discrimination" and "reverse discrimination". The introduction already mentioned an example of the Court of Justice apparently referring to reasonable accommodation as "positive discrimination". On the other hand, the judgment of the Court of Justice in *Mangold* states that the general principle of equal treatment irrespective of age extends to "affirmative action",[13] while the Opinion of Advocate General Kokott in *Test-Achats* states that "affirmative action" is an exception to the prohibition of discrimination on the ground of sex.[14] These examples also illustrate the problem of translating these terms; the French version of the *Mangold* judgment refers to "*actions positives*" rather than "affirmative action",[15] but in *Test-Achats* "affirmative action" is translated as "*discrimination positive*".[16]

When considering the origins of the terminology, Bacchi notes that the label "positive action" was preferred as a means of avoiding the stereotypes associated with "affirmative action".[17] The latter tends to be equated with practice in the USA and recourse to strong forms of preferential treatment, such as quotas in the allocation of jobs. While this characterization does not reflect the full range of measures pursued in the USA,[18] nor the contemporary

and Verstichel, "Integrating the Roma into European society: Time for a new initiative", in European Centre for Minority Issues (Eds.), *European Yearbook of Minority Issues.* Vol 4, 2004/05 (Brill, 2006), p. 432.

13. Case C-144/04, *Mangold* v. *Helm*, [2005] ECR I-9981, para 76.

14. Opinion in Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and others*, judgment of 1 March 2011, nyr, para 60. A.G. Poiares Maduro has used positive action, positive discrimination and affirmative action in an apparently interchangeable manner: cf. Opinion in Case C-319/03, *Briheche*, [2004] ECR I-8807, paras. 41–42.

15. Para 76.

16. Opinion of A.G. Kokott in *Test-Achats , supra* note 14, para 60.

17. Bacchi, "Policy and discourse: Challenging the construction of affirmative action as preferential treatment", 11 *Journal of European Public Policy* (2004), 128–146, 134.

18. McCrudden, "Rethinking positive action", 15 *Industrial Law Journal* (1986), 219–243, 221.

restrictions there on preferential treatment,[19] it reveals the politically-charged nature of this topic. Efforts to overcome social disadvantage may encounter opposition, particularly where the measures seek to benefit "unpopular" minorities, such as migrants or Roma communities. Hostile political parties or media may readily portray such initiatives as "discrimination" *against* the majority community. This underscores the value of conceptual clarity and care in the use of language.

Given that EU legislation adopts the term "positive action", it seems sensible and pragmatic for EU institutions, including the Court of Justice, to maintain focused on that label. Interchanging this with "affirmative action" and "positive discrimination" is perplexing and risks fuelling the belief that these measures are typically concerned with automatic and unconditional forms of preferential treatment in the allocation of jobs and other social goods. From a legal perspective, arguably it is clearer to make the distinction one of lawful positive action as opposed to unlawful discrimination. Nevertheless, a watertight distinction between what is lawful and what is not lawful is difficult given the ambiguity surrounding the scope for positive action in areas where the Court has yet to provide any interpretation. It might, for example, be tempting to exclude quotas from the concept of lawful positive action; however, these remain common in some Member States in relation to the employment of disabled persons.[20] Such quotas are potentially justifiable by virtue of Article 7(2) of the Employment Equality Directive. Assuming for the moment that this is the legally correct interpretation, here is an example of automatic and unconditional preferential treatment that falls under the heading of "positive action" within the Employment Equality Directive, even though this would not be treated as lawful positive action for the purposes of gender equality legislation. This indicates that the legal boundaries of permissible positive action may not be consistent across all grounds.

Academic and policy literature differs with regard to how widely the term positive action should be defined. In the UK, the previous government proposed a firm distinction between positive action and positive discrimination:

> "positive action means offering targeted assistance to people so that they can take full and equal advantage of particular opportunities. Positive discrimination means explicitly treating people more favourably on the

19. Ware, "Strict scrutiny, affirmative action, and academic freedom: The University of Michigan cases", 78 *Tulane Law Review* (2004), 2097–2116.

20. See Waddington, "Legislating to employ people with disabilities: The European and American way", 1 MJ (1994), 367, and Waddington, "Reassessing the employment of people with disabilities in Europe: From quotas to anti-discrimination laws", 18 *Comparative Labor Law Journal* (1996), 62–101.

> grounds of race, sex, religion or belief, etc by, for example, appointing someone to a job just because they are male or just because they are female, irrespective of merit".[21]

This formulation provides an extreme example in order to place clear distance between these two labels. While this offers a certain degree of clarity, it fails to reflect common practice. There are few examples that can be found in Europe of preferential treatment "irrespective of merit". One of the strongest forms of preferential treatment in employment in Europe is the quota system for recruitment to the Police Service of Northern Ireland. This requires one Catholic recruit to be appointed for every person who is Protestant or of another religion.[22] This scheme is not, though, "irrespective of merit"; all appointees must have already satisfied a preliminary capability assessment.[23]

In contrast to the attempt above to divorce positive action from strong forms of preferential treatment, much of the academic literature does not draw this distinction. McCrudden's typology of positive action includes preferential treatment, such as taking into account race or sex in recruitment decisions.[24] In a similar vein, he considers positive action to include practices where merit is redefined as *including* the protected characteristic,[25] such as deeming it relevant to take into account ethnicity in police recruitment on the basis that the police service would function better with greater representation of ethnic minority communities. Interestingly, the Court of Justice has opened the door to such practices in respect of age discrimination. In *Georgiev*, it held that a mandatory retirement age could be justified by the legitimate aim of promoting the recruitment of people of different ages: "the mix of different generations of teaching staff and researchers is such as to promote an exchange of experiences and innovation, and thereby the development of the quality of teaching and research at universities".[26] While the Court was only examining this as a justification for direct discrimination, its acceptance of the underpinning rationale indicates that it might be open to the idea that positive

21. Department for Communities and Local Government, "Discrimination law review. A framework for fairness: Proposals for a single equality bill for Great Britain" (Department of Communities and Local Government, 2007), p. 61.

22. Section 46 Police (Northern Ireland) Act 2000.

23. De Schutter, "Positive action", in Schiek, Waddington and Bell (Eds.), *Cases, materials and text on national, supranational and international non-discrimination law* (Hart Publishing, 2007), p. 778.

24. McCrudden, op. cit *supra* note 18, 224.

25. Ibid.

26. Joined Cases C-250 & 268/09, *Georgiev* v. *Tehnicheski universitet – Sofia, filial Plovdiv*, judgment of 18 Nov. 2010, nyr, para 46.

action includes engineering age diversity.[27] Like McCrudden, other academic commentators have taken the view that positive action is a wide concept that covers a variety of practices, some of which entail preferential treatment.[28]

The wide view acknowledges the continuum of practices that fall under the rubric of positive action. For example, in *Badeck*, the Court of Justice accepted that a gender quota for places on a training scheme was a lawful form of positive action.[29] In that case, the Court emphasized that equivalent training schemes were also in existence to which any excluded candidates could have sought admission. Yet if an employer attached great weight to completion of a particular training course, then the allocation of places on the training course may be intimately linked to eventual appointment to the job. In this scenario, the distinction between positive action prior to selection for appointment and (unlawful) preferential treatment at the appointment stage seems thin. Indeed, the dichotomy that the Court of Justice has built between automatic and non-automatic forms of preferential treatment during employment selection also appears to be a rather tenuous dividing line.[30]

Overall, it does not seem helpful to erect a terminological distinction between positive action and positive discrimination within EU law. This could be misleading if it was taken to imply that automatic preferential treatment, including quotas, never falls within the scope of lawful positive action. Where positive action takes such forms, it attracts a heightened level of scrutiny, both on the part of the legislator and the courts. Within EU legislation, special provisions have been included in the Employment Equality Directive to allow recourse to quotas in the Police Service of Northern Ireland, and (apparently) in the employment of disabled persons.[31] Stricter scrutiny of such practices also appears inherent given the Court of Justice's reliance on proportionality

27. On the diversity rationale for positive action, see further the findings of the PAMECUS research project coordinated by Prof. Uduak Archibong: <www.bradford.ac.uk/health/pamecus/> (last visited 4 July 2011). The findings of the project are published as European Commission, "International perspectives on positive action measures: A comparative analysis in the European Union, Canada, the United States and South Africa" (Office for Official Publications of the European Communities, 2009); Ware, op. cit. *supra* note 19.

28. E.g. Barmes, "Equality law and experimentation: The positive action challenge", 68 CLJ (2009), 623–654; Makkonen, *Equal in law, unequal in fact – racial and ethnic discrimination and the legal response thereto in Europe* (University of Helskini, 2010), p. 245; McColgan, *Discrimination Law*, 2nd ed. (Hart Publishing, 2005), p. 130; O'Cinnéide, "Positive action and the limits of existing law", 13 MJ (2006), 351–364, 354; Ellis, op. cit. *supra* note 2, 297; Tobler, op. cit. *supra* note 2, 59.

29. Case C-158/97, *Badeck and others*, [2000] ECR I-1875, para 52.

30. Fredman, "Affirmative action and the European Court of Justice: a critical analysis", in Shaw (Ed.), *Social law and policy in an evolving European Union* (Hart Publishing, 2000), p. 179.

31. Arts. 15(1) and 7(2) respectively, Directive 2000/78.

in its assessment of positive action.[32] Applying the proportionality test entails a balancing of means and ends. If past and present disadvantage is especially deep and difficult to overcome, this may warrant recourse to stronger means. Nevertheless, the experience in gender equality law demonstrates the Court's reluctance to proceed down this avenue.

4. Temporality and proportionality

A well-known characteristic of positive action measures under international law, such as the Convention on the Elimination of Discrimination Against Women,[33] is their temporality. This is even reflected in the name given to such measures under the Women's Convention, namely "temporary special measures".[34] A similar temporality requirement is attached to "special measures" provided for under the Convention on the Elimination of All Forms of Racial Discrimination.[35] In contrast, EU legislation makes no explicit reference to the need for positive action measures to be of limited duration. However, it is submitted that the requirement of temporality is a factor that should be considered when determining whether any particular positive action measure is proportionate under EU law. Whilst the Court has focused its attention on whether a measure breaches EU law because it provides for "automatic and unconditional" priority in a number of cases,[36] it has not yet been called upon to consider whether a positive action measure which is set up on a permanent basis is incompatible with the requirement of proportionality.[37] In contrast the temporary nature of many of the positive action measures considered by the Court in the 1990s can be taken for granted,

32. McHarg and Nicolson, "Justifying affirmative action: Perception and reality", 33 *Journal of Law and Society* (2006), 1–23, 14.

33. For a comparison of temporary special measures under the Women's Convention and positive action under EU law, see: Waddington and Visser, "Temporary special measures under the women's convention and positive action under EU law: Mutually compatible or irreconcilable?", in Westendorp (Ed.), *The Women's Convention Turned 30: Achievements, Setbacks and Prospects* (Intersentia, forthcoming).

34. Art. 4(1) of the Convention on the elimination of all forms of discrimination against women.

35. Art. 1(4), Convention on the elimination of all forms of racial discrimination. Under this Article "special measures" must not "lead to the maintenance of separate rights for different racial groups".

36. See further, section 2, "Positive action and EU anti-discrimination directives", *supra.*

37. However, see *Test-Achats*, cited *supra* note 14, where the Court was called on to consider if a rule which potentially provided for a permanent difference in treatment of men and women (with regard to the calculation of premiums and benefits for insurance and related financial services), and which was not a positive action measure, breached the principle of equal treatment. This case is considered further below.

as their legitimacy was dependent on a situation of "under-representation" of women in certain (senior) positions within the organizations in question.

The requirement that a measure be proportionate is a well-established principle in EU law. In the context of positive action this "requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view".[38] Into the second requirement should be read a further limitation that the measures should be "no more than necessary" in view of the "less restrictive alternative" test.[39] This is both because positive action measures have sometimes been regarded as a "derogation" from the principle of non-discrimination under EU law, and because they can result in negative effects on individuals who are not members of the target group. As a result of positive action measures such individuals may find it more difficult to access social goods, such as particular employment positions, than would otherwise be the case.

In the context of *Lommers*, Tridimas has argued that the Court "employs the mechanism of proportionality to control the harsher effects" of positive action measures.[40] In this case, the Dutch Ministry of Agriculture made available a number of subsidized places in nurseries to the children of employees. In order to address the under-representation of women in the Ministry, these places were reserved for the children of female employees, and male employees could only access them in situations of emergency. The Court recognized that this measure could help to improve the position of women on the labour market, but that it could also perpetuate the traditional division of roles between women and men. As a consequence, the scheme was only acceptable if the exclusion of male workers was necessary in order to guarantee access for women, because of the limited number of nursery places which were available, and if men in emergency situations, such as single fathers, also had access. If this was not the case, the exclusion of male workers would seem to be disproportionate and the measure not compatible with EU law.

In contrast stand the cases of *Briheche* and *Abrahamsson*, in which the Court found both the positive action measures in question to be

38. *Lommers*, cited *supra* note 10, para 39, *Briheche*, cited *supra* note 14, para 24. Tridimas has noted that the principle of proportionality comprises two tests: a test of suitability and a test of necessity. "The first refers to the relationship between the means and the end. The means employed by the measure must be suitable, namely reasonably likely, to achieve its objectives. The second is one of weighing competing interests. The Court assesses the adverse consequences that the measure has on an interest worthy of legal protection and determines whether those consequences are justified in view of the importance of the objective pursued".: Tridimas, *The General Principles of EU law*, 2nd ed. (OUP, 2006), p. 139.

39. Tridimas, ibid., 138.

40. Ibid., 116.

disproportionate to the aim pursued. *Briheche*[41] concerned the exclusion of widowers who were parents from a scheme that allowed a higher upper age limit for job applicants to certain civil service jobs. The age limit would have been higher for a widowed mother of the same age as Mr Briheche. This exclusion of a similarly placed male from the benefit was found to be disproportionate. Meanwhile *Abrahamsson* concerned a challenge to a scheme which provided that a candidate for a public post (university professor) who belonged to the under-represented sex and who was qualified for the post, had to be appointed in preference to a candidate of the opposite sex who was better qualified, as long as the difference between the candidates was not so great as to breach the requirement of objectivity in making appointments. Here the Court succinctly found the measure to be "disproportionate to the aim pursued"[42] without elaborating further.

The requirement of proportionality also implies that where a group experiences particularly severe disadvantage, exclusion and discrimination, more radical and long-lasting positive action measures will be justified, than in the case of a group which experiences less disadvantage.[43] Furthermore, the principle implies that once a positive action measure has achieved its aim, and the situation of social or economic disadvantage or the consequences of past or present discrimination or disadvantage have been eliminated, the measure should be discontinued. The proportionality principle therefore arguably translates into an obligation to cease the use of a positive action measure once the stated aim has been achieved or, in the alternative, if it becomes clear that the positive action measure is not capable of contributing to the achievement of that aim. Both these requirements imply a need for a clear statement of objectives prior to the commencement of the positive action measure and an adequate monitoring system to establish the impact and effectiveness of the measure in light of its pre-defined objectives. Notably, the Court has rejected one positive action in favour of women on the grounds, *inter alia*, that it did not contribute to removing the disadvantages women experienced in the labour market. In *Griesmar*[44] the Court held: "the measure at issue in the main proceedings does not appear to be of a nature such as to offset the disadvantages to which the careers of female civil servants are exposed by helping those women in their professional life. On the contrary, that measure is limited to granting female civil servants who are mothers a service credit at

41. *Briheche*, cited *supra* note 14.
42. *Abrahamsson*, cited *supra* note 8, para 55.
43. See also European Commission, cited *supra* note 27, 26.
44. Case C-366/99, *Griesmar* v. *Ministre de l'Economie*, [2001] ECR I-383.

the date of their retirement, without providing a remedy for the problems which they may encounter in the course of their professional career".[45]

As noted above, the proportionality principle implies that where a group experiences particularly severe disadvantage, more intensive positive action measures may be legitimate. It is submitted that, in some circumstances, even a permanent measure will meet the requirement of proportionality under EU law. Some forms of exclusion and disadvantage are so embedded that only long term positive action schemes can help to correct them and, where a group-related characteristic is likely to lead to a permanent reduction in (employment and educational) possibilities, such as is the case with certain kinds of (intellectual) disability, permanent positive action schemes can be proportionate and justified.

Although the Court of Justice has thus far not been called upon to rule on such issues, both EU and international law seem to recognize this possibility in the context of disability. As noted above, the Employment Equality Directive seems to allow greater room for positive action in favour of this group, than for the other groups or grounds covered by the Directive, and EU equality law more generally. Article 7(2) therefore allows for "measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their [disabled persons] integration into the working environment". There is also no evidence that long-standing and permanent employment quota schemes targeting people with disabilities in the Member States have been regarded as going beyond the limits of lawful positive action, and therefore as being incompatible with this requirement.[46] Similarly, the Convention on the Rights of Persons with Disabilities, which can be regarded as a partner treaty to the aforementioned Conventions addressing discrimination against women and on the grounds of race, seems to allow for a broader scope of positive action measures than the earlier Conventions, and makes no reference to temporality. Instead it states that "[s]pecific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention".[47]

Whilst the Court of Justice has not considered the compatibility of a positive action measure established on a permanent basis with the principle of equal treatment, it has been called upon to address this issue in a case

45. *Griesmar*, cited previous note, para 65.

46. This claim is based both on the fact that no Member State has seen the transposition of the Employment Equality Directive as a reason to withdraw or limit its pre-existing quota scheme, and the fact that the European Commission has shown no interest in initiating legal action against any Member State on the grounds that its quota scheme goes beyond what is permissible under Art. 7(2) of the Directive.

47. Art. 5(4), Convention on the rights of persons with disabilities.

involving differing treatment of men and women, which did not involve positive action. At issue in the *Test-Achats* case was the compatibility of Article 5(2) of Directive 2004/113 on equal treatment between men and women in the access to and supply of goods of services, with EU primary law. This article allowed, on a potentially permanent basis, "proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk". The Court found that this measure worked "against the achievement of the objective of equal treatment between men and women",[48] which was itself the purpose of Directive 2004/113. The challenged provision was also found to be incompatible with Articles 21 and 23 of the Charter. However the Court did suggest that, given the previous widespread use of different premiums and benefits for men and women, the Directive could have required the introduction of unisex premiums and benefits "gradually, with appropriate transitional periods".[49] The implication in this case was therefore that a derogation from the requirement to provide equal treatment which was limited in time would have been permissible, but not a provision allowing for a potentially permanent difference in treatment. This situation, which involved a breach of the principle of equal treatment should, however, be distinguished from positive action, which is designed to ensure "full equality in practice". It is submitted that, as long as a positive action measure contributes to that goal, and meets the other elements of the proportionality test, it is in principle compatible with EU law, even where no specific end date for the measure has been identified.

5. Distinguishing positive action from reasonable accommodation

At first glance it may seem that the obligation to make a reasonable accommodation, which is provided for *inter alia* in Article 5 of the Employment Equality Directive,[50] is a particular form of positive action. This is because reasonable accommodation provides for "advantages" to individuals who fall within the group of persons with a disability. Indeed, courts, legislators and academics have all occasionally merged the two

48. Para 32.
49. Para 23.
50. Art. 5 provides: "In order to guarantee compliance with the principle of equal treatment to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned".

concepts. As noted in the introduction to this article, in *Coleman* the Court of Justice may have suggested that both positive action and reasonable accommodation could be regarded as "positive discrimination measures".[51] However, such conceptual confusion is not confined to the Court of Justice; decisions of the British House of Lords (now the Supreme Court) have also equated reasonable accommodation with positive discrimination and preferential treatment.[52] Legislators have also conflated the two concepts. In Belgium, a perceived link between reasonable accommodation and positive action initially hampered the adoption of non-discrimination legislation at the federal level, where there was a reluctance to include any reasonable accommodation provision in the federal statute implementing the Employment Equality Directive. A proposal to include such a provision, which was heavily based on the wording found in the Directive, was rejected. One reason given for this by the Minister of Employment was that the proposal amounted to a form of positive action, whilst the national statute in question was only an anti-discrimination measure.[53] Meanwhile, the Portuguese Labour Code, which transposes Article 5 of the Employment Equality Directive, refers to "measures of positive action" which shall be taken by the employer.[54] Lastly, academics have also occasionally merged the two concepts. McHarg and Nicolson describe the obligation to make reasonable adjustments to accommodate the needs of disabled people under the (now repealed) UK Disability Discrimination Act as "affirmative action in favour of disabled persons … ".[55] In the US, Karlan and Rutherglen have described the reasonable accommodation requirement as conferring a right to "insist upon discrimination in their [persons with disabilities] favor"[56] and also regard the obligation as a form of affirmative action, albeit an unusual and distinct form.[57]

51. The Court held that Art. 5 (reasonable accommodation) and Art. 7(2) (positive action in favour of people with disabilities) "relate specifically to disabled persons either because they are provisions concerning positive discrimination measures in favour of disabled persons themselves or because they are specific measures which would be rendered meaningless or could prove to be disproportionate if they were not limited to disabled persons only" (para 42).

52. *Archibald* v. *Fife Council*, [2004] IRLR 651, para 57; *Mayor and Burgesses of the London Borough of Lewisham* v. *Malcolm*, [2008] 3 WLR 194, para 107.

53. Parl. St. Senaat 2001–2002, nr. 2-12/15. 149–52. See also Van den Langenbergh, "Discriminatie van gehandicapten bij aanwerving: Een verkennende analyse", in UFSIA, *Vrijheid en Gelijkheid, De horizontale werking van het gelijkheidsbeginsel en de nieuwe antidiscriminatie wet* (Maklu, 2003), pp. 601–604.

54. Art. 74, Portuguese Labour Code.

55. McHarg and Nicolson, op. cit. *supra* note 32, 4–5.

56. Karlan and Rutherglen, "Disabilities, discrimination and reasonable accommodation", 46 *Duke Law Journal* (1996), 3.

57. Ibid., 14–22.

Nevertheless, in spite of this widespread confusion regarding the relationship between the duty to provide a reasonable accommodation and positive action, it is submitted that the obligation to provide for reasonable accommodation can best be characterized as a particular kind of non-discrimination legislative provision, related to, but not synonymous with, the established forms of direct and indirect discrimination.[58] The reasonable accommodation requirement, as found in Article 5 of the Employment Equality Directive, obliges employers not to ignore disability, as is the case with regard to most elements of non-discrimination law,[59] but *specifically to take disability into account.* The reasonable accommodation requirement therefore prohibits an employer from denying an individual with a disability an employment opportunity, by failing to take account of the protected characteristic, if taking account of it – in terms of changing the job or physical environment of the workplace – would enable the individual to do the work.[60] Whilst current EU law only creates a disability-related reasonable accommodation duty with regard to employment and vocational training, national legislation in many Member States extends this duty to other areas, including access to goods and services, and the Proposed Equal Treatment Directive[61] similarly provides for such an extension. There are also isolated examples of national legislation that provide for *de facto* accommodation duties for other groups, such as an obligation to (attempt to) adapt working time to take account of the religion or faith professed by employees,[62] although such measures are not widespread in Europe.

58. For a more detailed examination see Waddington and Hendriks, "The expanding concept of employment discrimination in Europe: From direct and indirect discrimination to reasonable accommodation discrimination", 18 *International Journal of Comparative Labour Law and Industrial Relations* (2002), 403–428.

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

60. Karlan and Rutherglen, op. cit. *supra* note 56, 9.

61. Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008)426.

62. See the Bulgarian protection against discrimination Act, Art. 13(2) and the Spanish cooperation agreements with the various religious communities, law 24/1992, law 25/1992 and law 26/1992. For further comment see Waddington, "Reasonable accommodation", in Schiek, Waddington and Bell, op. cit. *supra* note 23, pp. 697–698.

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

The obligation to provide for a reasonable accommodation can be distinguished from positive action from a procedural perspective as well. Unlike most forms of positive action that are aimed at members of socially or economically disadvantaged groups, reasonable accommodations generally possess an individualized character,[63] and are framed in terms of an individual right. Individuals with a disability are entitled to require that an accommodation is made which takes account of their specific needs, subject to the requirement that the accommodation should not amount to a "disproportionate burden" for the employer. A similar individualized right to, for example, a "quota" employment position, is not recognized in national law. Moreover, and in contrast to many positive action measures, statistical data revealing a numerical imbalance of a particular group of workers, such as women, ethnic minorities or, indeed, people with disabilities, in a particular employer's workforce are largely irrelevant for decisions concerning individualized reasonable accommodations. In addition, accommodations can involve regular and ongoing expenditure directed at a specific individual, such as a provision of personal assistance, rather than a one-off decision to award a woman or a member of an ethnic minority a job or training.[64] For these reasons the "reasonable accommodation" obligation is not susceptible to the problems of under-inclusiveness or over-inclusiveness which can dog classical positive action measures. Lastly, it is worth noting that the requirement to make reasonable accommodations is mandatory under the Employment Equality Directive, whilst the use of positive action is an optional strategy available to Member States.

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

64. Karlan and Rutherglen, op. cit. *supra* note 56, 16–18.

6. Distinguishing positive action from positive duties

Part of the confusion surrounding the issue of what constitutes positive action stems from the expansion in the range of instruments found within the equality toolbox. Within EU policy circles, there has been increasing debate around the role to be played by data collection[65] and mainstreaming.[66] More recently, these have been enveloped in the idea of positive duties to promote equality. Some authors favour a broad understanding of positive action that embraces all of these phenomena.[67] This section proposes that a distinction is maintained between our understanding of positive action and the emergence of positive duties.

Since the mid-1990s, EU policy has included a commitment to mainstreaming.[68] This approach seeks to promote equality by mobilizing all areas of law and policy.[69] Rather than relying only on specific measures, such as anti-discrimination legislation, mainstreaming implies that equality needs to be pursued in all activities. In practice, this means that equality needs to be taken into account during policy formulation, implementation and evaluation.[70] For example, it might be assumed that equality issues are not especially relevant to transport policy. In contrast, mainstreaming demands that transport policy is used to promote equality. This could entail ensuring that public transport is accessible for disabled people[71] or that the transport infrastructure in urban areas with a large ethnic minority population is as good as that available in other parts of the city. Frustration with the effectiveness of

65. E.g. Makkonen, "European handbook on equality data" (Office for Official Publications of the European Communities, 2007); Commission, "Comparative study on the collection of data to measure the extent of discrimination within the United States, Canada, Australia, the United Kingdom and the Netherlands" (Office for Official Publications of the European Communities, 2004).

66. E.g. Centre for strategy and evaluation services, "Non-discrimination mainstreaming – instruments, case studies and way forwards" (European Commission, 2007).

67. E.g. O'Cinnéide, op. cit. *supra* note 28, 354.

68. Bell, *Racism and equality in the European Union* (OUP, 2008), p. 45.

69. There is a large body of academic literature on mainstreaming, e.g. Rees, *Mainstreaming equality in the European Union – education, training and labour market policies* (Routledge, 1999); Verloo, "Gender mainstreaming: Practice and prospects", 13 Report EG (Council of Europe, 1999); Beveridge, Nott and Stephen (Eds.), *Making women count – integrating gender into law and policy-making* (Ashgate, 2000).

70. See also, European Commission, cited *supra* note 27, 27.

71. In fact a number of mainstream EU transport instruments do include provisions mandating disability accessibility standards. See e.g. Directive (EC) 96/48 on the interoperability of the trans-European high-speed rail system, O.J. 1996, L 235/6; Directive (EC) 2001/16 on the interoperability of the trans-European conventional rail system, O.J. 2001, L 110/1 as modified by Directive (EC) 2004/49 (Railway Safety Directive), O.J. 2004, L 164/44; and Directive (EC) 2003/24 amending Directive (EC) 98/18 on safety rules and standards for passenger ships, O.J. 2003, L 123/18.

mainstreaming has often been linked to inconsistencies in its implementation.[72] In its original guise, mainstreaming was often a political commitment, with few mechanisms for legal enforcement. In some Member States, such as the UK, Sweden and Finland,[73] there has been increasing experimentation with the imposition of legally-enforceable duties to promote equality. These obligations, often called "positive duties", seem to be an evolution of mainstreaming. They continue to emphasize the need for equality to be pursued in a systematic fashion across all activities.[74] This is typically manifested in duties to have formal plans, procedures and objectives for promoting equality, combined with mechanisms, such as "impact assessment", for analysing the effects of laws and policies on equality.

The focus on predicting and monitoring the effects of law and policy creates a need for enhanced data collection mechanisms. If, for example, a local authority wishes to anticipate the equality impact of closing an adult education centre, it will need to have accurate data on the profile of the existing users of the centre by reference to characteristics like gender and ethnic origin. Another important component of the positive duties model is the participation of those affected by the laws and policies under consideration.[75] This entails an obligation on the duty-holder to ensure transparency in the decision-making process through the provision of information and opportunities for consultation with affected communities.

It would be premature to suggest that the positive duties model is fully reflected in EU law and policy, but there are elements of such an approach. The TFEU includes provisions that place the Union under a legal duty to promote gender equality (Art. 8, ex [Art.] 3(2) EC) and to combat discrimination on a range of grounds in its policies and activities (Art. 10, introduced by Lisbon). Impact assessment is already a familiar element of the policy-making process.[76]

In thinking about whether positive duties constitute positive action, it is helpful to reconsider the definition of positive action found within EU law. Article 157(4) TFEU refers to measures that provide "specific advantages" to the under-represented sex, or that "prevent or compensate for disadvantages". This implies that positive action is primarily concerned with actions that seek

72. Beveridge, "Building against the past: The impact of mainstreaming on EU gender law and policy", 32 EL Rev. (2007), 193–212.

73. Makkonen, op. cit. *supra* note 28, 258–260.

74. Fredman, "Changing the norm: Positive duties in equal treatment legislation", 12 MJ (2005), 369–398.

75. Fredman, "Making equality effective: the role of proactive measures" (European Commission, 2009).

76. Toner, "Impact assessments and fundamental rights protection in EU law", 31 EL Rev. (2006), 316–341.

to confer benefits on a disadvantaged group. This notion is captured in the definition of positive action proposed by Barmes:

> "positive action is taken to be activity designed to improve the position, in terms of the distribution of benefits or dis-benefits, of a given social group or sub-group (or of several such groups), on the basis that its members suffer systematic disadvantage in that regard".[77]

Seen through this light, positive duties do not, *per se*, fall within the concept of positive action. Positive duties aim to incorporate the promotion of equality into decision-making and service delivery. To this end, they advocate a change in the mindset of policy-makers and the method of policy-making so that improved equality outcomes are achieved. This manifests itself in a range of responses, many of which are not positive action. As mentioned above, the positive duties model promotes the participation of affected communities in the policy-making process; it would be inappropriate to describe this as positive action as it is seeking to improve governance rather than conferring a specific benefit. Similarly, positive duties should ensure that discriminatory elements of existing or proposed policies are identified and dismantled, or otherwise mitigated. Removing or avoiding discrimination does not necessarily imply the taking of positive action. With regard to data collection, the mere undertaking of research does not alter the position of those affected. Gathering information helps to identify where inequalities are currently being experienced. This evidence might spur an organization into taking positive action, but data collection does not inherently lead to the conferral of any benefit on disadvantaged groups.

Clearly, positive duties create an environment within which organizations might choose to engage in positive action. It would be artificial to suggest that there is a rigid distinction between these two concepts. If positive duties are designed to deliver concrete improvements in equality outcomes, then taking positive action might be an indispensable means of reaching these objectives. Nevertheless, clarifying the difference between the broad model of positive duties, and the more discrete notion of positive action, is more than a matter of linguistic semantics. Crucially, it will determine whether the scope of judicial scrutiny under EU anti-discrimination Directives extends to all measures taken under the auspices of positive duties. As noted earlier, the Court of Justice applies a proportionality test in order to determine the lawfulness of positive action. If positive duties are entirely conflated with positive action, then there is a risk that practices such as impact assessment requirements or

77. Barmes, op. cit. *supra* note 28, 623.

equality data collection processes could be rendered subject to compliance with the proportionality requirement.

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

As discussed above, the EU legal definition of positive action suggests that it is concerned with the conferral of benefits to prevent or compensate for disadvantage linked to protected grounds of discrimination. This raises questions as to whether all situations where benefits are provided to disadvantaged groups fall into the category of positive action. This is a particularly acute dilemma in relation to age and disability where there is a wide range of social entitlements linked to being under, or over, a certain age, or being disabled. For example, children may be eligible for free medical treatment, while older people may be entitled to free public transport. Disabled people are often entitled to specific social assistance allowances. As it stands, EU anti-discrimination law does not prohibit discrimination on grounds of age or disability in areas outside employment and vocational training. States are, therefore, currently free to differentiate on these grounds in the field of social welfare without having to justify these distinctions (at least in respect of EU law). However, in 2008 the Commission proposed to extend the prohibition of discrimination to cover areas outside employment, including social security and social advantages.[78] One of the thorny issues that has arisen in the negotiation of this Directive is its potential implications for benefits linked to age and disability.[79]

From one perspective, it could be helpful to characterize positive action measures as extending into the wider realm of social welfare. McHarg and Nicolson suggest that this provides an opportunity to reconceptualize the justification for positive action as one based on "social utility".[80] They note that there is much less public controversy about the targeted and redistributive actions that are embedded in the welfare State. While there is an enduring public debate about the extensiveness of social welfare, the idea that such benefits are confined to a specific class of persons does not arouse the antagonism that surrounds positive action measures limited to groups such as

78. Commission proposal, cited *supra* note 61. See also Waddington, "Future prospects for EU equality law. Lessons to be learnt from the proposed equal treatment Directive", 36 EL Rev. (2011), 163–184.

79. At the time of writing, discussions on the proposed Directive were ongoing in the Council.

80. McHarg and Nicolson, op. cit. *supra* note 32, 15.

women or ethnic minorities.[81] If positive action could be presented as a part of the wider web of social welfare, then its rationale might enjoy greater public comprehension and support.

There is, though, a risk in conflating positive action and general measures to promote social inclusion. Specifically, this would imply that social benefits should comply with the legal test for permitting positive action and be subject to judicial scrutiny. It is doubtful whether many of the common forms of social advantage relating to age and disability would meet the proportionality test applied by the Court of Justice. Take, for example, the provision of free public transport for those aged over 60. The first question that arises is how does this measure prevent or compensate for disadvantage? It might be argued that those over 60 have lower employment rates and reduced earning capacity, so this is a means of compensating for lower incomes. There could also be a wider social inclusion rationale linked to encouraging mobility and social participation of older people. The Court will also need to be satisfied that this is an appropriate and necessary means of achieving these aims. Here the difficulties are greater. It is obvious that amongst those over 60, many are not socially disadvantaged. Some will still be in well-paid employment, while others will be in receipt of good retirement pensions. Some continue to be well-integrated into society; indeed they may be more involved in social activities once freed from the restrictions of paid employment. In short, there would be at least some uncertainty as to whether such a benefit would pass the threshold to constitute lawful positive action; the Court might decide it was disproportionate and hence unlawful discrimination against those under 60.

The spectre of a wide range of social welfare benefits and social advantages being subject to judicial scrutiny under the auspices of a proportionality test illustrates the dangers involved in extending the remit of positive action in an over-inclusive manner. There might be a legitimate public debate to be had over the appropriateness of providing free public transport for the over 60s, but there are good reasons for this not to be conducted in the courts under the aegis of age discrimination. If the latter resulted in the dismantling of many existing forms of social protection, it is very likely that the law would soon lose its credibility as an instrument to promote equality. Arguably, there is a qualitative distinction between positive action and general measures to promote social inclusion. Measures which are closer to positive action share some or all of the following characteristics. First, they are targeted at a well-defined social group. Secondly, they seek to redress disadvantages in a specific setting, such as access to education or employment. For example, positive action schemes will typically be designed for those pursuing a particular job or career where there is evidence of past and/or present

81. Collins, "Discrimination, equality and social inclusion", 66 MLR (2003), 16–43.

disadvantage. The initiative may be open to any potential jobseeker, but it is normally not aimed at everyone in the labour market possessing a particular characteristic. Thirdly, the necessity for positive action will be subject to periodic review. As discussed earlier, this does not mean that positive action must be time-limited, but it is not automatically assumed to be indefinite. In contrast, many of the social benefits extended on the basis of age or disability are not assumed to have any preordained time-limit.

Although there are differences in nature between positive action and general measures for social inclusion, drawing a red line between these two categories is difficult. In relation to the proposed anti-discrimination Directive of 2008, the Commission included a clause exempting age-based benefits: "this Directive shall not preclude the fixing of a specific age for access to social benefits, education and certain goods or services".[82] No equivalent measures were put forward in respect of disability; however, a recent publicly available draft of the proposal recognizes the "exclusive competence" of Member States with regard to the organization of their social protection systems and includes a recital which provides that " … Member States retain the possibility to reserve certain benefits or services to certain age groups or persons with disabilities".[83] In addition, Article 5(2), addressing positive action, provides: "the principle of equal treatment shall be without prejudice to the rights of Member States to maintain or adopt more favourable provisions for persons with disabilities as regards conditions for access to social protection, including social security, social assistance and healthcare; education; and certain goods or services which are available to the public, in order to promote their economic, cultural or social integration".

Seeking to exclude preferential treatment linked to age or disability from the scope of anti-discrimination legislation offers a blunt, but potentially effective means of avoiding a situation where these social benefits are caught by the net of positive action. The approach proposed in Article 5(2) is, though, somewhat paradoxical. While it provides a broad scope for justifying benefits reserved to disabled people, it does so under the rubric of positive action. This may be unhelpful from a conceptual perspective as it encourages the loose idea that all forms of social welfare are aspects of positive action.

82. Art. 2(6), Commission proposal, cited *supra* note 61.

83. Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Annotated consolidated text, 11900/10, Brussels, 16 July 2010, recital 17f. This is the most recent version of the proposal that is publicly available on the Council homepage.

8. Conclusion

This article has highlighted the importance of determining whether a measure amounts to positive action or not under EU law. A range of measures can be used to combat discrimination and address disadvantage. Some of these measures, such as reasonable accommodation, have been added to the "equality toolbox" primarily as a result of their incorporation within EU law, whilst others, such as positive duties, have been developed at the national level in the absence of specific EU rules. Positive action, however, is in a special position, since EU law has established specific requirements with regard to such measures, which do not apply to other instruments operating in this field. In particular, under EU law, positive action measures must comply with the principle of proportionality in order to be lawful, and not amount to discrimination against individuals who are not members of the favoured group. It is therefore vital to determine whether any particular measure amounts to positive action, and consequently should be subject to the proportionality test, or whether it falls within the range of other tools that have been developed to combat discrimination and promote equality. If instruments such as reasonable accommodation, mainstreaming linked to positive duties, data collection, and policies to promote social inclusion are conflated with positive action, there is not only a risk of terminological and conceptual confusion, but also that such measures are tested against, and even fail to comply with, the proportionality principle.

This article has also revealed that there is a tendency to identify some of these concepts with positive action, even within the Court of Justice. This is particularly worrying, given that courts play a key role in applying the proportionality test, which essentially has been developed through case law within the EU. However, measures that are not positive action should be subject to less judicial scrutiny under EU law. Applying such scrutiny, and especially the proportionality requirement, to these measures can result in their being undermined, and hamper Member State action to combat discrimination and promote equality. For example, the proportionality principle might call into question positive action measures that do not have a time limit, or are not subject to periodic review. While we have argued that it could be proportionate to adopt open-ended forms of positive action in some circumstances, the question of time-limits illustrates the importance of distinguishing measures to promote equality that fall outside the category of positive action. It is clear, for example, that many social welfare benefits are intended to be indefinite in nature, such as benefits linked to older age. Similarly, equality data collection is an activity with no essential end-point; ongoing data gathering will be needed to establish not only if equality is

attained, but also that it is maintained. In addition, EU law requires Member States to ensure a reasonable accommodation duty on a permanent basis. Establishing the boundaries of positive action, and distinguishing it from other instruments in the arsenal of equality measures, is therefore vital to ensure the integrity of EU anti-discrimination law.