



**Twinning project “Implementation of the best European practices with the aim of strengthening the institutional capacity of the apparatus of the Ukrainian Parliament Commissioner for human rights to protect human rights and freedoms (apparatus)”
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2.3.4. Developing recommendations as regards improving the existing or employing new instruments for restoring human rights, in the spheres of personal data protection, access to public information and the prevention of all forms of discrimination in particular

Document	Recommendations on the application of the instrument of positive actions in the areas of antidiscrimination, data protection and access to public information
Short description of the document	Recommendations analyses advantages of the application of the instrument of positive actions by the Ukrainian Parliament Commissioner for Human Rights in the areas of antidiscrimination, data protection and access to public information
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Recommendations on the application of the instrument of positive actions in the areas of antidiscrimination, data protection and access to public information

1. Introduction

As mentioned in the report A 2.3.1, both the Anti-Discrimination Act as well as the Gender Equality Act define positive action as one instrument that can be applied by the Commissioner. In order to achieve substantive equality a purely complaints-led model – which in case of discrimination requires an individual person to lodge a complaint at a court or another competent body, such as equality bodies or ombud institutions, in order to establish a violation of her or his rights not to be discriminated against – is important but not sufficient.¹ Positive action² is a more encompassing instrument that requires proactive measures by state and other institutions to eliminate disadvantages faced by members of specific groups.

“(…) 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.”³

Positive action pursues a proactive approach, instead of reacting to individual claims, the responsibility lies with state and other institutions and organisations. Positive action aims at systematic change and addresses institutional and structural forms of inequality, “[r]ather than determining a breach of the law, the focus is on identifying systemic discrimination and creating institutional mechanisms for its elimination”.⁴

The introduction of positive action measures is a demanding task that requires considerable amount of resources. Several international stakeholders have repeatedly pointed out the importance of introducing different measures such as awareness raising campaigns,⁵ support services,⁶ access to education,⁷ training of state officials and judiciary⁸ in Ukraine. The CEDAW Committee has positively noted the establishment of minimum quota of 30 per cent for women candidates on the electoral lists of political parties in the districts at the national level in legislative elections as well as the efforts to take temporary special measures in the private sector. However, the CEDAW Committee is also concerned “about the lack of implementation in practice of temporary special measures in the State party”.⁹

¹ Fredman, Sandra (2009) Making Equality Effective: The role of proactive measures. European Network of Legal Experts in the Field of Gender Equality. European Commission. Directorate-General for Employment, Social Affairs and Equal Opportunities, p. 1.

² There are many terms that are used more or less synonymously for this instrument. The term positive action used mainly in European law and politics, in the US affirmative action is the term that is used more frequently. Other terms are positive measures or temporary special measures.

³ European Commission (2009) International perspectives on positive action measures. A comparative analysis in the European Union, Canada, the United States and South Africa, available at <http://bim.lbg.ac.at/files/sites/bim/International%20Perspectives%20on%20Positive%20Action%20Measures.pdf> (2 November 2017), p. 24.

⁴ Fredman (2009), p. 3.

⁵ See, for example, CRPD (2015) UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Ukraine, CRPD/C/UKR/CO/1, 2 October 2015, para. 15-16; CERD (2016) UN Committee on the Elimination of Racial Discrimination, Concluding observations on the twenty-second and twenty-third periodic reports of Ukraine, CERD/C/UKR/CO/22-23, para. 14(d), CEDAW (2017) Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Ukraine, CEDAW/C/UKR/CO/8, para. 19(d).

⁶ CRPD (2015) para. 36-37.

⁷ CRPD (2015) para. 44-45; CERD (2016) para. 22(f); CEDAW (2017), para. 34-35.

⁸ CRPD (2015) paras. 28-29; CEDAW (2017) para. 11(c),

⁹ CEDAW (2017) para. 24.

Also other international stakeholders and bodies such as the *European Commission against Racism and Intolerance*¹⁰ (ECRI) or international non-governmental organisations have emphasised the importance of positive action for the advancement of equality. The Equal Rights Trust has summarized a comprehensive list of recommendations including the adoption of different measures of positive action.¹¹

2. Recommendations concerning positive action in the fields of anti-discrimination, data protection and access to information

A. Recommendations concerning positive action in the fields of anti-discrimination

In general, NHRIs and equality bodies can play an important role concerning the achievement of equality. The utilisation of positive action measures is an important component in this process. The report published by Equinet has pointed out the most important dimensions where these bodies can contribute in this regard. In the following, these dimensions will be discussed in detail including an analysis of the questions how these dimensions are relevant for Ukraine and what the Commissioner can contribute in this regard.

a) Awareness raising

Raising awareness concerning inequalities and discrimination is an important component of realizing the right to equality and non-discrimination. The CRPD *General comment (2018) on equality and non-discrimination* stresses that “[d]iscrimination cannot be combated without awareness-raising among all sectors of government and society.”¹² Raising awareness can focus on many levels. According to the Council of Europe awareness raising in the field of gender equality “aims at showing how existing values and norms influence our picture of reality, perpetuate stereotypes and support mechanisms (re)producing inequality. It challenges values and gender norms by explaining how they influence and limit the opinions taken into consideration and decision-making. Besides that, awareness-raising aims at stimulating a general sensitivity to gender issues.”¹³ Awareness raising can also concentrate on disseminating knowledge on national and international legal obligations with regard to equality, including for example knowledge on human rights standards laid down by the Convention on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD) as well as the national equality legislation such as the Law of Ukraine ‘On Principles of Prevention and Combating Discrimination in Ukraine’.

In addition, it is important to raise awareness and disseminate knowledge on best practices concerning positive action to private and public institutions and bodies.¹⁴ As Equinet emphasises, the role of equality bodies can be “to promote and inform all relevant stakeholders, including companies/work councils/trade unions in a more comprehensive manner, about positive action (To date, except for women and persons with disabilities there is less awareness about the fact that positive action can also be implemented for other under-represented groups). Equality bodies could promote and conduct awareness-raising campaigns, targeting companies

¹⁰ ECRI (2017) ECRI Report on Ukraine (fifth monitoring cycle), CRI(2017)38, published on 19 September 2017.

¹¹ Equal Rights Trust (2015) pp. 375-380.

¹² Committee on the Rights of Persons with Disabilities (2018) *General Comment (2018) on equality and non-discrimination*, CRPD/C/GC/6, para. 39.

¹³ Council of Europe (n.d.), quoted after European Institute for Gender Equality, available at <http://eige.europa.eu/gender-mainstreaming/methods-tools/gender-awareness-raising> (accessed on 21 June 2018)

¹⁴ see Council of Europe (2000) Positive Action in the Field of Equality between Women and Men, EG-S-PA (2000) 7,

Strasbourg, available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805916bb> (accessed on 21 June 2018).

and citizens, among others, to tackle the prejudice against positive action while promoting awareness of human rights.¹⁵

As already mentioned above, international human rights treaty bodies have repeatedly called on Ukraine to initiative positive action measures in the field of awareness-raising. For example, the ICERD committee has requested in its 2016 Concluding observations on the twenty second and twenty-third periodic reports of Ukraine to “[i]ncrease public awareness-raising campaigns and other measures to counter incitement to hatred and hate crimes, and continue to train law enforcement officials in this area.”¹⁶ Also the CRPD Committee “urges the State party to step up its efforts to raise the awareness of the public on the rights of persons with disabilities, by conducting public campaigns and including the Convention on the curricula of schools and professional training of public officials and all relevant professionals.”¹⁷ Similar appeals were formulated by other bodies such as the CEDAW Committee or ECRI.

Recommendation

It is recommended that the Commissioner actively promotes and conducts awareness-raising campaigns in order to inform public and private stakeholders on their possibilities and duties in promoting equality (including on positive action) and in order to provide knowledge especially on national and international legal obligations regarding equality and anti-discrimination. The focus should not only be on gender-related inequalities and discrimination but also on other dimensions such as discriminations and inequalities concerning ethnic origin, racial discrimination and national minorities, religious belief, sexual orientation and gender identity, disability and other categories of discrimination. The Commissioner is advised to raise awareness about positive action and its role in promoting equality, it should aim at tackle misconceptions of and biases against positive action by targeting companies, citizens and public institutions. The Commissioner should aim at working towards complying with the recommendations to promote positive action/temporary measures as required by international and European human rights bodies.

b) Providing knowledge on the disadvantageous situation of specific groups or members of specific groups to stakeholders and to a wider public

Inequalities and different forms of discriminations are multifaceted and complex phenomena. In order to design good policies such as positive actions it is important to get knowledge on the prevalence, mechanisms and dynamics of different forms and dimensions of inequalities and discriminations. Conducting surveys and collecting data is an important part of this process and state parties of, for example, the ICERD, CEDAW and CRPD are obliged to collect data. In addition, the Commissioner in its function as an equality body has to fulfil the functions laid down by EU equality legislation in order to comply with its duties laid down in the Action Plan on Visa Liberalisation. For example, the Gender Equality Directives and the Racial Equality Directive (2000/43/EC) lay down in Article 13 (2) that ‘Member States shall ensure that the competences of these bodies include [...] conducting independent surveys concerning discrimination and publishing independent reports and making recommendations on any issue relating to such discrimination’.¹⁸

Also Equinet emphasises that „Equality bodies could be involved in research activities to map the current situation of disadvantaged people with regard to the different fields in which positive action can be applied, e.g. employment, education, housing, healthcare, etc. relating to these different grounds.”¹⁹

¹⁵ Equinet European network of equality bodies (2014) *Positive Action measures. The Experience of Equality Bodies*. Available at www.equineteurope.org (16 March 2018), p. 49.

¹⁶ CERD (2016) para 14 (d).

¹⁷ CRPD (2015) para 15-16.

¹⁸ Racial Equality Directive (2000/43/EC), Article 13(2).

¹⁹ Equinet European network of equality bodies (2014) *Positive Action measures. The Experience of Equality Bodies*. Available at www.equineteurope.org (16 March 2018), p. 49.

When reporting on Ukraine, international human rights bodies have repeatedly pointed out the importance of conducting research, especially with regard to collecting reliable and objective data in the field of equality and anti-discrimination. For example, the CERD Committee regrets in its 2016 Concluding Observation that Ukraine has not provided the “recent, reliable and comprehensive data, either on economic and social indicators or indicators of ethnic origin, that would enable the Committee to better evaluate the enjoyment of economic, social and cultural rights by various groups living in its territory, including minorities and migrants, and the impact of the various programmes, strategies and plans adopted by the State party.”²⁰ Furthermore, the Committee recommends that the State party conduct its census and collect such disaggregated data in order to enhance its implementation of the Convention.

The CEDAW Committee also calls on Ukraine in its 2017 Concluding Observations to ensure “that its national machinery develop policies and programmes aiming at achieving gender equality in a comprehensive and effective manner and within a human rights framework, and improve the collection of the data, disaggregated by sex and other relevant factors, necessary to assess the impact and effectiveness of those policies and programmes.”²¹ That means, the CEDAW Committee not only emphasis the importance of specific policies and programmes but also stresses the significance of data collection and surveys to assess the effectiveness of such policies.

Also ECRI report on Ukraine 2017 stresses the importance of collecting data several times. For example, the committee recommends to establish “a system of collection of statistical data in all areas relating to Roma integration, including a gender dimension, while strictly respecting the principles of confidentiality, voluntary self-identification and informed consent.”²² With regard to sexual orientation, ECRI in particular recommends “that the authorities undertake research and collect data on LGBT persons in Ukraine as well as on discrimination and intolerance against them.”²³

Recommendation

In practice, the Commissioner and her Secretariat is already involved in carrying out some surveys on different topics in the field of anti-discrimination.²⁴ The Commissioner also publishes annual reports with chapters on gender equality and anti-discrimination, however, mainly aiming to present the work of the Commissioner in these fields. The Commissioner should increase its efforts with regard to collecting equality data concerning all categories and fields of inequalities and discrimination and continually work together with research and academic institutions as well as public bodies collecting and processing these data in order to design and improve surveys, modes of data collections and indicators in these fields. That will not only provide an important foundation for designing positive action measures but also for implementing and evaluating its effectiveness. Although a transparent and scientifically based data collection process is time consuming, effortful and demanding it is important to realise that it could enhance the credibility of the Commissioner towards citizens, civil society, political representatives and bodies as well as international institutions and it could also support to advance the independency of the Commissioner.

²⁰ CERD (2016) paras 5 and 6.

²¹ CEDAW (2017) para 23(c)

²² ECRI (2017), para 60.

²³ ECRI (2017), para 111.

²⁴ For example, in partnership with the Centre for Political Studies and Analysis, the Secretariat of Ukrainian Parliament Commissioner for Human Rights carried out a survey on gender awareness raising of 166 authorities. Another example is a survey of problems faced by the Roma community that was carried out in cooperation with the International Charity Fund ‘Roma Women’s Fund Chirikli’ in the context of the UNDP Democratization, Human Rights and Civil Society Development Programme in Ukraine in 2014. For further information, see UKRAINIAN PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS (2017a), ‘Shadow Report (Submission) on Implementation of the Convention on the Elimination of all Forms of Discrimination against Women by Ukraine’, supra note 53.

c) *Formulating recommendations on how state and private institution can design specific measures advancing the rights of specific groups in certain fields (education, employment, access to justice, etc)*

Although international human rights treaties such as CEDAW, CRPD and ICERD stipulate the obligation of positive action/temporary special measures they leave it mostly to the state parties how to exactly design such measures. EU equality law allows for positive action but it is not formulated to be an obligation. Although the 2004 CEDAW General Recommendation No. 25²⁵ and the 2009 ICERD General Recommendation (No. 32)²⁶ lay down the meaning and scope of special measures as provided for in the respective Conventions, details on the exact content and structure of the measures are up to the state parties. Also in international reports that monitor the implementation of human rights treaties (such as CEDAW, ICERD, CRPD), the recommendations on positive action are usually formulated in a general manner. For example, in its 2015 Concluding Observation on Ukraine the CRPD Committee called on the State Party “to ensure effective implementation of affirmative measures and strengthen incentives for businesses and the public sector to employ persons with disabilities. The Committee also recommends that the State party take measures to provide for supported employment of persons with intellectual and psychosocial disabilities in the open labour market.”²⁷ However, the CRPD Committee leaves it to the Ukrainian authorities to exactly determine the design, elements, duration and procedures for such effective measures. Another example is the 2016 Concluding observations on Ukraine by the CERD Committee where the State Party is, amongst others, urged to “[s]trengthen its measures to improve access to education for Roma children, and reduce the illiteracy rate among and the school attendance drop-out rate of Roma children.”²⁸ A more detailed elaboration and conceptualisation of these measure is, however, up to the State Party.

The CEDAW Committee particularly highlighted in its 2017 Concluding Observations, that there is a need for supporting Ukrainian authorities regarding the development of capacities and the conceptualisation of positive action measures. The Committee called on Ukraine to

“Provide capacity-building to all relevant State officials and policymakers, and to political parties in particular, on the concept of temporary special measures and adopt and implement such measures, including time bound goals and quotas, directed at achieving the substantive equality of women and men in all areas in which women are underrepresented or disadvantaged, including in public and political life, education, health and employment”.²⁹

In order to design and conceptualised appropriate positive action/temporary special measures the knowledge of equality bodies could be very important to formulate such accurate and appropriate measures and to contribute to capacity building of public and other authorities. Equinet refers to the specific role of equality bodies in this respect. It says that equality bodies “could formulate specific recommendations to Member States for the use of positive action, including also in their public procurement contracts. More generally, equality bodies can improve the use and foster the taking up of positive action through educational activities and by providing results of research to the governmental bodies and the other institutions.”³⁰

²⁵ CEDAW Committee (2004) General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against women, on temporary special measures, UN Doc. HRI/GEN/1/Rev.7.

²⁶ Committee on the Elimination of Racial Discrimination (2009) General recommendation No. 32. The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/GC/32, 24 September 2009.

²⁷ CRPD (2015) para. 51.

²⁸ CERD (2016) para. 22(f)

²⁹ CEDAW (2017) para. 25.

³⁰ Equinet European network of equality bodies (2014) *Positive Action measures. The Experience of Equality Bodies*. Available at www.equineteurope.org (16 March 2018), p. 49.

Recommendation

As the Commissioner and her office have built up a profound knowledge base on the issue of inequality and discrimination in Ukraine it should issue detailed recommendation directed to public and private authorities and institutions on how to design and apply measures of positive action in different fields and concerning different dimensions of inequality. It could conceptualise measures that could be used by different institutions in order to facilitate and enable them to implement positive action measures. In a further step, the Commissioner could serve a focal point for “collecting and disseminating good practices and ensuring access to qualified advice, providing advice and criteria on how to evaluate and analyse the impact of positive measures”.³¹

d) Developing criteria and definitions when it is justified to apply positive measures in order to avoid misapplication

As already discussed in previous reports, positive action is an important, however, very often disputed and, even more, not well-understood instrument among the public at large but also among representatives of state institutions. Very often it is confused and wrongly equated with other principles such as reasonable accommodation, positive obligations or indirect discrimination. Exact definitions and features were already discussed in previous reports, however, it is important to highlight the following points:

- A distinction is commonly made between three main reasons that trigger positive action measures: the elimination of barriers in society, to address wrongs caused in the past that have an adverse impact on persons related to certain social characteristics such as gender or ethnic origin and to strengthen diversity in the society.³²
- Another important feature of positive action is that it is temporary. “The legitimacy of positive action is established and its effectiveness measured by its temporary nature. However, temporariness is a relative notion and may differ from case to case. Where positive action is directed at structural inequality in society, it may sometimes be in place for decades.”³³

It is important to note that the European Court of Justice has already refined criteria for positive action in several cases.³⁴ Detailed conditions and clarifications are also discussed in 2004 CEDAW General Recommendation No. 25³⁵ and the 2009 ICERD General Recommendation (No. 32).³⁶

Recommendation

It is important to support state and private institutions with regard to comprehensive definitions, clarifications and legal criteria for the drafting and implementing of positive action measures. The Commissioner could support other state and private bodies by providing detailed, comprehensive and comprehensible information on criteria and definitions concerning positive action as well as providing information on how to assess legality and legitimacy by making use of international and European legal sources as well as European case law.³⁷

e) Monitoring the legality and implementation of positive measures;

Closely connected with the last point is the necessity to monitor the implementation of positive measures. It is important to monitor the legality but also the impact and effectiveness of

³¹ Ibid.

³² Ibid. p. 27.

³³ Ibid. p. 28.

³⁴ For a detailed discussion see *ibid.*, p. 25-26.

³⁵ CEDAW Committee (2004) General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against women, on temporary special measures, UN Doc. HRI/GEN/1/Rev.7.

³⁶ Committee on the Elimination of Racial Discrimination (2009) General recommendation No. 32. The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/GC/32, 24 September 2009.

³⁷ See also Equinet (2014).

positive action measures. It is also important to examine if persons and institutions entrusted with the task of implementing specific measures are provided with the necessary knowledge, instructions, resources and other means essential for an effective implementation of these measures. This is particularly important as international stakeholders have pointed out the weak implementation of positive action measures. For example, in the 2016 Concluding Observations on Ukraine the CERD Committee voiced its concern concerning the lack of funding and the low level of implementation of the Roma strategy and action plan. Similar points of concern were raised by the CEDAW Committee. In order to tackle the issue the CEDAW Committee has called on Ukraine to “[a]ddress the root causes of the weak implementation of existing temporary special measures and adopt legislation to encourage the use of temporary special measures covering both the public and private sectors.”³⁸ The CRPD committee especially concerned about the fact “that the implementation of the 2009 “Ukraine without Barriers” action plan by public and private entities is not monitored” and calls on Ukraine to ensure effective monitoring by, inter alia, “clearly defining those bodies with the mandate to monitor the implementation at all levels”.³⁹ The CRPD Committee further called upon Ukraine “to ensure effective implementation of affirmative measures and strengthen incentives for businesses and the public sector to employ persons with disabilities.”⁴⁰

Recommendation

The Commissioner could play a decisive role concerning monitoring the legality and the effective implementation of positive measures. It could collect good practices and analyse and point out failures, omissions and other crucial issues in the implementation process. It could provide knowledge and develop measures to strengthen the implementation of existing temporary special measures and support in designing legislation to enhance the use of those measures by public authorities as well as by private organisations.

f) Promoting exchange and experiences on positive action

Positive action is not a new tool. Indeed, there is already a long tradition in different countries and institutions as well as in various equality fields and concerning different social categories to promote, develop, implement and evaluate positive action measures. Thus, there is the need to transfer and exchange knowledge on different levels, between different institutions, fields and countries in order to avoid the repetition of mistakes and learn from good practices and from the valuable experiences of others. There is also a need to involve interest groups and NGOs in the process on exchanging experiences and information on positive action, as, for example, pointed out by the CRPD Committee.

Recommendation:

It is recommended that the Commissioner plays a strong role in order to promote and enhance communication and the exchange of knowledge and information on different levels and between different countries, institutions and areas. In doing so, it is advised to specifically focus on the following levels of cooperation:⁴¹

- promoting the international exchange of knowledge and information with other NHRIs and equality bodies on the application of positive action, learn from good practices and experiences of other NHRIs and equality bodies and contribute to the international exchange of information on positive actions/temporary special measures.
- Enabling and promoting the dialogue between different public institutions and stakeholders on positive action, organise specific events to enhance the exchange of information and to promote mutual learning on the development and implementation of positive action measures. In this context it is particularly important to emphasise the need for involving interest groups and NGOs in the exchange process.

³⁸ CEDAW (2017) para. 25.

³⁹ CRPD (2015) para 17 and 18.

⁴⁰ CRPD (2015) para 51.

⁴¹ See also Equinet (2014)

- Enabling and promoting the transfer of knowledge on, practices and experience of positive action in the public sector to the private sector and vice-versa. As it is important that positive action is not only applied by public institutions, it is vital to motivate private entities to acknowledge the importance of positive action and to support mutual learning between the private and the public sector.

g) Contributing to the widening of the scope and implementation of positive action to grounds where positive action measures are rarely or not applied so far.⁴²

As discussed in previous reports, historically positive action measures in Europe mainly focused on enhancing gender equality. The employment and application of positive action concerning combating inequalities and discriminations of persons associated with other grounds is not so well known and not so widely applied. However, it is vital – and also an legal obligation – to apply positive action in order to promote the equality of groups and individuals that are discriminated on grounds such as ethnic origin, disability, sexual orientation and gender identity, religious belief, language or any other category.

Recommendation

The Commissioner should raise particular awareness among public and private bodies as well as among the public at large that positive action is vital to combat inequalities and discriminations on grounds where it is rarely or not applied at all so far.

h) What are recommended possible positive action measures – extended list of European equality bodies/NHRIs examples concerning positive action

Equality bodies are engaged in, support or even carry out a broad range of positive action activities. Some of them are designed to address members of specific groups; others are measures that are applicable for several groups and/or inequality categories and fields. The Equality Commission for Northern Ireland, for example, has drafted an *Outreach Positive Action*, that is a guide to the law and good practices for employers to reaching out ‘to specific under-represented or disadvantaged groups of people: for example, depending on the specific circumstances that apply in a particular workplace the groups might be: disabled people, members of the black or ethnic minority communities, women or men, Protestants or Roman Catholics, gays and lesbians.’⁴³ The UK Equality and Human Rights Commission has developed a broad range of tools and guidelines in order to support public services and private employers and individuals. The support is directed towards all stages of employment and education and targeting different inequality categories (for example, gender, disability, religious beliefs, LGBTI, ethnic minorities). For example, in 2014 it has published an updated version on “Good equality practice for employers: equality policies, equality training and monitoring”.⁴⁴ The Guide contains information on equality policies, on how to provide equality training for employees, monitoring equality and anti-discrimination, the duties of an employer concerning reasonable accommodation with regard to the employment of persons with disabilities, procedures to follow in case claims of discrimination should arise and a list of further source of information and advice.

Some equality bodies have also published general information on the instrument of positive action. For example, the Scottish Equality and Human Rights Commission provides general information on the legal background, design as well as on examples of positive action on its

⁴² Equinet European network of equality bodies (2014) *Positive Action measures. The Experience of Equality Bodies*, available at www.equineteurope.org (16 March 2018).

⁴³ Equality Commission for Northern Ireland (undated) *Outreach Positive Action. A Guide to the Law and Good Practices for Employers*, available at <http://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/PositiveActionEmployerGuide.pdf> (16 March 2018).

⁴⁴ Equality and Human Rights Commission (2014) *Good equality practice for employers: equality policies, equality training and monitoring*, Equality Act 2010, Guidance for Employers, Vol. 7, No. 7, available at https://www.equalityhumanrights.com/sites/default/files/good_equality_practice_for_employers_equality_policies_equality_training_and_monitoring.pdf (23 June 2018).

homepage.⁴⁵ The equality body of New Zealand published a brochure on its homepage containing “Guidelines on Measures to Ensure Equality”.⁴⁶

The following ideas constitute only few of the many examples equality bodies can support and contribute to positive action concerning the grounds of gender, sexual orientation and gender identity, disability and ethnic origin, racial discrimination and/or national minority.

Gender⁴⁷

Although positive action measures are widespread in the field of gender, the misunderstanding of and lack of information on the concept are also widespread. Thus, one of the most important tasks of equality bodies in this area is to raise awareness and distribute knowledge on the conceptualisation and implementation of positive action in all fields (employment, education, health care or political participation).

In the field of employment as well as political participation equality bodies could spread information on positive action aiming at tackling under-representation of women.⁴⁸ They could develop guidelines for diversity including gender diversity, inform employers and public bodies concerning the introduction of quota systems and trainings, do research on prevalent gender discrimination and help to develop action plans to address under representation and achieve equal pay.⁴⁹ Equality bodies could also specifically involved in supporting action concerning the so-called “work-life-balance” and, thus, enable families and individuals to better combine work and private life.⁵⁰

Another possible area for equality bodies to get involved is education, where not only material and training for gender sensitive education could be developed, distributed or initiated but also programs and guidelines to eliminate, for example, gender stereotypical representations in school books and specific gender-sensitive educational programs for girls and boys could be developed.

⁴⁵ See <https://www.equalityhumanrights.com/en/legal-work-scotland/legal-work-scotland/scottish-legal-articles/positive-action—your-opportunity> (23 June 2018).

⁴⁶ Human Rights Commission (2010) *Guidelines on Measures to Ensure Equality*, available at https://www.hrc.co.nz/files/3114/2374/6901/03-Mar-2010_16-12-18_Special_Measures_Feb_10.pdf (23 June 2018).

⁴⁷ For possible positive action measures in this context, please see, for example, Equinet European network of equality bodies (2014) *Positive Action measures. The Experience of Equality Bodies*, available at www.equineteurope.org (16 March 2018) and European Commission (2009) *International perspectives on positive action measures. A comparative analysis in the European Union, Canada, the United States and South Africa*, Luxembourg.

⁴⁸ See, for example, Selanec, G. and Senden, L. (2011) *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*, European Network of Legal Experts in the Field of Gender Equality, Commissioned by the European Commission, available at <https://publications.europa.eu/en/publication-detail/-/publication/6b4179c6-13e5-406f-b30e-048804d1bea3/language-en> (23 June 2018).

⁴⁹ The European Trade Union has published a toolkit for gender equality in practice that contains examples of 100 initiatives applicable in the workplace focusing on addressing gender roles, promoting women in decision-making, supporting work-life balance and tackling the gender pay gap, see <http://erc-online.eu/gendertoolkit-etuc/> (23 June 2018). Furthermore, the Equality and Human Rights Commission has published numerous reports and guidelines to advice employers on all issues related to gender equality. For example, it has published “A quick guide to being a gender champion in your workplace” (available at <https://www.equalityhumanrights.com/sites/default/files/a-quick-guide-to-being-a-gender-champion-in-your-workplace.pdf> (23 June 2018)), guidelines on “Managing pregnancy and maternity at work. A conversation for line managers” (available at <https://www.equalityhumanrights.com/sites/default/files/working-forward-conversation-guide-for-line-managers.pdf> (23 June 2018)) or an “Unconscious bias training: An assessment of the evidence for effectiveness” (available at <https://www.equalityhumanrights.com/sites/default/files/research-report-113-unconscious-bias-training-an-assessment-of-the-evidence-for-effectiveness-pdf.pdf> (23 June 2018)). The latter is directed towards all protected characteristics.

⁵⁰ Equinet (2013) *Equality Bodies Promoting a Better Work-Life Balance for All*, An Equinet Policy Perspective, available at http://www.equineteurope.org/IMG/pdf/wlb_for_website.pdf (23 June 2018).

In the field of health care, equality bodies could support the development of gender sensitive health care plans, research on specific obstacles for men and women to access the public health care system and information on addressing discriminatory gendered stereotypes and attitudes of health care personnel.

Sexual Orientation and Gender Identity

The European Network for Equality Bodies Equinet published a factsheet on how equality bodies can contribute to advance LGBTI equality. The fact sheet is a contribution to the 2015 List of Actions by the European Commission to advance LGBTI rights.⁵¹ The factsheet lists practices by equality bodies in the following areas:⁵²

- Addressing bullying and harassment of LGBTI people: This includes gaining information on the prevalence of bullying and harassment of LGBTI in the fields of education, employment, healthcare, housing and other relevant fields by doing research and public awareness raising campaigns as well as reaching out to LGBTI persons in order to inform them about their rights and possible ways of access to justice.
- Supporting education actors to advance LGBTI equality: Equality bodies can contribute to the training and guidance for all education actors (for example, by designing and drafting training material as well as carrying out trainings), they can formulate and publish policy recommendations in the field of education and review textbooks and workbooks in order to remove discriminatory contents.
- Supporting businesses to advance LGBTI equality: Equality bodies can conduct research on the prevalence and needs of LGBTI persons, they can draft guidelines for diversity addressing also LGBTI issues and inform about the benefits of inclusive workplaces.
- Supporting key actors to promote and enhance equality in access to healthcare for LGBTI people: Equality bodies can collect data on LGBTI health experiences and outcomes and draft recommendations taking into account healthcare challenges faced by LGBTI persons and addressing discriminatory barriers for LGBTI persons to access healthcare.⁵³

Disability

Also in the field of disability there are many well-proven positive action measures in many fields. The CRPD Committee emphasis that “[e]xamples of specific measures include outreach and support programmes, allocation and/or reallocation of resources, targeted recruitment, hiring and promotion, quota systems, advancement and empowerment measures, as well as respite care and technological aids.”⁵⁴ The following examples were developed by equality bodies:

- In the field of employment, the Irish Human Rights and Equality Commission has developed a detailed overview on different dimensions of positive action concerning disability in the workplace, including recruitment strategies, integration in the workplace, workplace accommodation and equipment and safety, health and welfare at work.⁵⁵

⁵¹ European Commission (2015) *List of actions by the Commission to advance LGBTI equality*, available at https://ec.europa.eu/info/sites/info/files/lgbti-actionlist-dg-just_en.pdf (16 March 2018).

⁵² Equinet (2017) *Equality Bodies contributing to the List of Actions by the European Commission to advance LGBTI equality*, an Equinet Factsheet, available at http://www.equineteurope.org/IMG/pdf/equinet_lgbti-factsheet-a4_def-web.pdf (16 March 2018).

⁵³ Ibid.

⁵⁴ Committee on the Rights of Persons with Disabilities (2018) para 28.

⁵⁵ Irish Human Rights and Equality Commission, *Positive Action in Relation to Disability*, available at <https://www.ihrec.ie/guides-and-tools/human-rights-and-equality-for-employers/positive-action-in-relation-to-disability/> (16 March 2018); see also Equinet (2017) *Equality Bodies contributing to the List of Actions by the European Commission to advance LGBTI equality*, an Equinet Factsheet, available at http://www.equineteurope.org/IMG/pdf/equinet_lgbti-factsheet-a4_def-web.pdf (16 March 2018), pp. 36-37.

- Concerning the access to goods and services, equality bodies could reach out to service providers of public transport and provide information how to create barrier free access to goods and services.
- Equinet has published a report on Realising Rights: Equality Bodies and People with Disabilities. Supporting the Review of the European Disability Strategy 2010-2020.⁵⁶ In this publication Equinet lists a broad range of suggestions how equality bodies can get involved in positive measures concerning the rights of persons with disabilities, including ‘publishing a compendium of good practice in advocacy services to people with disabilities and conducting a study on the participation of people with disabilities in decision making in politics, business and public sector institutions’⁵⁷.
- A specific field of action for equality bodies is also the combating of stereotypes and negative attitudes towards persons with disabilities and the publication and promotion of good practices to addressing these stereotypes as well as discriminatory behaviour within educational institutions.⁵⁸

Ethnic Origin/Racial Discrimination/National Minority

Similar to the measures outlined above, equality bodies, first and foremost, could get involved to provide information on how to use positive action measures in the fields of employment, education, health service, politics and other fields to tackle discrimination against and inclusion of people belonging to ethnic and national minorities.⁵⁹

In the field of employment as well as political participation equality bodies could spread information on positive action aiming at tackling under-representation of persons from ethnic and national minorities. They could develop diversity strategies for these fields, inform employers and public bodies concerning the introduction of quota systems, outreach activities and trainings aimed at persons from ethnic or national minorities, do research on prevalent racist discrimination and discrimination against ethnic and national minorities and help to develop action plans to address under-representation of persons from these minorities in all sectors of employment.⁶⁰

In the field of education equality bodies could get involved in developing curricula and training for educational actors and in guidelines on how to address stereotypes and discriminatory representation of race and ethnic and national minorities or combat prejudiced-based bullying in schools.⁶¹ Equality bodies could also support research on specific needs of children from these minorities and raise awareness among teachers for these needs. Similar activities can be promoted in the field of health care.⁶²

B. Recommendations concerning positive action in the fields of data protection and access to information

When it comes to the question how violated rights in the field of data protection and access to information can and shall be restored by positive actions, we have to take into account the results of Activity 2.3.1. Mission Report, Chapter III:

a) Separating the competence for data protection and access to public information from the mandate of the Human Rights Commissioner

⁵⁶ Available at http://www.equineteurope.org/IMG/pdf/disabiliby_perspective_with_cover.pdf (16 March 2018).

⁵⁷ Ibid, p. 4.

⁵⁸ Ibid.

⁵⁹ See, for example, Equinet (2016) *Fighting Discrimination on the Ground of Race and Ethnic Origin*, available at http://www.equineteurope.org/IMG/pdf/equinet_discussion_paper_final_-_web-2.pdf (23 March 2018); see also Equinet 2014.

⁶⁰ The UK Equality and Human Rights Commissioner has developed a broad range of tools for employers and organisations, see <https://www.equalityhumanrights.com/en> (23 June 2018).

⁶¹ See, for example, <https://www.equalityhumanrights.com/en/bullying> (23 June 2018)

⁶² See Equinet, European network of equality bodies (2012) *Equality Bodies Combating Discrimination on the Ground of Racial or Ethnic Origin*, available at http://www.equineteurope.org/IMG/pdf/Race_Perspective_MERGED_-_EN.pdf (16 March 2018).

First of all, the assessment has to be recalled that supervising the implementation of the right to data protection is in Member States of the CoE (which ratified Convention 108 and the Additional Protocol), the task of a specialised sort of supervisory body, which is independent like the Ombudsman and whose decisions have similar legal effects as of administrative authorities.⁶³ The same is widely true for the field of the right to access to public information. In many EU countries, supervision over both legal fields, data protection and access to public information, has even been entrusted to the same supervisory body, given that the two legal fields are related to each other in substance (even if very often in conflict) and also call for similar procedural remedies.⁶⁴ However, the development of the legal framework for these areas of law has undergone additional changes in Europe during the last 20 years. Dealing with these topics is no longer the prerogative of ombudsman-like institutions; in many countries, especially infringements of data protection have been subjected to “normal” procedures for counter acting and punishing violations of law by administrative courts. This results in applying the usual instruments of penal administrative law, which are coercive and subject to review under the general system foreseen for the revision of administrative decisions in a country.⁶⁵

Recommendation:

From that follows that the Ukrainian legislation shall consider to separate the legal fields of data protection and access to public information from the competence of the Human Rights Commissioner and to outsource them to an own supervisory body (for monitoring, registration, awareness raising, information, legal guidance, etc), respectively to (specialised) administrative courts whenever it comes to infringement of the rights to data protection or access to public information. Further, detailed suggestions in that regard are provided for by the Conclusions of Activity 2.3.1. Mission Report, Chapter V/1 (p. 62).

b) Information and education of the public

In order to already prevent violations of the rights of data protection and access to public information and at the same time to facilitate citizens the restoration of their violated rights, they should be better informed and educated about the nature and requirements of data protection and access to public information.

Information and education about the rights of data protection and access to public information has to be done not only by public awareness campaigns, in particular via spreading brochures, publications in the print and broadcasting media as well as via modern forms of social media, but also by introducing or intensifying respective competent education in schools at all levels, at universities as well as in further and adult education.

Recommendation:

According to Activity 2.3.3. Mission Report, Chapter 4.2. (pp. 43), the Commissioner shall develop a comprehensive information strategy in order to inform the public about

- the contents of their rights of data protection and access to public information;
- who – State and/or private persons (including companies) – can violate their rights in which way;
- possible ways and procedures to claim violations of these rights, including the disclosure of the authorities or other organs and institutions which are responsible to deal with those claims, as well as their competences (to decide on a case legally, whether based on administrative, civil or criminal law; or to give legal advice or support in procedures; or to forward the case to competent organs, etc.), and kind of remedy (including the question whether, and if, which sanctions and fines can be imposed on those who violate the rights of individuals;

⁶³ Activity 2.3.1. Mission Report, Chapter III, p. 30.

⁶⁴ Ibid, p. 30.

⁶⁵ Ibid, p. 62.

- organisations of civil society (NGOs) which support individuals or groups who have been violated in their rights and interests.

The information and education of the public by the Commissioner can be achieved best by

- respective information of the public via the Commissioner's website which can be patterned like the Austrian governmental information website www.help.gv.at, which offers in a quite comprehensive and very structured way the most relevant information which is necessary for living and working in Austria;
- using print, broadcasting and social media to informing the public about rights of individuals and possible threats for them, duties of State organs, actual developments and events;
- information campaigns and/or information days organised by the Commissioner on certain issues;
- publishing and disseminating respective brochures;
- organising "open days";
- respective awareness raising in schools at all levels;
- introducing or intensifying respective competent education in schools at all levels, at universities as well as in further and adult education.

c) Awareness raising, education and training of competent authorities

Since state institutions do quite often not react to a recommendation of the Commissioner explaining that, for example, some legal act is not in line with the LPDP, respective awareness raising and training of the given authority have to take place. The main reason for such non-reaction is most likely a lack of understanding for what data protection would require. Even if institutions want to comply, they often are not certain how to achieve compliance. There is evidently a considerable need of administrative authorities and even courts for education on data protection and its implementation. This is why the model of „positive action“ was explained in greater detail in Chapter IV of the Activity 2.3.1. Mission Report,⁶⁶ which could serve as a way of planning educative activities also for better implementation of the rights to data protection and access to public information.

Recommendation:

According to Activity 2.3.3. Mission Report, Chapter 4.2. (p. 44), positive actions by the Commissioner in that regard for any responsible State organ, be it from legislation, administration or judiciary, could be:

- to provide information, knowledge and training on European best practises regarding the implementation of the rights to data protection and access to information, based on CoE and EU standards, as well as referring procedures into domestic law and legal practice;
- formulating recommendations on how State organs and private persons (including companies) can take action and design specific measures advancing the rights of data protection and access to information, and monitoring their implementation;
- promoting and enabling the transfer of experience of positive actions concerning the rights of data protection and access to information in the public sector to the private sector and vice-versa;
- promoting and enabling the dialogue between the Commissioner, other State organs which are responsible for the implementation of the rights of data protection and access to information, science, companies and civil society.

⁶⁶ Activity 2.3.1. Mission Report, Chapter VI/5, p. 54