



Disability and non-discrimination law in the European Union

An analysis of disability discrimination law within and beyond the employment field



European Commission

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European Network of Legal Experts in the non-discrimination field
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European Commission
Directorate-General for Employment, Social Affairs and Equal Opportunities
Unit G.2

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Executive Summary

Overview

This report examines disability non-discrimination law in the European Union. It is divided into two main substantive sections – Part I and Part II.

Part I considers European Community (EC) law designed to combat disability discrimination, and specifically, the disability provisions of the Employment Equality Directive (Directive 2000/78/EC, henceforth: the Directive). In making this examination, the report draws on the Directive, including its preamble, and also (where available) on relevant case law of the European Court of Justice (ECJ). The report also explores how the Member States have transposed and interpreted specific provisions of the Directive, including examining how the personal scope of the national legislation has been defined, and how the concept of reasonable accommodation has been elaborated on.

Part II considers issues of disability discrimination which are currently not covered by EC law. It focuses on areas of social activity other than employment, such as access to goods and services, education, transport, housing and social protection. After some discussion of the ways in which disability discrimination manifests itself in these areas, attention is turned to a consideration of various legal strategies which are used by Member States to counter such disability discrimination.

The Employment Equality Directive: Disability and Personal Scope

The Directive does not include a definition of disability or guidance on who is to be protected from discrimination on the grounds of disability. However, the personal scope of the Directive has been the subject of judgments of the ECJ. In *Chacón Navas* the Court defined disability, for the purposes of the Directive, as: “a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.” In *Coleman* the Court focused on the fact that the Directive prohibits direct discrimination and harassment “on ... the grounds of disability”, and found that the Directive also protected individuals who were directly discriminated against or harassed not on the grounds of their own disability, but on the grounds that someone they associated with had a disability (*in casu*, a mother caring for a disabled child).

A review of Member State legislation reveals four different approaches to the issue of how and whether to define disability. Firstly, many Member States, including Belgium, Bulgaria, Greece, Italy, Poland, Romania and Slovakia, have not included a definition of disability in their non-discrimination legislation at all. In principle, this should leave the way open for courts in these countries to follow the approach of the ECJ identified in *Chacón Navas*. Secondly, some Member States, including Austria, Malta, Portugal, Sweden and the United Kingdom, have developed a definition of disability specifically in the context of non-discrimination legislation. Generally, such definitions seem to be in line with the approach developed in *Chacón Navas*, and consist of three elements: (1) the requirement that an impairment exists, defined as some sort of restriction or limitation caused by a medical condition; (2) the requirement that this impairment impacts on an individual’s capacity to take part in employment, or in everyday life in general; and (3) the requirement that the impairment be permanent or have lasted, or be likely to last, for a significant period of time. Thirdly, some Member States, including the Czech Republic and Slovenia, have used a definition of disability in national non-discrimination which has been “borrowed” from other legislation. Typically the original legislation which provides the source of the definition operates in the field of social security, and the definition of disability is highly limited and restricted as a result. The use of such limited definitions for the purposes of non-discrimination legislation almost certainly breaches the Directive and is not in line with the Court’s ruling in *Chacón Navas*. Lastly, some Member States, such as Germany and France, have adopted a dual approach to defining disability for the purposes of non-discrimination legislation. On the

one hand a general non-discrimination law, prohibiting, e.g. direct and indirect discrimination, provides for a broad definition of disability or no definition at all, whilst, on the other hand, a second law addressing reasonable accommodation makes use of a different, and more limited definition of disability, typically drawn from the social security field. This use of this more limited definition, albeit only in the context of reasonable accommodation, once again arguably amounts to a breach of the Directive.

The Employment Equality Directive: Reasonable Accommodation

Article 5 of the Directive creates the obligation for employers to make a reasonable accommodation for disabled people. It provides:

“In order to guarantee compliance with the principle of equal treatment in relation 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 provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate.”

Recital 20 of the (non-binding) Preamble to the Employment Equality Directive expands on the kinds of measure that could amount to a reasonable accommodation:

“Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.”

The Preamble also gives some guidance with regard to assessing whether any particular accommodation amounts to a disproportionate burden in Recital 21:

“To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.”

One can conclude that an accommodation is simply an adaptation of normal procedures, processes or infrastructure. The goal of any accommodation under Article 5 of the Directive is to enable a person with a disability “to have access to, participate in, or advance in employment”. Assessing what kind of accommodation will achieve this goal, and therefore what kind of accommodation is required, involves an individual analysis taking into account the situation of the individual and the employment or training at issue. Many Member States have opted to use the terminology of the Directive in their national legislation when transposing Article 5. However, in some jurisdictions the word “accommodations” has been replaced with another term, such as “adjustments” (United Kingdom), “steps” (Finland) or “appropriate measure” (Ireland, France, Lithuania and Slovakia). Nevertheless, it is submitted that the use of an alternative term to replace “accommodation” is of no legal significance, and that in essence all of the terms referred to above convey the same meaning.

There are three different ways in which the term “reasonable” has been understood in Member State legislation which has transposed Article 5 of the Directive. In the first approach, an accommodation will only be regarded as “reasonable” if it does not impose excessive difficulties or costs on the employer or other covered party.

Generally this requirement exists alongside the separate defence that making an accommodation would result in a disproportionate burden or undue hardship.

According to the second approach, an accommodation will be regarded as “reasonable” if it is effective in allowing the relevant individual to carry out the necessary (employment related) tasks. Given that the term “reasonable” cannot easily convey this meaning, European jurisdictions that have followed this approach have sensibly used alternative terms. Dutch legislation makes no reference to a “reasonable” accommodation but instead requires an “effective” accommodation, whilst the Irish Employment Equality Act 1998-2004 defines a “reasonable” accommodation as “appropriate measures”, which is also the term found in the French Labour Code.

What both approaches outlined above have in common is that they require a two-stage test to establish whether any accommodation must be made. Firstly, in principle the employer or other covered party is obliged to make an accommodation. At the second stage the relevant question is whether any defence to the requirement to make an accommodation exists. Most legal systems described make use of the disproportionate burden defence. However, those described in section 3.3.1 also combine this with the additional test of “reasonableness”, whilst those considered under section 3.3.2 rely exclusively on the disproportionate burden defence.

The last way in which the term “reasonable” is used in legislation is to convey both that the accommodation must be effective and that it must not impose significant inconvenience or cost on the employer or covered party. This is the approach adopted in the United Kingdom, which has the longest standing reasonable accommodation requirement within the EU. Given that this approach is also adopted in Article 5 of the Employment Equality Directive, the ECJ will be confronted with the task of interpreting, and thereby enabling national courts to apply, this dual meaning in the future. The Court may draw inspiration from the legal systems, identified in the report, which have opted for a two-stage approach to determining whether any accommodation is required. However, in doing so the Court will have to delineate clearly the two different meanings of the term “reasonable” in its case law.

With regard to the disproportionate burden limitation, the Directive and national (disability) non-discrimination law makes it clear that the cost of any accommodation is a key factor in determining the scope of the obligation to accommodate. According to most national (disability) non-discrimination laws, the availability of public funding or support to offset the cost of making any accommodation must be factored into the equation when determining whether the cost amounts to a disproportionate burden. In addition to cost, some jurisdictions provide for additional limitations or requirements which have to be met for an accommodation to be regarded as amounting to a disproportionate burden.

The Employment Equality Directive: Positive Action and Disability

Article 7(1) of the Employment Equality Directive specifies that the “principle of equal treatment shall not prevent any Member States from maintaining or adopting specific measures to prevent or compensate for disadvantages” linked to any of the grounds covered by the Directive. Moreover, Article 7(2) of the Directive provides additional protection for positive action in respect of people with disabilities. It states that

“with regard to disabled persons, the principle of equal treatment is without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.”

One potentially challenging issue is the compatibility of employment quotas for people with disabilities with the Employment Equality Directive. Numerous EU Member States provide for some form of (obligatory) quotas,¹ and in countries such as France and Germany quotas are regarded as an intrinsic element of disability employment policy. Such schemes would fall foul of the test established by the ECJ in *Kalanke*, which involved a challenge to a positive action measure which targeted women. In that case the Court, in essence, ruled out employment quotas in the context of gender. However, the Court may regard the different social context of people with disabilities, as well as the existence of Article 7(2) of the Directive, as justifying a broader scope for positive action with regard to disability.

Disability Discrimination in Non-Employment Contexts: Nature of the Discrimination

The material scope of the Employment Equality Directive is limited to employment-related issues. By contrast, the Racial Equality Directive (which was adopted in the same year as the Employment Equality Directive) also covers access to and supply of goods and services generally, housing, education, transport, healthcare, social security and social assistance. In relation to each of these non-employment areas, currently unregulated by EC disability non-discrimination law, disabled people experience discrimination in a variety of ways. While the nature of that discrimination varies in its particularities from area to area, several broad recurring themes emerge. It is thus clear that, in all relevant areas, disabled people experience discrimination in the following ways:

- Less favourable treatment than that afforded to a non-disabled person because of hostility, fear, impatience, ignorance or even misplaced kindness;
- Inaccessibility of physical environments, structures or features;
- Inaccessibility of information;
- Inflexibility as to modes of communication;
- Lack of staff assistance.

Such discrimination has damaging economic and social consequences, not only for the disabled people concerned, but for society more generally.

Disability Discrimination in Non-Employment Contexts: National Legal Strategies

Despite the fact that EC law does not currently require Member States to prohibit disability discrimination outside the area of employment, legal provisions prohibiting discrimination in non-employment areas (either generally or explicitly on grounds of disability) are to be found in many Member States. These provisions vary widely in scope, content, terminology and enforcement – a variety which makes classification and comparison challenging. Nevertheless, it is possible to identify a number of individual-orientated and group-orientated discrimination law concepts at work in at least some Member States.

Individual-orientated discrimination law strategies include the concepts of direct discrimination and (reactive) reasonable accommodation. The notion of direct discrimination (whether or not defined so as to include a general justification defence) is employed by a number of Member States to tackle the less favourable treatment of disabled people. Reasonable accommodation obligations, owed to individual disabled people, are imposed on service-providers and others by the laws of several countries. They require duty-bearers to take positive steps to remove the disadvantage which would otherwise be caused to the disabled person when attempting to access the relevant service by aspects of the duty-bearer’s operation (including its policies, practices and physical features).

¹ For further information see L. Waddington, “Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-discrimination Laws” (1996) 18 *Comparative Labor Law Review* 62-101.

Group-orientated discrimination law concepts at work in the laws of a number of Member States include the notion of indirect discrimination and that of anticipatory reasonable accommodation.

These non-discrimination obligations are sometimes supplemented and strengthened by two other mechanisms. First, by accessibility standards or requirements (relating e.g. to the built environment, to telecommunication or the internet) – aspects of EC law (falling outside the realms of non-discrimination law), indeed, have played an important role in promoting the use of such standards and requirements in a number of contexts. Second, by enforceable positive obligations (particularly on public bodies) to eliminate disability discrimination and to promote equality.

Introduction

Whilst the European Community (EC) has adopted and implemented instruments of disability policy since the mid 1970s, it only acquired the power to address disability discrimination in 1999 with the coming into force of the Amsterdam Treaty. The potential of the new Article 13 EC was quickly acted upon, and the Employment Equality Directive, which prohibits employment related discrimination with regard to *inter alia* disability, was adopted in 2000. The Directive has had a significant impact on the level of protection provided to victims of disability discrimination in the EU Member States. Prior to the adoption of the Directive, only three Member States prohibited employment related disability discrimination in civil law; today all 27 Member States prohibit such discrimination, as does Norway.

Today the Directive remains the most important instrument with regard to the Community's disability policy. However, this is not to say that its transposition and implementation have been straightforward for the Member States, or that the interpretation to be given to the (disability specific) provisions of the Directive has been, or indeed is, clear. The Directive addresses areas which had not previously been regulated in most Member States, such as the concept of reasonable accommodation, and requires reflection on the nature of disability based discrimination and the characteristics which an individual must possess before being able to claim protection from such discrimination. Moreover, a review of national legislation reveals that many of the disability relevant provisions, including the definition of who is protected from disability discrimination and who is entitled to claim a reasonable accommodation, and the concept of reasonable accommodation itself, have been transposed and implemented in (very) different ways.

This report, in Part I, will attempt to throw some light on the issues addressed above. In particular the disability specific provisions of the Directive will be explored in more detail. The starting point for this analysis will be the wording used in the Directive, including the preamble and, where available, case law of the European Court of Justice (ECJ). Part I will also explore how Member States have transposed and interpreted specific provisions, including examining how the personal scope of the national legislation has been defined, and how the concept of reasonable accommodation has been elaborated on. Where appropriate, non-European material will also be drawn upon, e.g. US experience and case law relating to the Americans with Disabilities Act (ADA). The goal will not be to examine the approach adopted on a State-by-State basis, but to attempt to identify the various different approaches found within the EU. Each approach will often be common to a number of EU Member States. Part I will attempt to identify what the consequences of each approach are, or are likely to be, and reflect on their compatibility with the Directive. Lastly Part I will also reflect briefly on the consequences of the Directive for positive action measures in favour of people with disabilities.

Part II will focus on strategies for tackling disability discrimination outside the area of employment and occupation, and the approaches adopted by Member States in the absence of EC non-discrimination legislation in this field. It will identify a number of key areas within which such discrimination occurs (e.g. the provision of goods and services generally, education, transport, housing, healthcare and social protection) and explore some of the ways in which disabled people experience discrimination within them.

The bulk of Part II will consist of an analysis of different strategies for tackling such discrimination which operate at the national level. There is currently a wide variation in the approaches adopted by different Member States – a variation which is likely to be reduced, at least to some extent, following the (eventual) adoption of the proposed Article 13 EC directive on discrimination outside the area of employment (which covers, *inter alia*, discrimination

on the ground of disability).² As in relation to Part I, the aim of Part II will not be to explore relevant approaches on a State-by-State basis, but to attempt to identify the various different approaches found within the EU and, where appropriate, reference will also be made to approaches adopted by countries beyond the EU. The legal strategies under consideration will be grouped together under headings reflecting concepts which appear in the Employment Equality Directive (direct discrimination, indirect discrimination and reasonable accommodation) and concepts which, although not appearing in that instrument, have particular relevance to disability discrimination in non-employment contexts (anticipatory reasonable accommodation, accessibility and positive duties). For reasons of space, harassment, victimisation and instructions to discriminate will not be examined here. It should also be noted that, while this discussion is rendered particularly timely by the current progress towards the adoption of a new directive covering disability and other grounds of discrimination in non-employment contexts, an analysis of the proposal for that directive and its likely effects are beyond its scope. So too is an analysis of the innumerable EC directives and regulations which, despite not prohibiting discrimination against disabled people, contain provisions designed to increase their quality of life and to ensure that they are able to access transport vehicles, telecommunications and infrastructure.³

² "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 (2 July 2008) 426. See:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0426:EN:HTML>.

³ See e.g., Directive 95/16/EC of 29 June 1995 on the approximation of the laws of the Member States relating to lifts, [1995] OJ L 312/1; Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), [2000] OJ L 178/1; Directive 2001/85/EC of 20 November 2001 relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat, amending Directives 70/156/EEC and 97/27/EC, [2002] OJ L 125/1; Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), [2002] OJ L 108/33; Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), [2002] OJ L 108/51; Directive 2003/24/EC of 14 April 2003 amending Council Directive 98/18/EC on safety rules and standards for passenger ships, [2003] OJ L 123/18–21; Regulation No 1107/2006 of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L 204/1; Regulation No 1371/2007 of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L 315/14–41; and Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, [2007] OJ L 332/27.

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Part I

The Employment Equality Directive and Disability

1 An Introduction to the Employment Equality Directive from a Disability Perspective

The Employment Equality Directive of 2000⁴ was the second directive which was adopted by the European Community on the basis of Article 13 EC, and followed closely on the heels of the Racial Equality Directive.⁵ Unlike the Racial Equality Directive and the Sex Discrimination Directives,⁶ the Employment Equality Directive sought to prohibit discrimination with regard to a number of diverse grounds, including disability, as well as the grounds of religion or belief, age and sexual orientation. In line with the general approach found in Community non-discrimination directives, the Directive does not include a definition of disability or guidance on the personal scope of the legislation with regard to disability. However, the question of who is protected from discrimination on the grounds of disability by the Directive has proven to be problematic for the national courts, which have been called upon to interpret the national implementation legislation, and has led (thus far) to the only two references to the European Court of Justice (henceforth: ECJ) relating to disability under the Directive. Moreover, research by the European Network of Legal Experts in the Non-Discrimination Field reveals that Member States have chosen to define the group of individuals who are entitled to protection from disability discrimination under national law in very different ways, leading to diverse levels of protection within the European Union.

Secondly, in the disability context, it is important to note that the Employment Equality Directive includes a requirement to provide reasonable accommodations for people with disabilities. Employers⁷ are obliged to accommodate, or make adaptations, to meet the needs of individuals with a disability, upto the point that making the accommodation would result in a disproportionate burden. This provision, found in Article 5 of the Directive, follows modern national disability employment non-discrimination laws,⁸ which recognise that in order to ensure equality of opportunity for people with disabilities it is necessary to address work practices and barriers which exclude or disadvantage (some) people with disabilities.

Article 5 has proven to be one of the more challenging provisions of the Directive, in terms of implementation, for Member States. Specifically, confusion has arisen regarding the concepts of “reasonableness”, in the context of a reasonable accommodation, and “disproportionate burden”. As a consequence, (some) Member States have struggled with the implementation of this provision and an analysis of national laws reveals a variety of different responses and ways of transposing the reasonable accommodation obligation.

As a consequence of the above mentioned factors, the most pressing⁹ disability-related issues with regard to the Employment Equality Directive are establishing who is protected from discrimination on the grounds of disability and clarifying the concept of, and obligations with regard to the making of, a reasonable accommodation. For this reason Part I of this report focuses on these two matters. In addition, the issue of positive action in favour of people with disabilities will be addressed briefly.

⁴ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] O.J. L303/16.

⁵ Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment irrespective of racial or ethnic origin, [2000] O.J. L 180/22.

⁶ Such as Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] O.J. L 204/23 and Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] O.J. L 373/37.

⁷ This obligation also extends to providers of vocational training, including universities.

⁸ See the United Kingdom’s Disability Discrimination Act 1995, Ireland’s Employment Equality Act 1998 and Sweden’s Law Prohibiting Discrimination in Working Life on Grounds of Disability 1999 (1999:132), all of which preceded the adoption of the Directive.

⁹ From the point of view of interpreting, transposing, and applying the Directive at EC and national level.

2 Who is protected from Discrimination? The Personal Scope of the Directive with Regard to Disability

As noted above, the Directive does not include a definition of disability or further guidance on the personal scope of the Directive with regard to disability. This raises a number of questions, some of which the ECJ has already been called upon to address.

Firstly, it is clear that individuals who have a disability themselves are protected from all kinds of discrimination under the Directive and, moreover, are entitled to claim a reasonable accommodation. However, what is meant by “disability” in this context?

Secondly, are only individuals who have a disability (however defined) themselves entitled to claim protection from discrimination, or can individuals who experience discrimination which is related to disability, albeit not their own (current) disability, also claim protection. For example, can someone who cares for, or supports, a disabled family member claim protection from discrimination on the grounds of disability under the Directive?

Both of these issues have received attention in either the national transposition legislation or judgments of the ECJ, and will be considered below.

2.1 Judgments of the European Court of Justice

2.1.1 Defining Disability - *Chacón Navas*¹⁰

In the first case relating to the disability provisions of the Employment Equality Directive, the Court was called upon to reflect on who was to be regarded as disabled for the purposes of the Directive. The case concerned Ms. Chacón Navas, who was ill and had not been able to work for her Spanish employer, Euresst Colectividades SA, for some time. She was dismissed after a period of absence and challenged this decision on the grounds that it was incompatible with the Employment Equality Directive.

The national court decided to stay the proceedings and referred two questions to the ECJ. In essence the national court asked whether the provision of the Directive which prohibits disability discrimination, also provided protection for a worker who had been dismissed solely because she was sick. In the alternative, the court asked if sickness could be added to the list of protected grounds covered by the Directive.

In response the ECJ elaborated a definition of disability for the purposes of the Directive and, in addition, held that sickness could not be brought within the scope of the Directive by being added to the already listed covered grounds.

With regard to the definition of disability, the Court noted that the Directive is designed to combat employment discrimination and defined disability, in that context as, “a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life” (para. 43). For any limitation to be regarded as a “disability”, “it must be probable that it will last for a long time” (para. 45). In addition the Court held, for the purposes of the Directive, “disability” is different from “sickness” (para. 44), and there is nothing in the Directive “to suggest that workers are protected by the prohibition of discrimination

¹⁰ Case C-13/05 *Chacón Navas v. Euresst Colectividades SA* (Case C-13/05) [2006] ECR I-6467. For further commentary on this case see L Waddington, “Case C-13/05, *Chacón Navas v. Euresst Colectividades SA*, Judgment of the Grand Chamber of 11 July 2006” (2007) 44 *Common Market Law Review* 487-499.

on grounds of disability as soon as they develop any type of sickness” (para. 46). The Court further stated that its definition of disability was “autonomous and uniform” (paras. 40 and 42). The Court also held that sickness could not be added to the list of grounds covered by the Directive, since it was not explicitly mentioned in the Directive or the EC Treaty (paras. 55-57).

A number of these points are worth examining in more detail. Firstly, it is clear that the definition of disability developed by the Court in *Chacón Navas* is based on the medical or individual model of disability.¹¹ According to the definition developed by the Court, the cause of the disadvantage (or the “limitation”) is the “impairment” which an individual has, and it is the “impairment” which hinders participation in professional life. Therefore, the problem lies in the individual, and not in the reaction of society to the impairment or the organisation of society.

The medical model of disability can be contrasted with a social model of disability. The social model is based on a socio-political approach which argues that disability stems primarily from the failure of the social environment to adjust to the needs and aspirations of people with impairments, rather than from the inability of people with impairments to adapt to the environment. The argument here is that it is discrimination, in both the physical and attitudinal environment, prejudice, stigmatisation, segregation and a general history of disadvantage, which is the major problem. The major Community institutions, namely the Commission,¹² Council¹³ and the Parliament, have all recognised the need to base policy on the social model of disability, and have committed themselves thereto. Indeed, the Employment Equality Directive is, in some ways, a manifestation of this approach.

It is questionable how a definition of disability exclusively based on the medical model and which determines access to one of the key EC human rights instruments which regard to people with disabilities, fits into this bigger picture. At the very least, it could have been expected of the Court that it would refer to the position of the other EU institutions in its judgment and recognise the existence, if not the importance, of the social model of disability.¹⁴

Secondly, the Court’s judgment is somewhat ambiguous with regard to the status of people with (long-lasting / chronic) illnesses. In paragraph 46 of the judgment the Court stated: “There is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop *any type of sickness*”.¹⁵

The Court’s approach raises questions. For some types of “sicknesses” it will be clear from the early stages that the effects will be long lasting. The judgment makes no distinction between conditions which, by definition, are long lasting and this is known as soon as a diagnosis is made, (which could potentially be covered by the Directive if they

¹¹ There is a wealth of literature addressing theoretical models of disability. See, eg M. Oliver, *Understanding Disability: from theory to practice*, (Basingstoke, Macmillan Press Ltd., 1996), and M. Priestley, “Constructions and creations: idealism, materialism and disability theory” (1998) 13 *Disability and Society* 1, 75-94.

¹² See eg Communication of the Commission on Equality of Opportunity for People with Disabilities of 30 July 1996, COM (96) 406 final and, more recently, EU Disability Action Plan (Equal opportunities for people with disabilities: a European Action Plan, COM (2003) 650 final), 4.

¹³ See eg Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 20 December 1996 on equality of opportunity for people with disabilities, *Official Journal* C 12, 13 January 1997, 1.

¹⁴ However, see also the arguments of Hosking, who, writing before the Court handed down its judgment in *Chacón Navas*, argued that the Court’s interpretation of the disability provisions of the Directive was likely to be “informed by the formal equality paradigm which it applies to other aspects of Community law” and any “Community law norm” would “probably reflect a minimalist conception of disability and focus on impairment based disabling conditions”. D. Hosking, “Great Expectations: Protection from Discrimination because of Disability in Community Law” (2006) 31 *European Law Review* 667 at 687 and 682.

¹⁵ Emphasis added.

were (re-)defined as disabilities), and conditions which may develop into long lasting illnesses (which could be re-defined as disabilities where it has been established that they are long lasting) and conditions which are never long lasting (which will never be covered).

In light of the above, one can argue that the difference between illness and disability is not as clear cut as the Court's judgment suggests and it is submitted that a long lasting illness (chronic illness), which leads to functional limitation, should be regarded as a disability for the purposes of the Directive. Indeed, the Court may have left itself some room to reach this conclusion in the future. Its chosen phraseology, which excludes "a person who has been dismissed solely on account of illness" (para. 47), may allow the Court to argue that adverse treatment in response to sicknesses which lead to long-term or permanent limitations which hinder professional activity does fall within the Directive's scope, because such treatment is not based "solely" on sickness. It is unfortunate that the Court did not clarify if this was its intention, as its judgment can only lead to speculation and doubt on this point.

2.1.2 Addressing Discrimination by Association – *Coleman*¹⁶

In the second case, which also concerned the personal scope of the Directive, the Court was called upon to consider whether the Directive prohibits discrimination against an individual on the grounds that he or she associates with a disabled person.¹⁷ The case concerned Sharon Coleman, who was a legal secretary and the mother of a disabled child in the United Kingdom. She alleged that, on returning to work after having given birth to her child, she was treated less favourably than other employees in comparable positions because she was the primary carer of a child with a disability. She made a number of allegations of adverse treatment, including that she was not allowed to return to her original job following her maternity leave, whilst parents of non-disabled children were allowed to do this; she was not allowed the same flexibility regarding her working hours as parents of non-disabled children; she was described as "lazy" for requesting time off to care for her child, and threatened with dismissal when she occasionally arrived late because of the need to care for her child, when parents of non-disabled children were not treated in this way; and that highly abusive comments were made about her and her child. Ultimately Ms. Coleman accepted voluntary redundancy, and subsequently lodged a claim before an Employment Tribunal that she had been discriminated against because she was the primary carer of a disabled child.

The Employment Tribunal which heard the case had to determine if the Disability Discrimination Act 1995 (henceforth: DDA) provided protection from such discrimination. It was accepted by all parties that, on a literal interpretation of the relevant wording of the DDA, only those individuals who had a disability themselves were protected from discrimination. However, a European dimension also arose because the DDA had been amended¹⁸ in order to comply with the Employment Equality Directive. The question of whether the Employment Equality Directive prohibited discrimination in such circumstances was therefore of significance, and the claimant's case turned on this matter.¹⁹

The Directive prohibits direct discrimination and harassment "on ... the grounds" of religion or belief, disability, age or sexual orientation (Article 1). Protection is not explicitly confined to individuals who possess these grounds or characteristics themselves, and Ms. Coleman's lawyers argued that, by virtue of using this language, the Directive prohibited "associative discrimination" with regard to direct discrimination and harassment, and the DDA should also be interpreted in this way. The Employment Tribunal concluded that guidance from the European Court of Justice

¹⁶ Case C-303/06 *S. Coleman v. Attridge Law and Steve Law*, Judgment of the Court (Grand Chamber) of 17 July 2008.

¹⁷ Specifically, the case concerned discrimination allegedly motivated by the fact that the employee in question had a child with a disability, and the employee was the primary carer of the child.

¹⁸ By the DDA Act 1995 (Amendment) Regulations 2003, which came into force on 1 October 2004.

¹⁹ In the words of Advocate General Poiares Maduro in his Opinion in the case: "Ms. Coleman can succeed in her case only if the Directive is to be interpreted as prohibiting discrimination by association" (para 5).

was required on this matter in order for it to proceed,²⁰ and forwarded a number of preliminary references which, in essence, asked whether the Employment Equality Directive prohibited direct discrimination and harassment against employees who, although not themselves disabled, are subject to less favourable treatment on the grounds that they associate with a person who is disabled.

In its judgment the Court began by recalling the purpose of the Directive, which it found to be “to combat all forms of discrimination on grounds of disability” with regard to employment and occupation (para. 38). Following its Advocate General, it noted that the “principle of equal treatment ... applies not to a particular category of person but by reference to the grounds mentioned in Article 1.” (para. 38). In light of this, the Court concluded that, when an employee suffers direct discrimination on the grounds of disability, an interpretation of the Directive which limited its application only to people who had a disability themselves “is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.” (para. 51).

Turning to the matter of harassment by association, the Court applied a similar line of reasoning as with regard to direct discrimination, and concluded its judgment by ruling that the protection from direct discrimination and harassment²¹ found in the Employment Equality Directive is not limited to people who are themselves disabled, but also applies when an employer directly discriminates against or harasses an employee, where that discrimination or harassment is based on the disability of the employee’s child, whose care is provided primarily by the employee.

As a consequence of this judgment Member States are obliged to ensure that national disability non-discrimination legislation provides protection to those who have experienced direct discrimination or harassment as a result of their association with a disabled person, such as a family member. In many cases the national legislation has followed the wording and structure of the Directive, referring to discrimination “on the grounds of disability”, and will easily lend itself to such an interpretation now that the ECJ has established that this is what is required.

2.2 Member State Legislation

Attention will now turn to the way in which Member States have chosen to address and define disability in their national transposition legislation. A number of different patterns are identifiable, not all of which, it seems, are fully compatible with the Directive.

²⁰ Employment Tribunal, Case Number 2303745/2005, 17 February 2006.

²¹ The Court was not called upon to consider whether discrimination by association was also prohibited in the context of indirect discrimination in this case. The Employment Equality Directive defines indirect discrimination as occurring where “an apparently neutral provision, criterion or practice would put persons having ... a particular disability ... at a particular disadvantage compared with other persons ...”. The definition therefore seems to provide protection from indirect discrimination only for “persons having ... a particular disability ...” who are disadvantaged. As a consequence, it seems difficult to argue that an individual who is disadvantaged not because they have a disability, but because someone they associate with has a disability, is protected from indirect discrimination as a result of this association under EC law. Such protection would only be possible if, “persons having ... a particular disability” could be interpreted as including “persons who associate with persons having a particular disability”.

2.2.1 No definition of disability in national non-discrimination legislation

A number of Member States have followed the precedent set by the EC, and included no definition of disability whatsoever in the transposition legislation. This is the case in, for example, Belgium,²² Bulgaria,²³ Greece,²⁴ Italy,²⁵ Poland,²⁶ Romania²⁷ and Slovakia.²⁸ On the one hand, this should leave the way open for national courts in these Member States to follow the definition of disability developed by the ECJ in *Chacón Navas*. However, there also exists the risk in such a situation that the courts will draw on definitions of disability found in other national legislation, typically social security legislation defining eligibility for a disability pension, when interpreting the concept of disability within the non-discrimination context. Such an approach would be wholly inappropriate as non-discrimination and social security legislation serve very different purposes. In the case of the former, it is important to spread a broad net to protect against discrimination and prejudice, whilst in the case of the latter, it is necessary to establish a limited definition of disability, since the definition is the gateway to financial support and other benefits which must be funded by the state. Protection from discrimination does not imply similar financial commitments on the part of the state. Therefore, should the courts interpret protection from disability discrimination as only applying to individuals who are officially recognised as disabled by the social security office, this would result in an excessively limited personal scope of the national legislation, and, it is submitted, amount to a breach of the Directive. However, there is insufficient case law at the national level to determine if this is a problem as yet.

2.2.2 A definition of disability which has been developed specifically in the context of national non-discrimination legislation

A number of Member States have chosen to include a definition of disability within their non-discrimination legislation. Generally these definitions of disability consist of three elements: firstly the requirement that an impairment exists, defined as some sort of restriction or limitation caused by a medical condition; secondly, the requirement that this impairment impacts on an individual's capacity to take part in employment, or in everyday life in general; and thirdly, the requirement that the impairment must be permanent or have lasted, or be likely to last, for a significant period of time. These three elements of the definition of disability can also be found in the ECJ's judgment in *Chacón Navas*, which refers to "physical, mental or psychological impairments" "which hinders the participation of the person concerned in professional life" and "it must be probable that [the limitation] will last for a long time."

The approach outlined above can be found, for example, in the disability non-discrimination legislation of Austria, Malta, Portugal, Sweden, and the United Kingdom.

The Austrian Act on the Employment of People with Disabilities, for example, defines "disability" as follows:

"Disability is the result of a deficiency of functions that is not just temporary and based on a physiological, mental, or psychological condition or an impairment of sensual functions which constitutes a possible complication for the participation in the labour market. Such a condition is not deemed temporary if it is likely to last for more than 6 months."

²² Act of 10 May 2007 pertaining to fight against certain forms of discrimination (Federal General Anti-Discrimination Act).

²³ Protection Against Discrimination Act, 2004.

²⁴ Law n. 3304/2005 Implementation of the Principle of equal treatment regardless of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

²⁵ Decreto legislativo 9 July 2003 n. 216 Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro.

²⁶ Labour Code.

²⁷ Governmental Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination, as amended.

²⁸ Act on Equal Treatment in Certain Areas and Protection against Discrimination, 2004.

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It is noticeable that this definition, which establishes the employers' duty not to discriminate against individuals on the ground of disability, refers to the impact the "deficiency of functions" has with regard to *participation in the labour market*.

Other national laws establish a non-discrimination duty both with regard to employment and in other fields, such as access to goods and services. As a consequence, the impact of the impairment or medical judgment is generally judged against a broader range of activities than just employment or professional life.

Adopting this approach, the Maltese Equal Opportunities (Persons with Disabilities) Act, 2000, defines a disability as a physical or mental impairment which substantially limits one or more of *the major life activities of a person*, the Portuguese Law 38/2004 of 18 August 2004²⁹ refers to the impact of "the loss or irregularity ... of bodily functions or structures" which are likely "to limit or hinder [the individual's] *activity and participation on equal terms with others*"; whilst the Swedish Disability Discrimination Act³⁰ refers to a "limitation of a person's *functional capacity*" resulting from an injury or illness. The UK Disability Discrimination Act (DDA) also adopts this approach and defines a "disabled person" as "a person who has a physical or mental impairment which has a substantial and long-term *adverse effect on their ability to carry out normal day-to-day activities*".³¹

Irish legislation,³² which also includes a definition of disability within the relevant non-discrimination statute, differs from the examples given above, in that, in essence, it only requires that an impairment exists, and makes no reference of the impact which the impairment must have on an individual's life or activities. The relevant legislation lists a number of impairments which are regarded as a disability.

What all these definitions have in common is a highly medicalised approach to defining disability. Such an approach can be problematic. These definitions, and that in *Chacón Navas*, all focus on the health status or impairment of an individual, and not on the (alleged) act of discrimination. As a consequence, individuals may first have to prove that they meet the criteria of the definition, i.e. that they qualify as "disabled", before they can begin to argue that they have been the victim of discrimination. If they cannot meet this first hurdle, they will not qualify for protection under the law. This has been the experience in the United Kingdom,³³ where many individuals have not met this first requirement before the courts, and have therefore been denied the chance to argue that they have been the victim of discrimination. Furthermore, experience reveals that applying any such definition is an unpredictable process, which borders on arbitrariness when it comes to deciding whether any specific individual qualifies as "disabled" or not.³⁴

A second problem is related to the requirement that an individual must "*prove*" that they have a disability. This requirement may necessitate the provision of extensive medical evidence, which may well consume a lot of time and resources. In addition, an individual is required to first prove what he or she cannot do (that he or she has an impairment which hinders professional activity) in order to be allowed to later argue that he or she is qualified for a job or position and able to carry out the essential functions, and should not be discriminated against. This rather

²⁹ Article 2, Law 38/2004 of 18 August 2004 defining the general legal basis for the prevention of the causes of disability, and the qualification, rehabilitation and participation of people with disabilities.

³⁰ Section 2, Law Prohibiting Discrimination in Working Life on Grounds of Disability 1999 (1999:132) as amended.

³¹ DDA section 1 (1).

³² Section 2(1) of the Employment Equality Act 1998-2004.

³³ See N. Meagre et al, *Monitoring the Disability Discrimination Act 1995* (London, Department for Education and Employment, 1999) 126; C. Woodhams and S. Corby, "Defining Disability in Theory and Practice: A Critique of the British Disability Discrimination Act 1995" (2003) 32 *Journal of Social Policy* 1.

³⁴ See A. Hendriks, "Different Definitions- Same Problems- One Way Out?" in M.L. Breslin and S. Yee (eds), *Disability Rights Law and Policy, International and National Perspectives* (Transnational Publishers, 2002), 195-220.

contradictory approach makes applying the law all the harder. Instead, one could argue that the key question should be whether discrimination has occurred, and not whether an individual is “disabled enough” to qualify for protection under the Directive.

However, having noted this, one should also remark that a medicalised approach to defining disability does not always have to be a problem in practice. In Ireland for example, the issue of establishing that a disability exists, and therefore that an individual is protected by the law, does not seem to have been problematic, and courts have accepted that many different conditions can amount to a disability.³⁵

2.2.3 A definition of disability in national non-discrimination legislation which has been “borrowed” from other legislation

A third approach found in the non-discrimination law of some Member States involves “borrowing” or using a definition of disability found in other legislation, typically legislation which provides for social security benefits or pensions on the grounds of disability, for the purposes of determining who is protected from disability discrimination. In essence this involves restricting protection from discrimination to those who are most severely disabled, and have had this officially recognised by a social security office.

Laws which adopt this approach can either make a cross reference to social security legislation, restricting protection from discrimination to those who have been officially recognised as disabled under social security provisions, or incorporate the definition of disability found in such laws within the non-discrimination statute. An example of the former approach can be found in the Czech Republic where the Law on Employment prohibits indirect discrimination on the ground of disability,³⁶ with only those individuals who have an officially recognised disability status being able to claim protection.³⁷ Slovenia also adopts such an approach, with the definition of disability found in the Pension and Disability Insurance Act³⁸ being used as a reference for non-discrimination legislation.

In general, the approach of utilising a definition of disability developed in a context other than non-discrimination and equality legislation, with regard to such legislation, is highly questionable. As noted above, definitions of disability which determine eligibility for social security and other financial benefits must, by necessity, be quite strict and limited, as they provide access to scarce resources. It is likely that only those individuals with the most severe disabilities will qualify for such benefits, and that such individuals will be eligible for benefits because they are regarded as (completely or partially) unable to work and earn an income in the (open) labour market. However, such individuals, who are not part of the open labour market, are least likely to need protection from discrimination from (prospective) employers. Instead, it is those individuals with lesser degrees of disability, or perhaps even no disability at all,³⁹ who require protection. As a consequence, those Member States which make use of a definition of disability developed in the context of social security in order to determine eligibility to protection from disability discrimination, are almost certainly breaching the Directive, as well as failing to follow the ECJ’s ruling in *Chacón Navas*, and seriously reducing the effectiveness of any national disability non-discrimination law.

³⁵ For example, see cases *Fernandez v. Cable & Wireless*, DEC E/2001/052, Equality Officer, 11 December 2002, (kidney infection may be a disability); and *A Civil Servant v. The Office of Civil Service and Local Appointments Commissioners*, DEC E/2004/029, Equality Officer, 1 June 2004, (asthma and irritable bowel syndrome may be a disability).

³⁶ Law No. 435/2004 Coll., on Employment, Section 2, para. 1, subsection b)ii.

³⁷ Disabled persons are persons acknowledged by the social security authorities as being fully or partially disabled or suffering from health disadvantages. The fact that a person is disabled must be demonstrated by recognition by or a decision from the social security authorities (Sec. 67, paras 2 and 5 of the Law on Employment).

³⁸ Article 60, The Pension and Disability Insurance Act.

³⁹ Reference here, for example, is to individuals who experience discrimination on the grounds that an employer wrongly assumes that they have a disability, or that they will develop a disability in the future.

2.2.4 Two definitions of disability in national non-discrimination legislation – a general definition and a more limited definition regarding reasonable accommodation

Lastly, a number of Member States have opted to implement the disability provisions of the Directive in two (or more) national laws. Typically, one law provides for protection from e.g. direct and indirect discrimination and covers the other general provisions⁴⁰ of the Directive, whilst a second law addresses the reasonable accommodation obligation. Generally, this approach goes hand in hand with a dual approach to defining disability, with the general non-discrimination law either providing a general definition of disability, or no definition at all, whilst the law addressing reasonable accommodation makes use of a different, and more limited definition of disability, typically drawn from the social security field.

Such an approach can be found in the laws of Germany, France⁴¹ and Hungary. In Germany, the General Law on Equal Treatment of 2006 (AGG), contains no definition of disability or any of the other protected characteristics. However, an explanatory report, which can be used to assist in the interpretation of the law, states that disability is to be understood in line with provisions in the Social Code IX⁴² and the Law on Promoting the Equality of the Disabled.⁴³ Accordingly, individuals are regarded as disabled if their physical functions, mental facilities or psychological health has a high probability of differing from the state which is typical for an individual of their given age, for a period longer than 6 months and if, as a consequence, their participation in society is impaired.

The AGG does not, however, establish a duty to provide for reasonable accommodations in favour of individuals with a disability. This is instead addressed in Section 81.4 of the Social Code IX. In this context a far more limited definition is used, and only individuals who are regarded as severely disabled (*schwerbehindert*) are entitled to claim an accommodation. Individuals can acquire such a status if their disability reduces their ability to participate in working life by at least 50%. Individuals with a degree of disability which is less than 50% but more than 30% can also be classified as severely disabled if they cannot find or maintain employment due to their disability.⁴⁴ The degree of disability, and therefore the status of a severely disabled person, is established by the administration,⁴⁵ and only individuals who have acquired this official status are entitled to claim an accommodation.

A somewhat similar situation exists in Hungary, although in this case the definition of disability used for determining access to reasonable accommodation is not as limited as found in German and French law. Act CXXV on Equal Treatment and the Promotion of Equality of Opportunities is a general non-discrimination law which prohibits, *inter alia*, discrimination on the grounds of disability. The concept of disability is not defined in the Act. Meanwhile, reasonable accommodation, to the extent that it is provided for under Hungarian law, is covered by Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities. Under this Act an individual is defined as disabled, and therefore entitled to claim an accommodation, if he/she “has a fully or greatly restricted command of sensory, locomotive or mental abilities, or is greatly restricted in his/her communication, and this constitutes an enduring obstacle with regard to his/her active participation in social life.”⁴⁶

Providing the definition of disability found in the Hungarian Act XXVI of 1998 is interpreted in line with the ECJ’s decision in *Chacón Navas*, and any subsequent decisions of the Court, Hungarian law may be compatible with the

⁴⁰ By “general provisions” is meant the provisions of the Directive which apply across most or all of the four grounds covered by the Directive.

⁴¹ Relevant French legislation is not considered below. However, under Article 5212-13 and 5213 – 6 of the Labour Code only individuals who are officially recognised as disabled can claim an accommodation.

⁴² Section 2 Social Code IX.

⁴³ Section 3 of the Law on Promoting the Equality of the Disabled.

⁴⁴ Section 2.3 Social Code IX.

⁴⁵ Section 69.1 Social Code IX.

⁴⁶ Article 4 Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities.

Directive. However, it is more difficult to reach the same conclusion with regard to the relevant German and French statutes. The Directive makes no distinction between those individuals with a disability who are entitled to claim protection from direct and indirect discrimination, and those individuals with a disability who are (also) entitled to claim a reasonable accommodation. Moreover, the Directive does not require that an individual has his or her disability status officially recognised by the administration or social security office before they can rely on any aspects of the protection provided by the Directive. For these reasons the limitations found in German and French law which restrict entitlement to claim an accommodation seem to amount to a breach of the Directive.

3 What is a “Reasonable Accommodation”? Exploring the Limits of Article 5

This part of the report considers how Member States have responded to the challenge of establishing a duty on employers⁴⁷ to provide for reasonable accommodations for individuals with a disability. The report reflects on the steps taken by Member States to incorporate the reasonable accommodation obligation into their national law and considers how the concept of “reasonableness” has been understood and interpreted. At first sight this notion may not seem particularly controversial or confusing; however, an analysis of the concept of “reasonable accommodation” in the Directive, and the relevant transposition legislation, reveals that the term is capable of conveying a number of meanings.

This section will begin by briefly introducing Article 5 of the Employment Equality Directive and discussing the meaning of the notion of an “accommodation”. The section will then proceed to discuss the different meanings which the term “reasonable” is capable of conveying and, through an analysis of legislation and case law, establish how various Member States have chosen to transpose the provision. Case law of the US courts, which have also struggled with this concept, will also be considered. Lastly the section will consider the limitation on the obligation to make a reasonable accommodation which is contained in the “disproportionate burden” defence.

At this stage it is also worth noting that a number of Member States have either failed completely to transpose Article 5 into their national legislation, or have only done this in an incomplete and unclear way. This is the case in Italy, where the national legislation makes no reference to reasonable accommodation, and in Poland and Slovenia where there is no clear and unambiguous duty to make a reasonable accommodation. In contrast, in those Member States which have established a duty to accommodate, an unjustified failure to comply with that obligation is frequently regarded as a form of discrimination. However, there is no consistent approach with regard to how such a failure should be classified, with national legislation defining such a failure as direct discrimination,⁴⁸ indirect discrimination,⁴⁹ a free standing form of discrimination⁵⁰ or not as discrimination.⁵¹

3.1 Article 5 of the Employment Equality Directive – The Obligation to Make a Reasonable Accommodation

Article 5 of the Directive creates the obligation for employers to make a reasonable accommodation for disabled people. It provides:

“In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures,

⁴⁷ And providers of vocational training, including universities.

⁴⁸ See eg Art. 7 of the Maltese Equal opportunities (Persons with Disability) Act 2000.

⁴⁹ See eg § 7c of the Austrian Act on the Employment of People with Disabilities.

⁵⁰ See s.3A of the UK DDA.

⁵¹ See eg the Bulgarian Protection Against Discrimination Act.

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 provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate.”

Recital 20 of the (non-binding) Preamble to the Employment Equality Directive expands on the kinds of measure that could amount to a reasonable accommodation:

“Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.”

The Preamble also gives some guidance with regard to assessing whether any particular accommodation amounts to a disproportionate burden in Recital 21:

“To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.”

The Americans with Disabilities Act (ADA) of 1990 also imposes an obligation on employers⁵² (and others) to make reasonable accommodations for disabled people. It is submitted that this US statute directly influenced the drafting of Article 5 of the Employment Equality Directive. In particular, it is submitted that the term “reasonable accommodation”, first used in the context of the US Rehabilitation Act of 1973⁵³ and later incorporated in the ADA, was determinant of the terminology used in Article 5. A conscious choice was made to use the term “reasonable accommodation” in the Directive because of the level of familiarity with this particular element of the ADA amongst relevant Commission staff, some Member States, and disability non-governmental organisations, which lobbied for the inclusion of such a requirement in the Directive. However, as will be revealed below, this may not necessarily have been a wise choice as the concept of “reasonableness” with regard to accommodations has also proved confusing in the context of US law.

3.2 What is an “Accommodation”?

In this context an accommodation is simply an adaptation of normal procedures, processes or infrastructure. The goal of any accommodation under Article 5 of the Directive is to enable a person with a disability “to have access to, participate in, or advance in employment”. Assessing what kind of accommodation will achieve this goal, and therefore what kind of accommodation is required, involves an individual analysis taking into account the situation of the individual and the employment or training at issue. As a consequence it is not possible for legislation to provide a definitive list of appropriate and required accommodations. Legislation can however provide a generic definition accompanied by an illustrative list of appropriate kinds of accommodation.

Many Member States have opted to use the terminology of the Directive in their national legislation when transposing Article 5. However, in some jurisdictions the word “accommodations” has been replaced with another term. In the

⁵² 42 U.S.C. § 12112(b)(5)(A), section 101(9).

⁵³ Regulations were adopted which imposed a duty of reasonable accommodation with regard to Section 504 of the Rehabilitation Act. See 29 C.F.R. §§ 32.13(a), 1613.704 (1995).

United Kingdom, legislation requires the making of reasonable “adjustments”;⁵⁴ Finnish law refers to “steps”;⁵⁵ whilst the Irish Employment Equality Act 1998-2004⁵⁶ and the French Labour Code,⁵⁷ drawing their inspiration from Recital 20 to the Directive, define a reasonable accommodation as an “appropriate measure” and this term is also found in the Lithuanian Law on Equal Treatment of 2005⁵⁸ and the Slovakian Act on Equal Treatment in Certain Areas and Protection Against Discrimination of 2004.⁵⁹ However, it is submitted that the use of an alternative term to replace “accommodation” is of no legal significance, and that in essence all of the terms referred to above convey the same meaning.

3.3 What is a “Reasonable” Accommodation?

In contrast, the meaning of the term “reasonable” is far more complex and confused. It is clear that the term serves the role of a modifier to the requirement to provide an “accommodation”. At first sight it may appear that the term is capable of only carrying one meaning – namely, the term “reasonable” implies that an employer is only obliged to take action which does not result in excessive costs, difficulties or problems – anything else would be “unreasonable”. This would seem to be in accordance with the everyday meaning attributed to the term “reasonable” and indeed many Member States have transposed the provision in this way. However, an analysis of the national transposition legislation, and a consideration of the judicial discussions which have occurred in the US in relation to the meaning of the term reveal that alternatively, or in addition, the term “reasonable”, or another selected adjective, could relate to the quality of the accommodation itself and mean that the accommodation must be “effective”. Therefore one can identify two ways in which the term can modify the requirement to make an accommodation. In the first instance, the term modifies the requirement to make the accommodation that is imposed on the employer, whilst in the second, the term is a modifier with regard to the actual accommodation. Indeed, as the analysis below will reveal, in many European jurisdictions the term is (arguably confusingly) used to convey both meanings.

The following section begins by examining the proposition that a “reasonable” accommodation is one that does not result in “excessive” difficulties being experienced by the employer and considering jurisdictions that have adopted this approach. Subsequently, attention will be paid to an alternative interpretation, whereby a “reasonable” accommodation is one that is effective in allowing an individual with a disability to carry out a particular set of employment related tasks, and jurisdictions that have transposed the Directive in this way will be discussed. On occasions, different terminology is used to convey this second meaning. Lastly, attention will be paid to those jurisdictions where the term is used to convey both the requirement that the accommodation must not result in excessive difficulties for the employer, and must be “effective”.

3.3.1 A “Reasonable” Accommodation is an Accommodation that does not result in Excessive Costs or Difficulties for the Employer

Some Member States have transposed Article 5 of the Directive by using the term “reasonable” to limit the obligation to accommodate which is imposed on employers. As a result, employers are only required to make accommodations

⁵⁴ The DDA 1995, as amended, sections 3A, 4A, 18 B i.a.. The original version of this statute was in force prior to the adoption of the Employment Equality Directive.

⁵⁵ Non-Discrimination Act 21/2004, Section 5.

⁵⁶ Employment Equality Act 1998-2004, section 16.

⁵⁷ Labour Code (Legislative Part), Article L. 323-9-1.

⁵⁸ Law on Equal Treatment, Article 5.

⁵⁹ Act on Equal Treatment in Certain Areas and Protection Against Discrimination 2004, § 7.

that do not result in excessive costs or inconvenience.⁶⁰ Any accommodation which has these consequences is, by implication, defined as “unreasonable” and therefore not required under the national law.

This is the approach that has been adopted, for example, in the Finnish Non-Discrimination Act 21/2004⁶¹ which obliges employers and trainers to “take any reasonable steps to help a person with disabilities to gain access to work or training, to cope at work and to advance their career.” The Act elaborates on the notion of reasonableness, by noting that: “In assessing what constitutes reasonable [sic], particular attention shall be devoted to the costs of the steps, the financial position of the person commissioning the work or arranging the training, and the possibility of support from public funds or elsewhere towards the costs involved.” The Preparatory Works⁶² accompanying the Act also throw some light on the meaning of the term reasonable, and provide that, in addition to the factors mentioned above, the size of the organisation and its financial position should be taken into account. Moreover, arrangements can be regarded as unreasonable if they “would excessively change the activities of the workplace and at the same time could endanger compliance with workplace safety legislation, for example.”

As a consequence the Finnish Non-Discrimination Act and Preparatory Works refer to three elements in determining whether any accommodation is reasonable: the cost of the accommodation for the employer; the need to make (excessive) changes to the activities of the workplace; and compliance with workplace safety legislation. The term is therefore clearly, and exclusively, used as modifier to the obligation which is imposed on employers to make an accommodation.

At this point it is appropriate to note that Article 5 of the Directive provides for a second modifier, or limitation, on the obligation to make an accommodation. Namely employers are not required to make an accommodation where this would result in a disproportionate burden. Where Member States have opted to require employers to make only accommodations which are regarded as “reasonable”, how do the two limitations interact? Are these regarded as two separate defences which can be used to justify a failure to make an accommodation, with the former being far easier to satisfy than the latter, or are they merged into one common defence?

In the case of the Finnish legislation, unusually, no express reference is made to the notion of “disproportionate burden”. Instead the legislation relies solely on the notion of “reasonableness” to limit the obligation. Therefore, employers are required to take “steps” to enable an individual with a disability to pursue employment related activities unless this would be unreasonable, as defined in the statute and preparatory works. The reasonableness test is therefore a substitute for the disproportionate burden defence that is found in most other jurisdictions.

In contrast other jurisdictions, which define a “reasonable” accommodation as one which is not excessively costly or inconvenient, also specify that a “reasonable” accommodation is one which does not create a disproportionate burden, thereby linking the two notions. This is the approach found in the Spanish Law 51/2003,⁶³ which establishes a duty to provide for a reasonable accommodation for individuals with a disability with regard to the broad area of telecommunications, built-up public spaces and buildings, transport, goods and services available to the public, and relations with the public administration. Article 7 of the law defines a reasonable accommodation as “measures to adapt the physical, social, and attitudinal environment to the specific needs of persons with disabilities which

⁶⁰ In those jurisdictions which have defined a “reasonable” accommodation as one which is “effective” in allowing a disabled individual to carry out the relevant employment related tasks, a limitation also exists on the obligation imposed on the employer. However, this limitation is generally established through the disproportionate burden defence, rather than (also) through the application of a “reasonableness” test.

⁶¹ Section 5 – Improving the access to employment and training of persons with disabilities.

⁶² Preparatory Works to the Finnish Non-Discrimination Act, HE 44/2003 [Government proposal 44/2003] concerning Section 5.

⁶³ Law 51/2003, 2 December, on Equal Opportunities, Non-Discrimination, and Universal Access for Persons with Disabilities (henceforth: Law 51/2003).

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effectively and practically, without involving a disproportionate burden, facilitate accessibility or participation for a person with a disability on the same terms as for other citizens.” Law 51/2003 therefore only requires an accommodation which does not result in a disproportionate burden. Such an accommodation is, by definition, a reasonable accommodation.

A third approach can be found in German legislation which clearly separates the requirement of reasonableness from the disproportionate defence – with both concepts being used to limit the obligation imposed on the employer. The German Social Law Code⁶⁴ imposes duties on employers with regard to accommodating severely disabled workers, but subjects this to the requirement that the fulfilment of the worker’s claim for an accommodation must be reasonable for the employer. The Code lists the rights which a severely disabled person can claim against the employers, such as the right “to be employed in a way that allows them to utilize and improve their skills and knowledge to the fullest extent possible” and concludes by stating: “... A claim ... does not exist if its fulfilment is not reasonable for the employer or if it would entail disproportionate burden or in as far as the occupational safety and health rules laid down by national law or by employer’s liability insurance associations or rules governing members of the civil service are opposed.”

German law therefore requires that, in principle, employers must make an accommodation,⁶⁵ and, quite separately, sets out the grounds on which an employer might justifiably refuse to make such an accommodation.⁶⁶ According to paragraph 5 of section 81(4), a severely disabled individual is not entitled to claim the accommodation rights specified in the section if one (or more) of three conditions is met, namely the fulfilment of the claim would:

- be not reasonable for the employer;
- result in a disproportionate burden for the employer; or
- result in the breach of health and safety rules.

The concept of reasonableness is therefore once again used as a limitation on the actions that can be expected of the employer. In addition, and in contrast to Finnish and Spanish law, the concept is distinct from two other defences to the requirement to make an accommodation – namely that this would result in a disproportionate burden for the employer or breach health and safety rules. The implication is that an accommodation might not result in a disproportionate burden or pose a threat to health and safety standards, but could still not be required of the employer on the grounds that it would be unreasonable. However, the exact requirements for determining whether making any accommodation would be unreasonable, or result in a disproportionate burden, are not set out in the legislation.

In none of the jurisdictions considered above have the courts analysed the meaning of the term “reasonable” or adjudicated between the two possible meanings which were presented at the very beginning of this section. However, this has happened in the US, which has a much longer experience of working with the reasonable accommodation requirement in the context of disability. It is therefore worth considering how the US legislator and courts have interpreted the concept.

The Americans with Disabilities Act (ADA) defines discrimination as including a failure to make a reasonable accommodation, unless making the accommodation would result in an “undue hardship”. The latter term is used in preference to the phrase “disproportionate burden” which is found in the Employment Equality Directive. The US statute adopts a two-stage process in determining whether an accommodation is required. Under the ADA in principle an obligation to make a reasonable accommodation exists; once it has been established that such an

⁶⁴ Section 81 Social Code IX.

⁶⁵ In the first sentence of section 81(4) Social Code IX.

⁶⁶ In the second sentence in section 81(4) Social Code IX.

accommodation is possible, the employer can still demonstrate that to make the accommodation would lead to an undue hardship and it is therefore not required. As a consequence of this two-stage approach, the “reasonableness” of the accommodation is assessed quite separately from the question of undue hardship.

The Equal Employment Opportunity Commission (EEOC), which is the federal agency charged with the administrative and judicial enforcement of federal civil rights laws with regard to employment, has issued guidance on how the term “reasonable accommodation” should be interpreted. Their Regulations on the ADA define a reasonable accommodation as follows:⁶⁷

- “(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicants desires; or
- (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
- (iii) Modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.”

In light of the EEOC Guidance one could argue that an accommodation is reasonable if it allows a qualified individual with a disability to achieve one or more of the goals set out above. However, in litigation before senior US courts, including the Supreme Court, this argument has been rejected and the courts have regarded the term “reasonable” as a modification to the requirement which is imposed upon the employer, albeit a modification which is quite separate from the undue hardship defence.

One such case is *Vande Zande*,⁶⁸ in which the plaintiff argued that the term “reasonable” referred to the qualities of the requested accommodation, and simply implied that the accommodation should be “apt or efficacious”. Any accommodation which was “tailored to the particular individual’s disability” was reasonable, and the cost of the accommodation was a matter exclusively for consideration under the “undue hardship” test. However Judge Posner, sitting on the bench of the 7th Circuit, rejected this argument. He found:

“To “accommodate” a disability is to make some change that will enable the disabled person to work. An unrelated, inefficacious change would not be an accommodation of the disability at all. So “reasonable” may be intended to qualify (in the sense of weaken) “accommodation,” in just the same way that if one requires a “reasonable effort” of someone this means less than the maximum possible effort, or in law that the duty of “reasonable care,” the cornerstone of the law of negligence, requires something less than the maximum possible care.”

He continued by holding that the question of cost of the accommodation was not only relevant in determining whether an undue hardship existed, but also entered into the consideration of whether any accommodation was reasonable or not:

“... it seems that costs enter at two points in the analysis of claims to an accommodation to a disability. The employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs. Even if this prima facie showing is made, the employer has an opportunity to

⁶⁷ EEOC Title I regulations, 29 C.F.R. §§ 1630.2(o) (1), 1630.9. Available via: http://www.access.gpo.gov/nara/cfr/waisidx_08/29cfr1630_08.html.

⁶⁸ *Vande Zande v. State of Wisconsin Department of Administration*, 7th Circuit 1995, 44 F.3d 538.

prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health. ..."

The Court therefore clearly rejected the argument that an accommodation was "reasonable" if it was effective and tailored to the needs of an individual with a disability. Instead the court saw the term "reasonable" as serving to modify ("in the sense of weaken") the accommodation itself. In doing so, Judge Posner, who is a leading advocate of "law & economics", drew inspiration from the law of negligence, and stated that the term "reasonable" implied the cost of making the accommodation to the employer should not be disproportionate to the benefit. Therefore, even if making a particular accommodation would not result in a disproportionate burden for the employer, and if the accommodation would result in a benefit to the individual with the disability, the accommodation need not be made if it would be unreasonable: the employer "would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee". The proportionality principle was therefore built into the calculation of whether any accommodation is reasonable or not. However, whilst Judge Posner clearly felt that a proper assessment of the "reasonableness" of any accommodation required a cost-benefit analysis, meaning that the accommodation should be expedient and proportionate to the resulting benefits, he did not further elaborate on the formula to be applied.^{69 70}

Whilst the US courts have had the opportunity to find that the term "reasonable" should act as a modifier to the actual accommodation, and mean that the accommodation should meet the needs of the disabled individual, they have firmly rejected this interpretation in recent years. Instead, any claim for an accommodation in the US must both be reasonable, and not result in an "undue hardship" for the employer. The case law suggests that it is easier to establish that an accommodation is not reasonable than to prove an undue hardship and that even very minor and cheap accommodations – such as the lowering of a sink requested by the wheelchair user Vande Zande – can be rejected on the grounds that they are not reasonable.

3.3.2 A "Reasonable" Accommodation is an Accommodation that is Effective in meeting the needs of the Individual with a Disability

In this section an alternative understanding of the term is considered, namely that an accommodation is regarded as reasonable if it is effective in allowing the individual with a disability to carry out (employment-related) tasks. Given that the term "reasonable" is not easily capable of conveying such a meaning, legislators generally opt to use an alternative term or elaborate on the meaning of the term "reasonable" if they favour such an approach.

A leading example of a jurisdiction which has chosen to transpose Article 5 of the Directive in this way is the Netherlands. The Dutch Act on Equal Treatment on Grounds of Disability or Chronic Illness 2004⁷¹ provides:

⁶⁹ For a criticism of Judge Posner's judgment in Vande Zande on the grounds that it did not seriously analyse either costs or benefits, or sufficiently take into account the stigmatic harms and daily humiliations that disabled people experience see C.R. Sunstein, Cost-Benefit Analysis without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms, University of Chicago Law & Economics, Olin Working Paper No. 325 and University of Chicago, Public Law Working Paper No. 149, available at: <http://www.law.uchicago.edu/lawecon/workingpapers>. For a thoughtful discussion as to how a law & economics approach can be used to analyse accommodation claims see M. A. Stein, "The Law and Economics of Disability Accommodations" (2003) 53 Duke Law Review at 79-191.

⁷⁰ In this respect see also the judgment of the US Supreme Court in *U.S. Airways, Inc. v. Barnett* 535 U.S. 391 (2002). In this case the Supreme Court likewise rejected the argument that the term "reasonable" accommodation should be interpreted as "effective" accommodation.

⁷¹ Article 2.

“The prohibition of making distinction⁷² also includes the duty for the person to whom the prohibition is addressed, to make effective accommodations in accordance to the need for this, unless doing so would constitute a disproportionate burden upon her.”

The Dutch statute therefore does not require a “reasonable accommodation”, but instead establishes a duty to make “effective accommodations”. The Dutch government explained its decision to use the latter term on the grounds that it better reflected the fact that an accommodation had to achieve the pursued effect.⁷³ This approach also has the advantage of establishing a clearly defined two-stage test to establish whether an employer is obliged to make an accommodation. One must first establish whether any “effective accommodation” is possible and then, quite separately, consider whether making such an accommodation would amount to a “disproportionate burden”.

Whilst the term “effective accommodation” itself is not defined in the Act on Equal Treatment on the Grounds of Disability or Chronic Illness, one can conclude from the Explanatory Memorandum that accompanied the adoption of the Act, that the first stage of the test to establish whether an employer is under an obligation to provide an accommodation involves asking two separate questions:

1. Is the accommodation that is being considered suitable and appropriate, i.e. does it enable the individual with a disability to carry out the job?
2. Is the accommodation that is being considered necessary (i.e. a pre-condition to do the job)?

If both of these questions have been answered in the affirmative, the “(dis)proportionality” of the burden on the part of the employer can be assessed.

A further jurisdiction in which a reasonable accommodation is regarded as one which is effective in meeting the needs of a disabled individual is Ireland. Whilst the Employment Equality Act 1998-2004⁷⁴ uses the term “reasonable accommodation”, it defines such an accommodation as an “appropriate measure”. A measure is regarded as appropriate if it is effective in allowing an individual with a disability to have access to employment related activities. An appropriate measure is not required if it would result in a disproportionate burden for an employer. However, the existence of a disproportionate burden does not detract from the fact that the measure would still be appropriate.

Likewise the French legislator has opted to refer to an obligation to take appropriate measures (“*mesures appropriées*”) rather than reasonable accommodations (“*aménagements raisonnables*”) when amending the Labour Code to render it compliant with the Employment Equality Directive. Article L.323-9-1 therefore provides that “employers shall take appropriate measures as a function of concrete needs” to meet the employment related needs of covered disabled workers, unless this would lead to disproportionate expenses.

The decision of the Dutch, Irish and French legislators to define a reasonable accommodation as one that is “effective” or “appropriate” in allowing the covered disabled individual to meet the relevant employment related requirements

⁷² Dutch law does not make use of the term “discrimination”, but instead uses the term “distinction” in all its non-discrimination statutes. For a more detailed discussion of the reasoning behind the use of this terminology see L. Waddington, “Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion” in A. Lawson and C. Gooding (eds), *Disability Rights in Europe: From Theory to Practice*, (Oxford, Hart Publishing, 2005), 122-124.

⁷³ Gelijke behandeling op grond van handicap of chronische ziekte, memorie van toelichting, Tweede Kamer 2001/02, 28 169, nr. 3, 25 [Equal treatment on the ground of disability and chronic disease, Explanatory Memorandum, Second Chamber of Parliament, 2001-2002, 28 169, nr. 3, p. 25]. See also M. Gijzen, “Het nieuwe gelijkebehandelingsrecht voor gehandicapten en chronisch zieken”, in *Oordelenbundel*, (Utrecht, CGB, 2003) at 105.

⁷⁴ Section 16.

can be welcomed for the clarity which it brings to a complicated process. Naturally it remains possible to justify a failure to make a reasonable accommodation, through the disproportionate burden defence or equivalent thereof, in all of these jurisdictions, but this examination is not merged with the first issue of whether an effective or appropriate accommodation is theoretically possible.

3.3.3 A “Reasonable” Accommodation is an Accommodation which does not result in Excessive Costs or Difficulties for the Employer and is Effective in meeting the needs of the Individual with a Disability

This section considers how the term “reasonable” can be used to convey the dual meaning that any accommodation must both not result in excessive difficulties for the employer and be effective.

At this stage it seems appropriate to return to Article 5 of the Employment Equality Directive, since, although the Directive does not clearly elaborate on the meaning of the term “reasonable”, a number of provisions suggest that the intention may have been that the term be understood to mean that any accommodation must be effective in allowing an individual with a disability to participate in employment related activities whilst not resulting in an excessive burden for the employer. The Article states that “reasonable accommodation shall be provided” and explains that as meaning: “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...”. Recital 20 to the Directive’s Preamble, which was quoted earlier, then goes on to give examples of the kind of appropriate measures which should be provided.

If we break Article 5 up into its constituent parts we discover that the obligation to make a reasonable accommodation under the Directive means that:

- a. the employer must take “appropriate measures”;
- b. unless this would result in a disproportionate burden.

It is submitted that this reflects poor drafting, as the defence for failing to make a reasonable accommodation (disproportionate burden) is included within the definition of the obligation to make such an accommodation. Matters would have been clarified if the Directive had clearly stated what the obligation to make a “reasonable accommodation” involved, and, separately specified that employers could rely on the defence that making such an accommodation amounted to a “disproportionate burden”.

Nevertheless, one can extract from the text of Article 5, in combination with Recital 20, that a “reasonable accommodation” is any “appropriate measure”. A “measure” will be “appropriate” if it is “effective and practical ... to adapt the workplace to the disability” meaning that it should “enable a person with a disability to have access to, participate in, or advance in employment or to undergo training”. One could argue that the “reasonableness” requirement therefore firstly relates to the “effectiveness” of the accommodation in allowing employment participation by an individual with a disability. If such an accommodation can be made, the question then arises whether it would amount to a “disproportionate burden”. If such a burden will result, then, by definition, the accommodation will not be “reasonable”. This interpretation implies that under the Directive the “reasonable” requirement is seen as a modifier to both the accommodation itself and the obligation to make an accommodation, by requiring that the measure is both “effective” and not a “disproportionate burden”.

Given that the Directive brought the concept of reasonable accommodation to the attention of many European legislators, and indeed “forced” the notion onto these legislators, it is not surprising to find that many national transposition statutes have simply copied, or closely followed, the wording of Article 5. This is the case, for example,

with regard to the Latvian Labour Law,⁷⁵ the Greek Non-Discrimination Law⁷⁶ and the Decree of the Flemish Community of Belgium concerning balanced participation in the labour market.⁷⁷ As a result these jurisdictions have also attributed the dual meaning to the term “reasonable” within their jurisdictions.

On the other hand, the European jurisdiction which has the longest experience of working with the concept of reasonable accommodation, namely the United Kingdom, also seems to follow this approach. The Disability Discrimination Act (DDA) 1995 as amended, which establishes a duty to make reasonable adjustments (rather than reasonable accommodations), provides:

“18B Reasonable adjustments: supplementary

- (1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to -
- (a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;
 - (b) the extent to which it is practicable for him to take the step;
 - (c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;
 - (d) the extent of his financial and other resources;
 - (e) the availability to him of financial or other assistance with respect to taking the step;
 - (f) the nature of his activities and the size of his undertaking;
 - (g) where the step would be taken in relation to a private household, the extent to which taking it would -
 - (i) disrupt that household, or
 - (ii) disturb any person residing there.”

Section 18B of the DDA therefore provides elaboration on determining whether an adjustment is reasonable. Of the points listed under the section the first relates to the effectiveness of the adjustment, whilst the remainder relate to the difficulty an employer might experience in making the adjustment.

3.4 What is a “disproportionate burden”?

The “disproportionate burden” test is generally used to establish the limits of the obligation to make a reasonable accommodation. As seen above, sometimes this test is accompanied by other restrictions, such as the requirement that the accommodation shall be “reasonable”, and sometimes it operates as the sole limitation on the obligation to accommodate. The Directive, in Recital 21, refers to a number of factors to be considered when determining whether an accommodation gives rise to a disproportionate burden: “the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or other assistance.” In many instances, national legislation follows the lead of Recital 21. For example, the cost of the accommodation and / or the financial or economic resources of the employer, are referred to explicitly as factors to be taken into account in determining whether a disproportionate burden exists in the legislation in Austria,⁷⁸

⁷⁵ Article 7(3).

⁷⁶ Article 10, Law no. 3304/27.01.2005 Implementation of the Principle of equal treatment regardless of racial or ethnic origin, religion or other beliefs, disability, age or sexual orientation.

⁷⁷ Article 5.

⁷⁸ § 7c of the Act on the Employment of People with Disabilities (“economic capacity of the employer”).

Bulgaria,⁷⁹ France,⁸⁰ Ireland,⁸¹ Malta,⁸² Slovakia,⁸³ Spain,⁸⁴ and the United Kingdom.⁸⁵ As a result of this consideration more can be required and expected of a large employer, with access to significant financial resources, in terms of making accommodations, than can be required of a small employer. Similarly in line with the Recital, the availability of (public) funding to offset some of the costs of the accommodation must also be considered in determining whether making an accommodation is required according to the legislation in Austria,⁸⁶ Cyprus,⁸⁷ Denmark, France,⁸⁸ Ireland,⁸⁹ Luxembourg,⁹⁰ Malta,⁹¹ Netherlands,⁹² Portugal,⁹³ Slovakia,⁹⁴ Spain,⁹⁵ Sweden, and the United Kingdom.⁹⁶ This implies that the extent of the obligation to accommodate can differ from Member State to Member State in accordance with the levels and degree of public funding available to offset accommodation costs.

- ⁷⁹ The Protection Against Discrimination Act, Art. 16 and Art. 32 (costs are unreasonably big and would “seriously hinder” the employer). Also the Integration of Persons with Disabilities Act Art. 24.
- ⁸⁰ Article 5213-6 par 2 Labour Code (“disproportionate costs”).
- ⁸¹ Section 16(3)(c)(i), (ii), (iii) Employment Equality Act 1998-2004 (the costs of the measure in question and the scale and financial resources of the employer in question).
- ⁸² Art. 20(2) Equal Opportunities (Persons with Disability) Act 2000 (“the nature and cost of the actions in question; the overall financial resources of the person, body, authority or institution concerned and the effect on expenses and resources or the impact of such actions upon the operation of such person, body, authority or institution”); and Article 7(4) of the Equal Opportunities (Persons with Disability) Act, 2000 ((a) the nature and cost of the accommodation; (b) the overall financial resources of the workplace involved in the making of the accommodation; (c) the number of employees at the workplace requiring accommodation; (d) the effect on expenses and resources and the impact of the required accommodation upon the operation of the workplace; (e) the overall financial resources of the employer; (f) the overall size of the business of the employer including the number of employees, and the number, type and location of its workplaces; (g) the type of operation or operations of the employer, including the composition, structure and functions of the work-force).
- ⁸³ Section 7 of the Act on Equal Treatment in Certain Areas and Protection against Discrimination, 2004 (financial resources of the employer).
- ⁸⁴ Art. 7c of Law 51/2003 (“the cost of the measures”). Art. 37.3 bis of Law 13/1982, 7 April, on the Social Integration of Disabled (“the financial and other costs involved by the measures and the size and turnover of the organisation or company”).
- ⁸⁵ s. 18B(1) DDA (financial and other costs which would be incurred; employer’s financial or other resources).
- ⁸⁶ § 7c of the Act on the Employment of People with Disabilities (public financial assistance available for the necessary improvements).
- ⁸⁷ Art. 5(1A) of the Law on Persons with Disabilities N.127(I) 2000, as amended by Law No. 72(I) of 2007 (the burden is not disproportionate when it is sufficiently balanced by measures adopted by the state in favour of persons with a disability).
- ⁸⁸ Article 5213-6 par 2 Labour Code (financial support available to the employer).
- ⁸⁹ Section 16 (3)(c)(i),(ii) and (iii) Employment Equality Act 1998-2004 (the possibility of obtaining public funding or other assistance).
- ⁹⁰ Article 8 of the Law of 12 September 2003 (“burden shall not be disproportionate when it is sufficiently remedied by the measures contained in article 26 of the grand-ducal regulation of 7 October 2004”. The latter regulation provides for financial measures to support adjustments to workplaces and provide accessibility, the purchase of work related equipment and reimbursements for work related travel costs).
- ⁹¹ Art. 20(2) Equal Opportunities (Persons with Disability) Act 2000 (“the availability of grants from public funds to defray the expense of the said actions”).
- ⁹² The Explanatory Memorandum to the Act on Equal Treatment on Grounds of Disability or Chronic Illness 2004, states that where financial compensation exists to cover the costs of an accommodation, the costs cannot be regarded as disproportionate. However, this exception is not mentioned explicitly in the statute.
- ⁹³ Article 74 of the Labour Code (burden will not be considered disproportionate when it is compensated for by the State in special legislation (which has not yet been adopted)).
- ⁹⁴ Section 7 Act on Equal Treatment in Certain Areas and Protection against Discrimination, 2004 (the possibility of obtaining funding or any other assistance for the adoption of the measure).
- ⁹⁵ Art. 7 of Law 51/2003 (“the possibility of obtaining official funding or any other aid”) and Art. 37.3 bis of Law 13/1982 (whether burden “is sufficiently offset by public measures, aid or subsidies for the disabled (sic”).
- ⁹⁶ DDA s. 18B(1) (availability to the employer of financial or other assistance).

In addition to the factors mentioned in Recital 21, some Member States have provided for additional factors which are to be considered when determining whether any accommodation is required. Austrian legislation requires that both the necessary effort to eliminate the conditions constituting the disadvantage and the time span between the coming into force of the legislation and the alleged discrimination (i.e. failure to make the accommodation) must be considered in determining whether a disproportionate burden exists.⁹⁷ In addition, both Austrian⁹⁸ and Slovakian⁹⁹ legislation imply that an accommodation shall not be regarded as disproportionate if it is required under separate legislation, such as legislation relating to accessibility of (public) buildings. Meanwhile, the Dutch authorities have noted that the duration of the employment contract can also be considered in determining whether any accommodation is required,¹⁰⁰ implying that people with short term contracts are less likely to be entitled to claim an (expensive or difficult) accommodation, than those with permanent contracts. Slovakian law also requires that the benefit to the individual with a disability of providing the accommodation, and the possibility of achieving the purpose of the measure in an alternative manner should be included in the assessment of whether a disproportionate burden exists.¹⁰¹ Spanish law likewise lists “the discriminatory effects for disabled persons if [the accommodation] is not adopted” as a matter to be considered in determining whether a disproportionate burden exists.¹⁰² Both of these provisions seem to imply that an accommodation which is expensive or difficult to achieve is more likely to be required if it would lead to a significant advantage for an individual with a disability, such as enabling them to (continue in) work. In contrast, if such an accommodation would lead to only a marginal advantage, such as a slightly more comfortable working environment, the difficulties experienced by the employer are likely to weigh more heavily.¹⁰³ Lastly, the UK DDA also refers to the practicability of making the accommodation as a relevant factor.¹⁰⁴

One can conclude that, as a result of the Directive, there exist a set of core considerations, which are factors related to cost, which are to be taken into account in determining whether a disproportionate burden exists. In addition, as noted above, some Member States have developed additional criteria which are to be considered. However, the source of these criteria is national law, and not the Directive.

4 Positive action and Disability under the Directive

Article 7(1) of the Employment Equality Directive specifies that the “principle of equal treatment shall not prevent any Member States from maintaining or adopting specific measures to prevent or compensate for disadvantages” linked to any of the grounds covered by the Directive. Moreover, Article 7(2) of the Directive provides additional protection for positive action in respect of people with disabilities. It states that “with regard to disabled persons, the principle of equal treatment is without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.” The latter element of this

⁹⁷ § 7c of the Act on the Employment of People with Disabilities.

⁹⁸ § 7c of the Act on the Employment of People with Disabilities (“it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent they have been obeyed”).

⁹⁹ Act on Equal Treatment in Certain Areas and Protection against Discrimination, 2004 § 7(3) (“The measure shall not be considered as giving rise to disproportionate burden if its adoption by the employer is mandatory under separate provisions.”)

¹⁰⁰ Netherlands Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2006, Rikki Holtmaat.

¹⁰¹ Section 7 Act on Equal Treatment in Certain Areas and Protection against Discrimination, 2004.

¹⁰² Art. 7 of Law 51/2003.

¹⁰³ Although note that the Spanish law in question does not cover employment, but telecommunications, built-up public spaces and buildings, transport, goods and services available to the public and relations with the public administration.

¹⁰⁴ DDA s. 18B(1).

provision appears to stem from proposals of the Dutch delegation,¹⁰⁵ reflecting a desire to protect existing elements of Dutch law which provide for preferential treatment of disabled persons in order to support their reintegration into the workforce.¹⁰⁶ It is less clear how the reference to health and safety law in this context relates to positive action for disabled persons. The most logical explanation is that this provides Member States with the possibility to adapt their health and safety regimes to take account of the particular situation of disabled workers. This reinforces certain existing obligations on employers imposed under health and safety Directives.¹⁰⁷ However, there is also a risk that excessively protectionist measures ostensibly designed to guarantee the health and safety of workers with a disability, could in fact result in the exclusion and denial of equal treatment to people with disabilities.¹⁰⁸

A further potentially challenging issue is the compatibility of employment quotas for people with disabilities with the Employment Equality Directive. Numerous EU Member States provide for some form of (obligatory) quotas,¹⁰⁹ and in countries such as France and Germany quotas are regarded as an intrinsic element of disability employment policy. Such schemes would fall foul of the test established by the ECJ in *Kalanke*,¹¹⁰ which involved a challenge to a positive action measure which targeted women. In that case the Court, in essence, ruled out employment quotas in the context of gender. However, the Court may regard the different social context of people with disabilities, as well as the existence of Article 7(2) of the Directive, as justifying a broader scope for positive action with regard to disability.

¹⁰⁵ EU Council (2000) 'Outcome of proceedings of the Working Party on Social Questions of 14 and 28 March 2000', 6941/00, Brussels, 31 March 2000 at pp. 5-6.

¹⁰⁶ Specifically Art 7 of the Wet op de (re)integratie arbeidsgehandicaten. See L. Waddington, "Tweede-generatie richtlijnen Gelijke Behandeling: de nieuwe Richtlijn inzake gelijke behandeling ongeacht ras of etnische afstamming en de Kaderrichtlijn gelijke behandeling in arbeid en beroep" (2000) 12 *Sociaal Recht* 357-362.

¹⁰⁷ See eg Directive 89/391/EEC on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work, O.J. [1989] L183/1, Article 15.

¹⁰⁸ For a consideration of this problem from a British perspective see J. Davies and W. Davies, "Reconciling Risk and the Employment of Disabled Persons in a Reformed Welfare State" (2000) 29 *Industrial Law Journal* 347-377.

¹⁰⁹ For further information see L. Waddington, "Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-discrimination Laws" (1996) 18 *Comparative Labor Law Review* 62-101.

¹¹⁰ Case C-450/93 *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051.



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Part II

Strategies for Tackling Disability Discrimination in Areas other than Employment

1 Coverage

In this part of the report the focus will move away from the Employment Equality Directive. The material scope of that directive is confined to employment, occupation and vocational training but Article 13 EC, on which it is based, extends well beyond these areas. This is clearly illustrated by the fact that the Racial Equality Directive and, to a lesser extent, the Gender Goods and Services Directive¹¹¹ (both of which are also based on Article 13) have a much wider material scope. Thus, in addition to employment, occupation and vocational training, the Racial Equality Directive prohibits discrimination in the areas of “social protection” (which includes social security and healthcare), “social advantages”, education, transport and access to goods and services (which includes housing)¹¹². It is these additional areas - falling within the ambit of Article 13 but outside the confines of the Employment Equality Directive – which provide the limits for the current discussion.

2 Nature of the Discrimination Experienced by Disabled People Outside the Employment Context

2.1 Introduction

As will be clear from the previous paragraph, the fields of social life of relevance to this part of the report are numerous and varied. In this section, attention will be turned to some of the forms which disability discrimination may take in these contexts.

This focus on “discrimination” is required by the overall purpose of this report and consistent with the language of Article 13 EC. Nevertheless, it should be stressed that “discrimination” is not a concept with fixed and immutable boundaries. This point is well illustrated by the increasing recognition that a failure to provide reasonable accommodation constitutes “discrimination”¹¹³ and also by the growing awareness of phenomena such as “institutional discrimination”¹¹⁴.

The concept of “discrimination” which has been influential in the development of EC law has, at its heart, the notion of a comparator.¹¹⁵ Accordingly, “discrimination” will generally require a person to have been exposed to some

¹¹¹ Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] O.J. L373/37.

¹¹² Art. 3(1)(e)-(h).

¹¹³ The Employment Equality Directive does not explicitly classify a failure to provide reasonable accommodation as discrimination. The UN Convention on the Rights of Persons with Disabilities, however, does so in Article 5 and this seems likely to influence the future EC approach. See further, A Lawson, “The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?” in O Arnardottir and G Quinn (eds), *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden: Martinus Nijhoff, 2009); and L. Waddington and A. Hendriks, “The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination” (2002, Winter) *The International Journal of Comparative Labour Law and Industrial Relations* 403. With regard to the UN Convention on the Rights of Persons with Disabilities, it is worth noting that the European Commission has commissioned a research study. The Study on challenges and good practices in the implementation of the UN Convention on the Rights of Persons with Disabilities is due to be completed and published in 2010. For further information see: www.study-uncrpd.eu.

¹¹⁴ A term which was introduced into common parlance in the UK by the MacPherson Report into the death of Stephen Lawrence (a black teenager) in police custody – Home Office, *The Stephen Lawrence Inquiry: Report of an inquiry by Sir William Macpherson of Cluny* (London: Her Majesty’s Stationery Office, 1999), available at <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>.

¹¹⁵ Although its approach to pregnancy discrimination and harassment mark important departures from a comparator-based model.

detriment or disadvantage because of the characteristic which has attracted legislative protection (race, gender, disability etc) – a detriment or disadvantage to which a person unaffected by that characteristic would either not have been exposed or, in the case of indirect discrimination, be significantly less likely to have been exposed. Disabled people experience many forms of such “discrimination” in the areas of concern here.

It is the aim of this discussion to draw attention to various manifestations of such “discrimination”. Nevertheless, it is important to recognise that disabled people are also exposed to forms of disadvantage and exclusion which do not fall neatly into a comparator-based notion of “discrimination”. Such disadvantage, which is likely to result in social exclusion, may consist of the denial to disabled people of impairment-linked facilities, aids and services which, if provided, would enhance their ability to make autonomous decisions or to live independently. Examples of such facilities, aids and services include the provision of supportive decision-making regimes; of mobility aids such as wheelchairs, long canes and guide dogs; and of relevant training in skills such as the use of Braille or sign language. A detailed discussion of these issues, however, is beyond the scope of this report.

2.2 Access to and Supply of Goods and Services

The phrase “goods and services” is generally understood to cover a very wide range of social activity. It would, for instance, generally be understood to cover all goods and services which are available to the public.¹¹⁶ Such services might include those offered by shops, restaurants, hotels, shoe-repairers, doctors, lawyers, estate agents, gymnasiums, theatres, libraries, banks and insurance companies, education-providers and transport providers. The latter two areas will be dealt with separately in this section because of particular issues which they raise. The former categories will be considered here.¹¹⁷

Barriers to the access or supply of goods and services by disabled people frequently arise in connection with the physical inaccessibility of the facility or outlet through which the good or service is being made available to the public. Shops, for example, may be impossible for people with mobility impairments to enter or navigate around because of steps, narrow doorways, high counters or lack of internal space. Further, the provision of services (eg from a restaurant or a cinema) often entails a relatively lengthy stay in the service-provider’s premises. The provision of washing and toilet facilities make it possible for non-disabled people to enjoy the service in comfort. Failure to make such facilities accessible to people with physical impairments, however, is likely in practice to deny many such people access to the service in question.

In addition to physical or architectural barriers, inaccessible information may prevent disabled people from accessing goods and services on an equal basis with non-disabled people. Goods or services provided through websites which have not been designed in compliance with accessibility guidelines,¹¹⁸ for instance, will be impossible for substantial groups of disabled people to access unassisted.

¹¹⁶ National legislation sometimes specifies that relevant non-discrimination law will apply whether or not the good or service is provided in return for a payment (see eg the UK Disability Discrimination Act 1995, s 19(2)(c)). Under EC law, however, ‘services’ generally refers only to those provided for remuneration – EEC Treaty, Art 50. For an argument that the EC directives should be interpreted expansively so as to apply, for instance, to services provided by the police, see eg C. Brown, “The Race Directive: Towards Equality for All the Peoples of Europe?” (2002) 21 *Yearbook of European Law* 195 at 214-215.

¹¹⁷ See generally on the discrimination experienced by disabled people in this field, European Policy Evaluation Consortium, Study on Discrimination on Grounds of Religion and Belief, Age, Disability and Sexual Orientation Outside of Employment (Brussels: 13 June 2008), available at < http://www.cosac.eu/en/info/earlywarning/anti-discrimination.pdf/external_study.pdf>, para 2.3.9.

¹¹⁸ See eg the Website Accessibility Initiative Guidelines, Version 2 of which was published by the Worldwide Web Consortium on 11 December 2008 and available at <http://www.w3.org/WAI/>.

Inflexibility as to modes of communication will also create significant barriers for disabled people wishing to access the good or service in question. For instance, a service-provider's rule that appointments must be made only by telephone is likely to deny or severely restrict access to the relevant service to people with hearing impairments.

The failure of a provider of goods or services to ensure that appropriate staff assistance will be available for disabled people may also represent a discriminatory barrier. Such assistance will always be required by some disabled people – no matter how much care has been taken to construct physical and architectural features or information systems in accordance with principles of design for all. Thus, without staff assistance, it will effectively be impossible for people with certain visual or mobility impairments and for some people with learning difficulties to locate and obtain the items they need from supermarket shelves, however well designed the physical features and information structures in that shop might be.

2.3 Education

As in other areas of social life, disabled people experience discrimination and marginalisation in the context of education at all levels (including primary, secondary and tertiary as well as continuing professional and adult education). A recent report by the European Policy Evaluation Consortium (EPEC) assesses the extent of this phenomenon, in schools alone, as follows:

“The key ultimate effect of discrimination in schools (including inadequate support) is a lower educational achievement amongst disabled persons, which will result in lower wage prospects. Altogether, an estimated 3,592 severely or moderately disabled persons may have achieved a lower level of education than they would if all countries were as successful in narrowing the education gap as ... the best performer (Germany). The combined wage loss in the EU-25 between the actual situation and this hypothetical case is estimated to reach 28 billion euro per annum.”¹¹⁹

The educational disadvantage experienced by disabled people may take the form of straightforward refusals of places in particular establishments, or of participation in certain activities, as a result simply of prejudice or misinformed assumptions about the abilities or characteristics of disabled people. More commonly, perhaps, it takes the form of inadequate access or support. Architectural and other physical barriers are likely to prevent people with mobility impairments participating fully in the life of many educational establishments. Barriers in the way of accessing information and communication create serious obstacles for people with sensory impairments. Further, inadequate support or staff training and awareness can result in major barriers to the full participation of people with psychosocial impairments and conditions and people with learning difficulties.

A common response to tackling the barriers which disabled people face in education has been to remove them from mainstream schools and place them in segregated educational establishments. Whilst this has the advantage of ensuring that specialist facilities and support may be made available to people with similar needs, it is a strategy which is fraught with difficulty. Segregation runs counter to the aims of inclusion and participation which underlie equality legislation and indeed is sometimes explicitly categorised as a form of unlawful discrimination.¹²⁰ Further,

¹¹⁹ Above note 118, para. 2.3.1.

¹²⁰ See generally, M. Bell, “Direct Discrimination”, in D. Schiek, L. Waddington and M. Bell (eds), *Cases, materials and text on National, Supranational and International Non-Discrimination Law* (Oxford, Hart Publishing, 2007) section 2.5; and J. Schoonheim and D. Ruebain, “Reflections on Inclusion and Accommodation in Childhood Education: from International Standard Setting to National Implementation” in A. Lawson and C. Gooding (eds), *Disability Rights in Europe: from Theory to Practice* (Oxford, Hart Publishing, 2005).

such schools often fall outside the curriculum and other requirements imposed on mainstream schools and there is evidence that the quality of education provided in them has frequently been sub-standard.¹²¹

Finally, the situation of children living in residential care homes must be mentioned. The extreme educational neglect of such children has recently attracted the concern of the European Committee of Social Rights – a Committee set up to monitor and decide upon complaints relating to the implementation of the European Social Charter (which is a human rights treaty falling within the domain of the Council of Europe and not that of the European Community).¹²²

2.4 Transport

In the EPEC Report it is estimated that, within Europe, some “5.7 million wheelchair users”, “1.6 million persons with ... visual impairments, and 764,000 [persons] with hearing difficulties” encounter barriers when accessing public transport.¹²³ People with psychosocial impairments or conditions and people with learning difficulties, with asthma or epilepsy and other unseen conditions can also experience difficulty.

Problems can arise from overt discriminatory responses – such as the refusal of the driver of an accessible bus to allow a wheelchair user to board,¹²⁴ of a taxi driver to take a passenger with an assistance dog¹²⁵ or of an airline company to allow more than four people with “restricted mobility” to travel on the same aircraft.¹²⁶

Difficulties of access will also be caused by physical features and the way in which information is presented or communication takes place. Thus, certain vehicles may well be inaccessible to wheelchair users¹²⁷ and the absence of a lift or ramp permitting access to a railway bridge may require such people to take a significant and time-consuming detour in order to change platforms.¹²⁸ The failure to provide information (such as details of platform alterations) in a visual format will create difficulties for passengers with hearing impairments and the failure to provide it orally will create problems for those with visual impairments.

Staff assistance is also vital to the effective use of public transport by disabled people. People with mobility impairments may need assistance in boarding and leaving vehicles; visually impaired people may need assistance in locating a vehicle (especially in unfamiliar environments); and people with other impairments may need assistance in various other ways. Without such assistance, travelling unaccompanied would be an impossibility for a great many.

¹²¹ For recent judicial acknowledgement of this, see *DH v Czech Republic* App No 57325/00 (13 November 2007) where the European Court of Human Rights (at para. 135) accepted the fact that the standard of education provided by special schools in the Czech Republic was inferior to that provided by mainstream schools and (at para. 198) expressed concern about this difference in standards and also about the segregation entailed in the special education system.

¹²² *Mental Disability Advocacy Centre v. Bulgaria*, Complaint 41/2007 (3 June 2008), available at <http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC41Merits_en.pdf>.

¹²³ Above note 118, para. 2.3.4.

¹²⁴ See, eg S. Bunney, “Disabled Man Refused Access to Cardiff Buses”, *WalesOnline* 24 February 2009, available at <http://www.walesonline.co.uk/news/wales-news/2009/02/24/disabled-man-refused-access-to-cardiff-buses-91466-22993751>.

¹²⁵ “‘Unclean’ Guide Dog Banned by Muslim Cab Driver”, *Mail Online*, 6 October 2006, available at <http://www.dailymail.co.uk/news/article-408912/Unclean-guide-dog-banned-Muslim-cab-driver.html>.

¹²⁶ “Ryanair Deboards Blind Passengers”, *The Times*, 20 August 2007, available at <http://www.timesonline.co.uk/tol/travel/news/article2293457.ece>.

¹²⁷ See the Irish case of *Hennessy v. Dublin Bus* DEC-52003 – 046 where it was held that adapting a bus to make it accessible fell outside the reasonable accommodation duty because of the cost involved.

¹²⁸ These were the facts of the English case of *Roads v. Central Trains* [2004] England and Wales Court of Appeal Civil 1540.

2.5 Housing

Housing is explicitly brought within the material scope of the Racial Equality Directive. It is an area in which disabled people frequently encounter many barriers¹²⁹ – barriers which may well force them to abandon attempts to live independently in the community and move into residential institutions instead.

Difficulties may arise, as in other areas of social activity, because of prejudice, ignorance, intolerance or hostility. Fears (often unfounded) that a disabled person will be untidy or likely to upset the neighbours, to cause a fire or to fall down the stairs, for instance, may deter landlords and property managers from agreeing to lease property to them. Difficulty in finding accessible and affordable accommodation may force a disabled person to live in an area remote from family and friends or even to move into residential care. Difficulties in persuading landlords and fellow occupiers to agree to physical modifications of leased premises or communal areas may mean that recently disabled people are forced to find somewhere else to live. Inflexibility as to modes of communication or as to the format in which information is provided may also be problematic for disabled tenants - causing potential misunderstandings and allegations of failure to comply with obligations imposed by the landlord or property manager.

Closely connected with the difficulties outlined above is another problem to which social protection schemes may be able to provide some solutions. A major obstacle which disabled people face in relation to housing is the financial expense of adapting a property to their needs. The cost of such alterations is likely to put them well beyond the reach of many disabled people unless financial assistance can be obtained from public funds.

2.6 Healthcare

As is now demonstrated by a considerable body of evidence, healthcare is an area in relation to which disabled people experience discrimination and disadvantage.¹³⁰ Some indication of the scale of this is provided by the EPEC Report according to which, throughout the EU:

“8.4 million severely or very severely disabled individuals are estimated to face discrimination when accessing health services. Resulting ill health is calculated to effect a loss of 599 million euro in net wage per year. Ill health leads to lower economic performance and a loss of GDP as a result of diminishing workforce, estimated at 812 million euro per year. The direct tax revenue foregone is estimated to reach 213 million euro a year.”¹³¹

Disabled people are sometimes prevented from accessing healthcare on an equal basis with others by the negative and discriminatory attitudes of healthcare providers. Such attitudes may be born out of inappropriate assumptions about the quality of a disabled person’s life – unduly negative assessments of which are likely to result in reduced willingness to provide them with treatment designed to prolong their lives. They also arise out of fear of how disabled people (particularly those with psychosocial impairments and conditions or learning difficulties) might behave or nervousness as to how to react to them. Such fear and nervousness is likely to result in less detailed examinations and in unpleasant experiences for the disabled patients which are likely to deter them from seeking assistance in

¹²⁹ See generally the EPEC Report, above note 118, para 2.3.2.

¹³⁰ See further, the EU commissioned study “Quality in and Equality of Access to Healthcare” 2008, available at <http://ec.europa.eu/employment_social/spi/studies_en.htm#healthcare>. For a UK study see C. Samele et al, *Equal Treatment: Closing the Gap. A Formal Investigation into Physical Health Inequalities Experienced by People with Learning Difficulties and Mental Health Problems* (London, Disability Rights Commission, 2006), available at <http://www.leeds.ac.uk/disability-studies/archiveuk/central%20england/Area_Studies_Executive_Summary.pdf>.

¹³¹ Above note 118, tbl 2.12.

the future. Further, unfounded assumptions about the inadequacy of disabled people as parents, or about their sexual/a-sexual behaviour, may result in unequal access to sexual and reproductive healthcare services.

Access-related barriers also underlie the inequality in healthcare provision for disabled people. These may take the form of physical features of the building in which the health care services are provided. They may also take the form of inaccessible information or modes of communication – e.g. an inability or unwillingness to communicate in sign language or even in writing rather than orally; an inability or unwillingness to communicate in the format of choice of a visually impaired person (e.g. over the telephone or in Braille rather than in print); and an inability or unwillingness to present information in sufficiently clear and simple terms for people with learning difficulties to understand.

For many disabled people in Europe, adequate healthcare provision is dependent on the possession of a healthcare insurance policy. There is evidence, however, that providers of such insurance are often unwilling to allow disabled people to participate in their scheme.¹³² Further, even where participation is permitted, it is frequently on terms much less favourable and more expensive than those offered to non-disabled people.¹³³ Such differentiation is often not based on careful calculations and assessments of risk.

Before leaving the issue of healthcare, the position of disabled people living in residential institutions should be noted. For such people, access to healthcare will be heavily dependent on the staff running the institution. There is disturbing evidence¹³⁴ which suggests that, in some institutions, disabled people are denied access to appropriate medical treatment with the result that what should have been minor conditions become serious and that the disabled person concerned has to endure avoidable pain and suffering.

2.7 Social Security and Social Assistance

These issues, which fall within the “social protection” dimension of the Racial Equality Directive, have important implications for disabled people and their ability to live independently. In relation to social security, as the EPEC Report points out,¹³⁵ disabled people experience discrimination in the form of hostile and unhelpful treatment from staff involved in administering schemes. They are also faced with schemes which fail to take into account the additional costs which disability generally imposes on people with impairments. In relation to programmes of social assistance, the EPEC Report¹³⁶ draws attention to a number of ways in which disabled people may be disadvantaged. These include the failure of authorities to take adequate steps to bring relevant forms of assistance or service to the attention of disabled people (eg through communications in alternative formats); the failure of authorities to take the needs and concerns of disabled people into account in the design and delivery of services; and the failure of authorities to ensure that staff are appropriately trained and able to respond flexibly to changes in the needs and circumstances of a disabled service-user.

Disability discrimination undoubtedly occurs in the contexts of social security and social assistance. Where disability-specific benefits or services are being provided, however, the language of “discrimination” is somewhat

¹³² Ibid, para 2.3.8.

¹³³ Ibid.

¹³⁴ See, for Bulgarian examples, the cases revealed in “Bulgaria’s Abandoned Children” – a BBC 4 documentary directed by K. Blewett and available at <<http://www.bbc.co.uk/bbcfour/documentaries/features/bulgarias-children.shtml>> ; and, for UK examples, see the cases discussed in A. Abraham (Health Service Ombudsman for England) and J. White (Local Government Ombudsman), “Six Lives: The Provision of Public Services to People with Learning Disabilities” Second Report, Session 2008-9, laid before Parliament on 23 March 2009 and available at http://www.ombudsman.org.uk/news/news_six_lives.html.

¹³⁵ Above note 118, para. 2.3.6.

¹³⁶ Ibid, para 2.3.7.

problematic. This is because, in such cases, non-disabled people do not have access to the relevant benefit or service and consequently there is no obvious comparator with whom to compare the disabled person. Nevertheless, the effective design and delivery of disability-specific benefits and services is likely to play a significant part in promoting independence, inclusion and disability equality. For instance, as mentioned above in relation to housing, financial assistance with the cost of adapting an inaccessible home may be what enables a disabled person to continue living in the community rather than moving into residential care.

3 National Legal Strategies for Combating Disability Discrimination Outside the Employment Context

3.1 Introduction

Some of the principal ways in which disabled people are liable to be discriminated against when attempting to access the areas of social activity relevant to this part of the report were outlined in the previous section. Here, attention will turn to various legal strategies which have been used by Member States and also, where helpful, by other countries (particularly the US and Australia) in attempts to tackle the discrimination experienced by disabled people in non-employment contexts. The emphasis will be on the use of different types of legal obligation or strategy. A detailed consideration of different enforcement methods, although a matter of great importance, is beyond the scope of this report.

Unsurprisingly, given the absence of a relevant EC directive, there is less information about the legal strategies which Member States use to tackle disability discrimination outside the employment context than there is about the strategies which they use to tackle it within that context. Nevertheless, the annual country reports produced by the European Network of Legal Experts in the non-discrimination field¹³⁷ do contain much useful information about non-employment issues. In addition, valuable information and analysis is set out in the 2006 Mapping Study of national non-discrimination laws outside the employment context.¹³⁸

These reports make it clear that many countries (including Bulgaria, Hungary, Ireland, Luxembourg, Romania, Slovenia and the UK) provide some form of protection from disability discrimination in all of the areas discussed in Section 2 above. Even where protection from disability discrimination does not extend to all these areas, significant protection is often provided on a less comprehensive basis. Only in relation to three countries – Denmark, Greece and Poland¹³⁹ – did the Mapping Study Report conclude that “there is little in the way of legal control of disability discrimination outside the employment context”.¹⁴⁰

¹³⁷ Available at the website of the European Network of Legal Experts in the Non-Discrimination Field: www.non-discrimination.net.

¹³⁸ A. McColgan, J. Niessen and F. Palmer, *Comparative Analysis on National Measures to Combat Discrimination outside Employment and Occupation: Mapping Study on Existing National Legislative Measures and their impact in Tackling Discrimination Outside the Field of Employment and Occupation on the Grounds of Sex, Religion or Belief, Disability, Age and Sexual Orientation*, VT/2005/062, (December 2006).

¹³⁹ But note that Articles 23-24 of the Polish Civil Code, which protect “personal goods” and “personal values”, have been used to challenge the refusal of a supermarket to allow entry to a blind woman accompanied by her guide dog - *Jolanta K. v. Carefour Polska Sp.z.o.o.* (lodged 6 May 2008).

¹⁴⁰ Mapping Study Report, above note 139, p. 4. For an explanation of how national legislation covers discrimination outside the field of employment see also Annex III of the Impact assessment accompanying the 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 - SEC(2008) 2181, at page 65. This Impact Assessment can be found at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:2180:FIN:EN:PDF>.

Thus, in the vast majority of Member States, strategies designed to counter disability discrimination outside the employment context are already at work. Unlike in the employment context, however, there has to date been no over-arching EC directive to exert a harmonising influence over the shaping of these strategies.¹⁴¹ Unsurprisingly, therefore, they take a wide variety of forms – varying in their content, in their enforceability and in their use of terminology. The extent of this diversity makes it impossible to identify a classification system which divides the various legal strategies into discrete and self-contained units. There is a considerable overlap between many of the concepts described here and an attempt will be made to make this clear in the course of the discussion which follows. A further complication arises from the fact that, in different countries, the relevant concepts and obligations are set out in a variety of different types of legal instrument – eg in constitutional guarantees of equality,¹⁴² in criminal law provisions¹⁴³ and in dedicated non-discrimination law statutes. Although the source of an obligation may have a significant impact on its operation and its enforceability, it has played no role in the classification which has been adopted here. The current classification is based on concepts contained in the Employment Equality Directive – direct discrimination, indirect discrimination and reasonable accommodation – but, in addition, consideration will be given to the issues of anticipatory reasonable accommodation, accessibility and positive equality duties because, although not appearing in that Directive, they have appeared in the laws of some Member States and have particular relevance to tackling disability discrimination in non-employment areas.

3.2 Direct Discrimination

In many EU Member States¹⁴⁴ there are provisions which prohibit direct discrimination against disabled people outside the area of employment (although not necessarily in all the areas covered by the Racial Equality Directive). Such prohibitions take one of two principal forms, each of which will now be considered.¹⁴⁵

3.2.1 Direct Discrimination not subject to a General Justification Defence

First, prohibitions against treating disabled people less favourably may take the form of prohibitions against “direct discrimination”, as that term is understood in the Employment Equality Directive. According to Article 2(2)(a) of that instrument:

“direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.”

¹⁴¹ This is likely to change in the near future, however – see “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.

¹⁴² See eg s 6 of the Finnish Constitution 1999 and Art 13 of the Constitution of the Portuguese Republic of 2 April 1976. According to the Mapping Study Report, above note 139, p 8, such provisions often protect only citizens of the relevant country; are subject to a general justification defence; are binding only on the State and not on private bodies or individuals; and are difficult to enforce.

¹⁴³ See eg Spanish Law 47/2007 on offences and sanctions in the field of equality for disabled people; the Dutch Criminal Code Art. 137; and Luxembourg’s General Discrimination Law of 28 November 2006, Art. 1.

¹⁴⁴ Exceptions include Denmark, Greece and Poland.

¹⁴⁵ Interestingly, the UK Disability Discrimination Act 1995 adopts both types of approach. The first is termed “direct discrimination” and operates only in relation to employment – though there are proposals to extend it to all areas of relevance here. The second is generally known as “disability-related discrimination” and is not confined to employment.

Joyce | 1981

Daan | 1985



In direct discrimination provisions of this type, there is no general justification defence although there may be specific or limited defences.¹⁴⁶

According to the Mapping Study, this form of direct discrimination is prohibited in all the non-employment areas of relevance here in Ireland, Bulgaria, Slovenia, Romania and Luxembourg.¹⁴⁷ A recent Bulgarian case - *Ventsislav Tsvetanov Ivanov and Ors v. "Optima Group" OOD*¹⁴⁸ - demonstrates its operation in the context of disabled people attempting to access services. The Pazardzhik District Court found a private company liable for directly discriminating against a group of people with learning difficulties because its employee had denied them access to a swimming-pool which was open to the public.

Despite the absence of a general justification defence, prohibitions of "direct discrimination" such as this may be interpreted so as to embrace the notion of reasonable accommodation.¹⁴⁹ Where this occurs, the abilities of the disabled person must be judged as they would have been had a reasonable accommodation obligation in their favour been fulfilled. Defendants would thus be unable to rely on a difference between the circumstances of the disabled person and those of a non-disabled person to explain their differential treatment, where that difference would have been removed had the defendant made a reasonable accommodation in favour of the disabled person. Incorporating the notion of reasonable accommodation into the concept of direct discrimination in this way has the effect of increasing the number of successful direct discrimination claims. Where those claims would otherwise have succeeded as freestanding failure to make reasonable accommodation claims, however, the substantive difference in levels of protection would seem to be negligible.

3.2.2 Direct Discrimination subject to a General Justification Defence

The second form of prohibition against direct disability discrimination departs from the conventional model in that it incorporates a general justification defence. It is an approach which the Mapping Study found to be present in the laws of Finland, Portugal, Spain, Cyprus, Estonia, and France.¹⁵⁰

The existence of a general justification defence carries the obvious risk of diluting protection from discrimination. It allows defendants the opportunity to argue that their disadvantageous treatment of disabled people was justified in some way. The seriousness of this risk increases in proportion with the ease with which the defence can be established. A very wide and easily raised justification defence will deprive any prohibition of direct discrimination of all its usefulness.

The existence of a justification defence may, however, encourage legislators and courts to take a more expansive approach to other elements of direct discrimination. The presence of such a defence for instance, may result in the development of a less strict comparator requirement than might otherwise have emerged. Thus in Finland, where the Penal Code's prohibition of discrimination in the provision of services¹⁵¹ is subject to a general justification

¹⁴⁶ See eg the defence set out in s 4(4) of the Irish Equal Status Act 2000 which applies when the otherwise discriminatory conduct is reasonably necessary to prevent harm being caused to the disabled person or to others; and the defences set out in Art.

457(1) of Luxembourg's Penal Code which apply where the otherwise discriminatory conduct was intended to prevent or to guard against death, bodily injury or work incapacity. See also the US defence based on a 'direct threat' to the health and safety of others – Americans with Disabilities Act 42 USC § 12182(b)(3); and Fair Housing (Amendment) Act 42 USC § 3604(f)(9).

¹⁴⁷ Above note 139, p. 42. See also s 6 of the Finnish Non-Discrimination Act (which applies to education but not to the other fields of interest here.

¹⁴⁸ N 473/07 (19 March 2007). See also the Integration of Persons with Disabilities Act.

¹⁴⁹ It is not entirely clear from the reports whether this approach has been or will be developed in any of the EU Member States. Examples of it, however, may be found in the Americans with Disabilities Act 1990 42 USC and also in the Australian Disability Discrimination Act 1992.

¹⁵⁰ Mapping Study Report, above note 139, p. 3.

¹⁵¹ Penal Code s 11:9.

defence, it has been held that a restaurant discriminated against a blind person when it refused to allow entry to their guide dog.¹⁵² Without the leeway granted by a justification defence, however, a stricter comparator requirement might have been applied according to which no less favourable or disadvantageous treatment of the disabled person would have been established because a non-disabled person's dog would also have been turned away.¹⁵³

Another example of a relatively generous approach being adopted to the less favourable or disadvantageous treatment element of direct discrimination prohibitions of this type is well illustrated by Article 8 of the Hungarian Equal Treatment Act. Under this, an inaccessible physical environment may be regarded as creating the required disadvantageous treatment of a disabled person.¹⁵⁴ Because a robust approach appears to have been adopted to attempts by public bodies to raise a justification defence based on cost, disabled people have succeeded in establishing direct discrimination based on lack of physical access.¹⁵⁵

Prohibitions of "direct discrimination" of this type – if based on a relaxed understanding of less favourable treatment and subject to a suitably rigorous general justification defence, provides a mechanism through which to hold up to judicial scrutiny a wide range of treatment which operates to disadvantage disabled people. In this sense, it performs a function very similar to that of indirect discrimination, but without the need to demonstrate group disadvantage or disproportionate impact.

3.3 Indirect Discrimination

The Employment Equality Directive requires Member States to prohibit indirect discrimination on grounds of disability in the employment context. For these purposes, indirect discrimination is defined in Article 2(2)(b) as occurring when "an apparently neutral provision, criterion or practice would put persons having ... a particular disability... at a particular disadvantage compared with other persons" unless it can be justified.

Indirect disability discrimination outside the area of employment is prohibited in many Member States – including Bulgaria,¹⁵⁶ Ireland,¹⁵⁷ Hungary,¹⁵⁸ Portugal,¹⁵⁹ Slovenia¹⁶⁰ and Spain.¹⁶¹ In Austria, the relevant federal legislation¹⁶² goes beyond wording such as that of the Employment Equality Directive and makes it clear that, in addition to "provisions, criteria and practices", indirect disability discrimination may be caused by "features of designed areas". It appears that, in assessing the viability of a claim for indirect discrimination based on access difficulties, courts are required to consider the extent to which the defendant has complied with any legislation prescribing access standards.¹⁶³

¹⁵² Decision of the District Court of Vaasa on 27 September 2005.

¹⁵³ This form of strict comparator requirement operates in the UK's Disability Discrimination Act 1995 provisions on "direct discrimination" (see above note 146).

¹⁵⁴ Guideline No. 10.007/3/2006. of the Equal Treatment Advisory Body interpreting certain legal issues related to the obligation to make the environment accessible for people with disabilities.

¹⁵⁵ See eg Equal Treatment Authority, Case 13/2006, available at www.egyenlobanasmod.hu where it was held that the inaccessibility of a courtroom constituted direct discrimination and that it could not be justified on the basis of shortage of funds for carrying out the necessary modifications.

¹⁵⁶ Protection Against Discrimination Act, 2004, Art. 4 (3).

¹⁵⁷ Equal Status Act 2000, s 3(1)(c).

¹⁵⁸ Act CXXV on Equal Treatment and the Promotion of Equality of Opportunities, Art 9.

¹⁵⁹ Law 46/2006 of 28 August 2006 prohibiting and punishing discrimination based on disability.

¹⁶⁰ Act Implementing the Principle of Equal Treatment 2004-2007, Art 4, s 3.

¹⁶¹ Law 51/2003 Art. 6.

¹⁶² Disability Equality Act 2005, s 5.

¹⁶³ *Ibid.*

Even without additional wording of the type used in the Austrian legislation, it is entirely conceivable that phrases such as “provisions, criteria and practices” in relevant indirect discrimination laws will be interpreted to cover aspects of the physical environment, technology or information and communication that operate to exclude or disadvantage disabled people. This would grant considerable potential to the prohibition of indirect discrimination as a mechanism for challenging a wide variety of policies and practices.

Glimmerings of this potential are revealed in the Bulgarian case of *Rossitza Pavlova Belcheva v. City of Plovdiv*.¹⁶⁴ The claimant was there able to demonstrate that the city’s architectural environment created the disproportionate impact on disabled people necessary to found an indirect discrimination claim. The claim failed, however, on the ground that achieving full accessibility was a lengthy and costly undertaking and that the city authorities had taken some steps to improve access.

The potential of indirect discrimination as a mechanism for tackling disabling barriers is more clearly illustrated by three Australian cases. First, in *Waters v Public Transport Corporation*,¹⁶⁵ the High Court of Australia held that a policy of removing conductors from trams and introducing a scratch-card ticketing system instead constituted indirect discrimination against disabled people. Many disabled passengers relied on conductors for assistance and were unable to use the scratch-card system because they lacked the required degree of vision or manual dexterity. Second, in *Maguire v Sydney Organising Committee for the Olympic Games*,¹⁶⁶ the Human Rights and Equal Opportunities Commission held that the failure of the Organising Committee to ensure that its website was accessible to blind people constituted indirect discrimination under the Disability Discrimination Act 1992. In its words:

“The respondent in providing access to the information available on its web site imposed upon or required of the complainant that he comply with a “requirement or condition” that he be able to read print. That was a requirement or condition with which a substantially higher proportion of persons without his disability were able to comply.”

Third, in *Hurst and Devlin v Education Queensland*,¹⁶⁷ a challenge was mounted against the practice in schools of communicating with deaf students through English Sign Language and not Auslan (the officially recognised Australian sign language). It was held that this practice indirectly discriminated against the claimants even though they had mitigated the damaging effects of the practice by developing effective coping strategies.

Indirect discrimination thus offers a potentially powerful mechanism for challenging aspects of policies, practices and design that have an unjustified exclusionary impact on disabled people. Its power, however, will depend on the ease with which such cases may be brought before national courts. In the UK, for instance, indirect discrimination claims (which cannot currently be brought on grounds of disability) have traditionally been hampered by the expense, technicality and time associated with establishing disproportionate impact on the relevant group. There does not, as yet, appear to be evidence that non-employment claims for indirect disability discrimination are common in any EU country – a fact which may reflect the existence of practical or other difficulties associated with the bringing of such claims. The dearth of European indirect discrimination cases to date, however, may at least in part be due to the relative newness of the relevant law in many countries.

¹⁶⁴ Plovdiv Appellate Court, 21 February 2007.

¹⁶⁵ [1991] HCA 94, available at http://www.austlii.edu.au/au/cases/cth/high_ct/173clr349.html. The case was brought under the Victoria Equal Opportunities Act 1984.

¹⁶⁶ Human Rights and Equal Opportunities Commission; 24 August and 18 November 2000; (2001) Equal Opportunity Cases 93-123 and 124, available at http://www.humanrights.gov.au/disability_rights/decisions/comdec/2000/DD000120.htm.

¹⁶⁷ Full Court Federal Court; 28 July 2006; [2006] FCAFC 100.

3.4 (Reactive) Reasonable Accommodation Duties Owed to Disabled Individuals

The appearance of the term “reactive” in this heading will, no doubt, be puzzling to some. It has been included in order to differentiate the type of strategy to be considered here clearly from that to be discussed in Section 3.5 below – “anticipatory” reasonable accommodation duties owed to groups of disabled people. It should be noted, however, that this distinction between reactive and anticipatory reasonable accommodation duties is not one which is made in the laws of most Member States. Indeed, many reasonable accommodation laws appear to be entirely lacking in detail and specificity. While many Member States impose reasonable accommodation duties in areas outside employment, the delineation, operation and effect of such duties is often left vague and undefined. Indeed, such duties are often implicit rather than explicit and frequently not mandatory or enforceable. While this lack of clarity creates obvious difficulties in assessing whether reasonable accommodation obligations operate in the various countries, the Mapping Study suggested that Ireland and the UK were the only countries in which such duties operated in all the areas covered by the Racial Equality Directive.¹⁶⁸

The form of legal obligation which constitutes the subject matter of this section is the conventional notion of reasonable accommodation of the type which appears in the Employment Equality Directive. Key aspects of this concept and its implementation in the employment context were examined in Section 3 of this report. A detailed examination of them is therefore unnecessary here.

For present purposes, however, the reactive and individualised character of this form of obligation should be stressed. A reasonable accommodation obligation requires duty-bearers to take positive steps to remove the disadvantage which a particular disabled person would otherwise experience because of some aspect of the duty-bearer’s operations or structure. It is a mandatory duty to react or respond to the circumstances of a particular disabled person and (subject to the limits of disproportionate burden) to take such steps as would be effective to remove the particular barriers that he or she faces. The need to find solutions appropriate for the particular individual concerned means that duty-bearers will need to engage in a process of consultation with the disabled person as to the likely effectiveness of possible accommodations.¹⁶⁹

This form of reasonable accommodation obligation has a unique and vital role to play in facilitating the equality and inclusion of disabled people in areas outside (as well as within) employment. Individually tailored adjustments are likely to prove particularly vital in fields such as education, healthcare and the provision of other services which may entail a close or long-term relationship between the service-provider and the disabled person concerned. In such cases, service-providers may be expected to take more extensive steps to ensure that the particular disabled person is not disadvantaged by their standard procedures or practices than would be expected of them in cases where the relationship between the service-provider and the disabled person is fleeting or transitory.

The reactive and responsive nature of this obligation is what enables it to achieve individually tailored solutions. Some such solutions will benefit only the particular person whose appearance has triggered the duty. Other such solutions, however, have the potential also to benefit other disabled people. This is particularly the case in relation to accommodations which take the form of alterations to the physical structure which have the effect of facilitating access.

The extent to which the duty will require alterations which take time and money to effect, however, is severely limited by the duty’s reactive and responsive nature. Because it is a duty to respond to the disadvantage experienced by a

¹⁶⁸ Above note 139, p. 4.

¹⁶⁹ This is termed the “procedural” component of reasonable accommodation duties by S.J. Schwab and S.L. Willborn, “Reasonable Accommodation of Workplace Disabilities” (2003) 44 *William and Mary Law Review* 1197 at 1258–64.

particular individual, it imposes no requirement to anticipate that disadvantage and take steps to remove it before the actual appearance of a disabled person or the receipt of a request for an accommodation to be made in favour of such an individual. Without such anticipation, however, it may be impossible to respond to the disadvantage experienced by a disabled person by providing physical access, by providing information in Braille or easy-speak, by communicating in sign language or even by providing appropriate staff assistance in a timely manner. While such measures might be effective in removing the disadvantage, they frequently require long-term planning.

3.5 Anticipatory Reasonable Accommodation Duties Owed to Groups of Disabled People

The term “anticipatory reasonable accommodation” is not uncontroversial. It is, however, a term which describes a type of obligation which is well established in the UK and which also appears to operate in a number of other Member States. It is suggested that this concept differs from the traditional, or “reactive”, concept of reasonable accommodation in a number of important respects. It should also be stressed, from the outset, that the existence of an anticipatory reasonable accommodation duty in no way replaces or reduces the need for a reactive and individualised reasonable accommodation duty.

As in relation to the previous section, differences in terminology, enforcement and effect make it impossible to provide one single account of this form of obligation which will capture all of its incarnations. An account will therefore be given of the key elements of this concept as it has been developed in the UK – the country in which it appears to have enjoyed the longest history and been subjected to the closest judicial scrutiny and elaboration.¹⁷⁰ Brief reference will then be made to other countries in which analogous duties appear to operate.

In the UK, anticipatory reasonable accommodation (or “anticipatory reasonable adjustment”) duties operate in all fields apart from housing and employment. They are triggered whenever a group of disabled people (eg those with mobility impairments, visual impairments or hearing impairments) would experience the required degree of disadvantage when attempting to access the relevant good or service. The duty therefore requires providers of education, healthcare, transport, accommodation, public functions and other goods and services to monitor the accessibility of their services on a continual basis. Once triggered, the duty requires duty-bearers to take reasonable steps to remove the disadvantage. Inherent in this requirement is the need to take steps, wherever possible, which would have the result of allowing disabled people to access the relevant good or service on the same basis as non-disabled people (eg to have access through the same doorway).¹⁷¹ Duty-bearers may be sued for disability discrimination by a disabled individual who experiences disadvantage when attempting to access their good or service because of a difficulty which the duty-bearer should have anticipated and taken steps to remove.

Requirements or guidelines relating to accessibility (provided eg by building regulations or the World Wide Web Consortium) play a role of obvious importance in anticipatory duties such as the one just described. Compliance with such requirements or guidelines will generally provide duty-bearers with a means of proving that they had indeed taken the appropriate steps to remove access-related barriers. The duties, however, require more than

¹⁷⁰ See, in particular, *Roads v. Central Trains* [2004] England and Wales Court of Appeal Civil 1540; and *Ross v. Ryanair and Stansted Airport* [2004] England and Wales Court of Appeal Civil 1751. See further Disability Rights Commission, “DDA 1995 Code of Practice, Rights of Access: Services to the Public, Public Authority Functions, Private Clubs and Premises” (London, Stationery Office, 2006); C. Gooding and C. Casserley, “Open for All: Disability Discrimination Laws in Europe on Goods and Services” in A. Lawson and C. Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Oxford, Hart Publishing, 2005); and A. Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment*, (Oxford, Hart Publishing, Oxford, 2008).

¹⁷¹ *Roads v. Central Trains*, *ibid*, para [13] per Lord Justice Sedley approving the approach suggested in the Disability Rights Commission Code of Practice, *ibid*, at paras. 7.36-40.

compliance with accessibility standards. They require duty-bearers to anticipate disadvantage that may flow from sources other than inaccessible design. For instance, a transport provider is likely to be required to anticipate and take steps to remove (eg through the provision of appropriate and timely staff assistance) the difficulty which a blind passenger may face when trying to locate the correct train; and a shopkeeper is likely to be required to anticipate and take steps to remove the difficulty that some people with physical impairments may have in taking items from the shelves (again, perhaps in the form of making staff assistance available).

Spain also appears to have reasonable accommodation duties which require the removal of group-based disadvantage on an anticipatory basis. Thus, Art 7 of the Spanish Law on Equal Opportunities, Non-Discrimination, and Universal Access for Persons with Disabilities 2003 (which imposes reasonable accommodation duties outside the area of employment) defines reasonable accommodation as “measures to adapt the physical, social, and attitudinal environment to the specific needs of persons with disabilities which effectively and practically, without involving a disproportionate burden, facilitate accessibility or participation for a person with a disability on the same terms as for other citizens”. This is a much younger provision than its British equivalent, however, and it is as yet unclear how much emphasis will be placed on its potential anticipatory nature. It should also be noted, that while the duties are mandatory in that they are punishable by fine,¹⁷² a breach of them is not classified as discrimination.

Duties in the nature of anticipatory reasonable accommodation obligations also appear to exist elsewhere under the label of duties of access rather than of reasonable accommodation. In Hungary, for instance, disabled people are granted a right of “equal access” to public services.¹⁷³ “Equal access”, for these purposes, is not confined to compliance with principles of universal design in relation to physical features or information provision but extends to the provision of such assistance as may be required by a disabled person in order to enable them to access the service.¹⁷⁴ The clear thrust of this duty is thus very similar to the UK anticipatory reasonable adjustment duty but, like the Spanish duty, it is relatively new and therefore as yet little developed.

Anticipatory reasonable accommodation has much in common with indirect discrimination. Indeed, the two concepts may be made to perform much the same function. Anticipatory reasonable accommodation, however, makes it very clear that the duty is an active duty to monitor, to anticipate and to take relevant action. It is therefore likely to prove easier to bring a claim for breach of it than to bring a claim for indirect discrimination in cases based on the failure of an organisation to act (eg to ensure that relevant disability-related assistance or provision has been made available). It may also escape some of the technical difficulty that appears to accompany indirect discrimination claims in some countries and, importantly, it may be easier for lay people to understand and act upon.

3.6 Accessibility

It is clear that strategies designed to promote accessibility have been developed by the vast majority, if not all, of the EU Member States. Indeed, compliance with minimum accessibility standards is required by EC law in certain contexts. These include the design of particular types of passenger bus, coach, train, ship and plane; and also

¹⁷² Law 47/2007, 26 December, on offences and sanctions in the field of equality for disabled people.

¹⁷³ By Act XXIII of 2007 which inserts a new Article 4(f) into XVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities.

¹⁷⁴ *Ibid*, Art. 4(h).

certain aspects of telecommunication.¹⁷⁵ Accessibility requirements relating to the construction of new buildings (particularly those to be financed through public funds) and to the substantial renovation of existing buildings also appear to exist in most Member States.

It is also patently clear that there is a wide divergence of approach between different Member States in relation to accessibility entitlements and standards. This variation is to be found in the nature and breadth of the issues subjected to principles of accessibility. In Germany, for instance, the Law on the Equality of the Disabled requires public bodies (but not the private sector) to grant disabled people hindrance-free access to infrastructure including public buildings, street environments and transport; and also to communication with public bodies (which should be made available through methods such as Braille and sign language). In Finland, there are requirements that the buildings used by the public administration, service-providers and businesses should be generally accessible to disabled people.¹⁷⁶

The accessibility strategies adopted by Member States place a heavy emphasis on issues of physical access. Less attention is generally devoted to issues of access to information, communication and technology. There are some notable exceptions, however, where careful attention has been given to ensuring access to information (eg through the provision of guidelines for accessible web design¹⁷⁷), television and products.¹⁷⁸

In addition to this variation between Member States as to the coverage of their accessibility strategies, there also appears to be considerable variation in their content. Detailed standards and specifications may be entirely absent. Even where they exist, it appears that their content may vary considerably from country to country.

Another important respect in which national approaches to accessibility requirements vary is in relation to enforcement mechanisms. The Australian approach of introducing legally enforceable disability standards,¹⁷⁹ under its federal Disability Discrimination Act 1992, does not appear to have been widely replicated in Europe.¹⁸⁰ In some Member States, a failure to comply with relevant accessibility standards represents an important consideration

¹⁷⁵ See generally L. Waddington, "Breaking New Ground: The Implications of the UN Convention on the Rights of Persons with Disabilities for the European Community" in O. Arnardottir and G. Quinn (eds.) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden, Martinus Nijhoff, 2009); and L. Waddington, "From Rome to Nice in a Wheelchair: The Development of a European Disability Policy" (Groningen, Europa Publishing, 2006). For more information on the numerous pieces of EC legislation which have an impact on the life of persons with disabilities outside employment, see also annex II of the Proposal for a Council Decision concerning the conclusion, by the European Community, of the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities, COM(/2008)530 final, available at: <http://eur-lex.europa.eu/Notice.do?val=479558:cs&lang=en&list=479558:cs,479552:cs,479582:cs,479581:cs,&pos=1&page=1&nbl=4&pgs=10&hwords=&checktexte=checkbox&visu=#texte>.

¹⁷⁶ Land Use and Building Act (132/1999) and Land Use and Building Decree (895/1999).

¹⁷⁷ See eg the "Remove Barriers" guidance provided in the Netherlands, available at www.drempelsweg.nl. This appears to be non-binding and unenforceable, however. It is also worth noting that in the US the Federal Government has adopted the W3C, Web Content Accessibility Guidelines, available at <http://www.w3.org/TR/WAI-WEBCONTENT>.

¹⁷⁸ See eg developments under the Spanish Law 51/2003 on Equality of Opportunities, Non-Discrimination and Universal Accessibility for the Disabled 2003; and Law on Urgent Measures to Promote Digital Terrestrial Television 2005. Note also that, in the US, the Architectural and Transportation Barriers Compliance Board (Access Board) promulgates accessibility standards for federal agencies in areas related to hardware and software products, telecommunications, and video and multi-media.

¹⁷⁹ For Education Standards see <http://www.dest.gov.au/sectors/school_education/programmes_funding/forms_guidelines/disability_standards_for_education.htm>; and for Accessible Public Transport Standards, see <<http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/E31CFFB47B7946BCA256FFE0015A9A3?OpenDocument>>.

¹⁸⁰ Although the Spanish and Portuguese approaches involve the drawing up of detailed plans covering accessibility issues, it is not clear from the reports whether compliance with these plans is mandatory and enforceable.

in discrimination cases (eg for direct discrimination in Hungary,¹⁸¹ for indirect discrimination in Austria,¹⁸² and for breach of the anticipatory reasonable adjustment duty in the UK¹⁸³). Many accessibility standards, however, appear not to be mandatory and not to define or shape national concepts of discrimination.

In summary, accessibility strategies can be found in the law of the vast majority of Member States. Nevertheless, considerable variation and some uncertainty is to be found in all aspects of the functioning of these strategies – including the areas of life to which they apply, the requirements which they lay down, the extent to which they are mandatory obligations rather than guidelines as to good practice or policy objectives, the extent to which they can be enforced and their relationship with principles of equality and non-discrimination. It appears to be an issue on which more detailed research would be useful. Encouragingly, there are indications that public opinion would be well disposed to the devotion of additional public funds to improving access for disabled people.¹⁸⁴

3.7 Positive Duties to Promote Disability Equality and Inclusion

The Mapping Study Report reveals the existence of positive duties to promote disability equality in a number of Member States. These may take the form of constitutional obligations to take positive action to promote equality,¹⁸⁵ duties imposed on governments or public bodies by equality laws to draw up plans and strategies to promote disability equality,¹⁸⁶ or duties to take active steps to ensure equal rights imposed on specific types of institution.¹⁸⁷ However, little detail about the functioning of these duties and their enforceability emerges from the reports. Nevertheless, because positive duties have great potential to counter disadvantage and promote equality, a few words will be devoted to the version of such a duty which has recently emerged in Britain.¹⁸⁸

The British disability equality duty imposes a general duty on all public authorities to have “due regard” to the following considerations when discharging all their functions:

- “(a) the need to eliminate discrimination that is unlawful under this Act;
- (b) the need to eliminate harassment of disabled persons that is related to their disabilities;
- (c) the need to promote equality of opportunity between disabled persons and other persons;
- (d) the need to take steps to take account of disabled persons’ disabilities, even where that involves treating disabled persons more favourably than other persons;
- (e) the need to promote positive attitudes towards disabled persons; and
- (f) the need to encourage participation by disabled persons in public life.”¹⁸⁹

¹⁸¹ See Section 3.2 above.

¹⁸² See Section 3.3 above.

¹⁸³ See Section 3.5 above.

¹⁸⁴ “Discrimination in the European Union”, Special Eurobarometer Report 263 (Brussels, January 2007) available at: <http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_sum_en.pdf> para 6.2.

¹⁸⁵ This appears to be the case in Greece and Spain.

¹⁸⁶ See eg the Irish Disability Act 2005 and the Lithuanian Law on Equal Treatment.

¹⁸⁷ In Sweden, for instance, such a duty is imposed on universities in relation to their students by the Law on Equal Treatment of Students in Higher Education 2001.

¹⁸⁸ See further S. Fredman, “Equality: A New Generation?” (2001) 30 *Industrial Law Journal* 145; S. Fredman, “Changing the Norm: Positive Duties in Equal Treatment Legislation” (2005) 12 *Maastricht Journal of European and Comparative Law* 369; C. O’Cinneide, “A New Generation of Equality Legislation? Positive Duties and Disability Rights” in A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice* (Oxford, Hart Publishing, 2005); and C. Gooding, “Promoting Equality? Early Lessons from the Statutory Disability Duty in Great Britain” (2009) 1 *European Yearbook of Disability Law and Policy* (forthcoming).

¹⁸⁹ Disability Discrimination Act 1995, s 49A (added by the Disability Discrimination Act 2005).

This general duty is supplemented by specific duties (created by statutory instrument¹⁹⁰) which require public authorities to draw up and publicise “disability equality schemes”. These schemes, which set out their plans for tackling disadvantage and promoting meaningful inclusion and participation, must be drawn up with the involvement of disabled people.

The general duty to have due regard to considerations of disability equality may be enforced by any person affected by the work of the public authority through judicial review proceedings. In addition, the Equality and Human Rights Commission¹⁹¹ has the power to assess the level to which a public authority has complied with this general duty; to make recommendations as to improvements; and to issue a compliance notice if the public authority fails to respond adequately to such recommendations. The failure of an authority to respond appropriately to such a notice entitles the Commission to apply to the courts for an order requiring compliance. The specific duties may also be enforced by means of such compliance notices by the Commission but not by judicial review proceedings.

Thus, while the general disability equality duty may be enforced by an interested disabled person, a failure to comply with it does not amount to discrimination. Further, while the duty requires authorities to take considerations of disability into account when making relevant decisions, it does not oblige them to reach a particular conclusion. It is accordingly an obligation of process rather than substance and, in that respect, differs from the anticipatory reasonable adjustment duty. Nevertheless, it provides disabled people with a powerful mechanism for challenging decisions which are likely to have the effect of perpetuating or increasing the isolation and marginalisation of disabled people. This is clearly illustrated by *R (on the application of Chavda and others) v London Borough of Harrow*¹⁹² where the decision of a local authority to withdraw care services from disabled people with “substantial” as opposed to “critical” needs was successfully challenged.

Positive duties, such as the British disability equality duty, are likely to prove more useful than conventional discrimination concepts in attempts to persuade public bodies to develop services or benefits needed by disabled people but not by others. It seems likely that there will be particular demand for such services and benefits in the contexts of healthcare, social security and transport. The impact and power of these duties, however, will extend beyond these contexts. Because they impose an enforceable duty to have due regard to disability equality in all aspects of the functioning of public bodies, they represent a means by which to make the mainstreaming of disability equality considerations mandatory. The need to involve disabled people in the drawing up of plans is likely to increase the effectiveness of this mainstreaming approach. Further, although these duties are confined to public bodies, the procurement of goods and services from the private sector would be regarded as one aspect of the functioning of such bodies. Considerations of disability equality must therefore be given “due regard” in the procurement process and consequently be made to reach out into the private sector.

¹⁹⁰ See eg the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005.

¹⁹¹ <http://www.equalityhumanrights.com/en/Pages/default.aspx>.

¹⁹² [2007] England and Wales High Court 3064.



Aïcha | 1997

Conclusion

The most challenging disability-related issues with regard to the Employment Equality Directive are establishing who is protected from discrimination on the grounds of disability and clarifying the concept of, and obligations with regard to the making of, a reasonable accommodation. With regard to the first point, relating to the personal scope of the Directive with regard to disability, the European Court of Justice has handed down two important rulings in *Chacón Navas* and *Coleman*.

The definition of disability developed by the Court in *Chacón Navas* is based on the medical view of disability, and is largely in line with the definitions of disability found in the non-discrimination laws of most Member States.¹⁹³ Where national legislation does not contain a definition of disability, the Court’s ruling can provide a framework for interpreting the concept at national level. However, in a number of Member States, the definition of disability used in the context of non-discrimination legislation generally, or with regard to reasonable accommodation specifically, is based on the definition used in the context of national social security legislation. This means that an individual is required to have their disability officially recognised by the administration or social security office before they can claim protection under national non-discrimination law transposing the Directive. This highly limited and restrictive approach to personal scope seems to amount to a breach of the Directive, and seriously reduces its effectiveness.

With regard to the issue of reasonable accommodation, there is a high degree of consistency in the way national non-discrimination legislation understands both the notions of “accommodation” and “disproportionate burden”. Whilst, on occasions, terms which differ from those found in the Directive are used in transposition legislation with regard to these two issues, this does not seem to reflect a different conceptual understanding.

In contrast, the notion of “reasonableness” with regard to an accommodation has been interpreted in three different ways in the non-discrimination legislation of the Member States, and as referring to:

- an accommodation which is not *unduly difficult* or *troublesome* for the employer to implement;
- an accommodation which is *effective* in allowing a person with a disability to carry out the employment or training related tasks; or
- an accommodation which is not *unduly difficult* or *troublesome* for the employer to implement and which is *effective* in allowing a person with a disability to carry out the employment or training related tasks.

The latter interpretation is arguably most in line with that found in Article 5, although it is certainly not the most straightforward to interpret and understand. The two other approaches identified above may also be compatible with Article 5, and may be more straightforward to apply and understand. This is because these approaches make use of a two-stage test, with the question of whether there exists a suitable accommodation which can be made, being assessed separately from the issue of whether there is any legal justification for not making the accommodation. It is submitted that the ECJ would be wise to follow this two-stage approach when it is called upon to interpret Article 5 of the Directive.

Outside the context of employment, disabled people are exposed to discrimination which has serious and damaging consequences for them as individuals and also for society more generally. Such discrimination is not yet addressed by EC non-discrimination law. At the national level, however, many States have responded to the problem – albeit in different ways and to varying degrees. Indeed, even where no protection is afforded from discrimination (as in Greece, Denmark and Poland) strategies to promote accessibility are to be found.

¹⁹³ Although it is worth noting that the ECJ in its *Chacón Navas* judgment did not refer to sensory impairments (mentioning instead only “physical, mental or psychological impairments”). In contrast, the definitions of disability found in national non-discrimination law do frequently make explicit mention of sensory impairments.

Although the terminology is not always consistent and the content of relevant legislative provisions diverge, it is clear that a number of Member States employ the notion of direct discrimination to tackle the less favourable treatment of disabled people in areas outside employment. Unlike in the Employment Equality Directive, however, direct discrimination is often defined in such a way as to allow for a general justification defence. Another individual-orientated (as opposed to group-orientated) legal tool which has been adopted by several Member States outside the employment field is that of (reactive) reasonable accommodation. Where this concept is used, however, there is a wide range of approaches as to its enforceability and effect. Indeed, it is not always placed on a mandatory footing and, even where it is, a failure to provide a reasonable accommodation does not always amount to discrimination.

Group-orientated legal tools for tackling disability discrimination outside the employment context also exist at national level. The most common example of such a tool is that of indirect discrimination. Anticipatory reasonable accommodation is another. It should be noted, however, that while both of these concepts possess group dimensions, they are generally enforceable only by an affected individual.

Strategies designed to promote “accessibility” feature, in various ways, in the law or policy of all Member States. Such strategies are often unenforceable by an individual, however. Nevertheless, in some countries they can be factored into one or more of the types of discrimination claim mentioned in the previous paragraphs (particularly into indirect discrimination and anticipatory reasonable accommodation claims) with the result that they acquire legal force.

Positive duties to counter disability discrimination and to promote equality have also emerged in the laws of some Member States. These provide a useful supplement to the imposition of non-discrimination obligations and have the potential to increase the pace of progress towards equality and inclusion quite significantly. The likelihood of them achieving this potential is considerably enhanced if their implementation is closely monitored and facilitated by some form of independent equality body; if they are enforceable by individuals or groups with an interest in the operations of the duty-bearer; and if their discharge involves the production of plans which must be drawn up with the involvement of disabled people.

There has thus undoubtedly been activity at national level in relation to legal strategies for tackling disability discrimination outside employment. However, the extent, strength and quality of the protection from discrimination which is afforded to disabled people varies widely from country to country. Although there are some States in which that protection appears to be extensive and relatively strong, there are others in which it is severely limited in coverage or in strength. There is therefore an urgent need for the levels of protection afforded in many States to be raised to match those afforded by others – a need which has driven the current move towards the adoption of a new directive on non-discrimination outside employment.

Michelle | 1997

John | 1959



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Austria

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Cyprus

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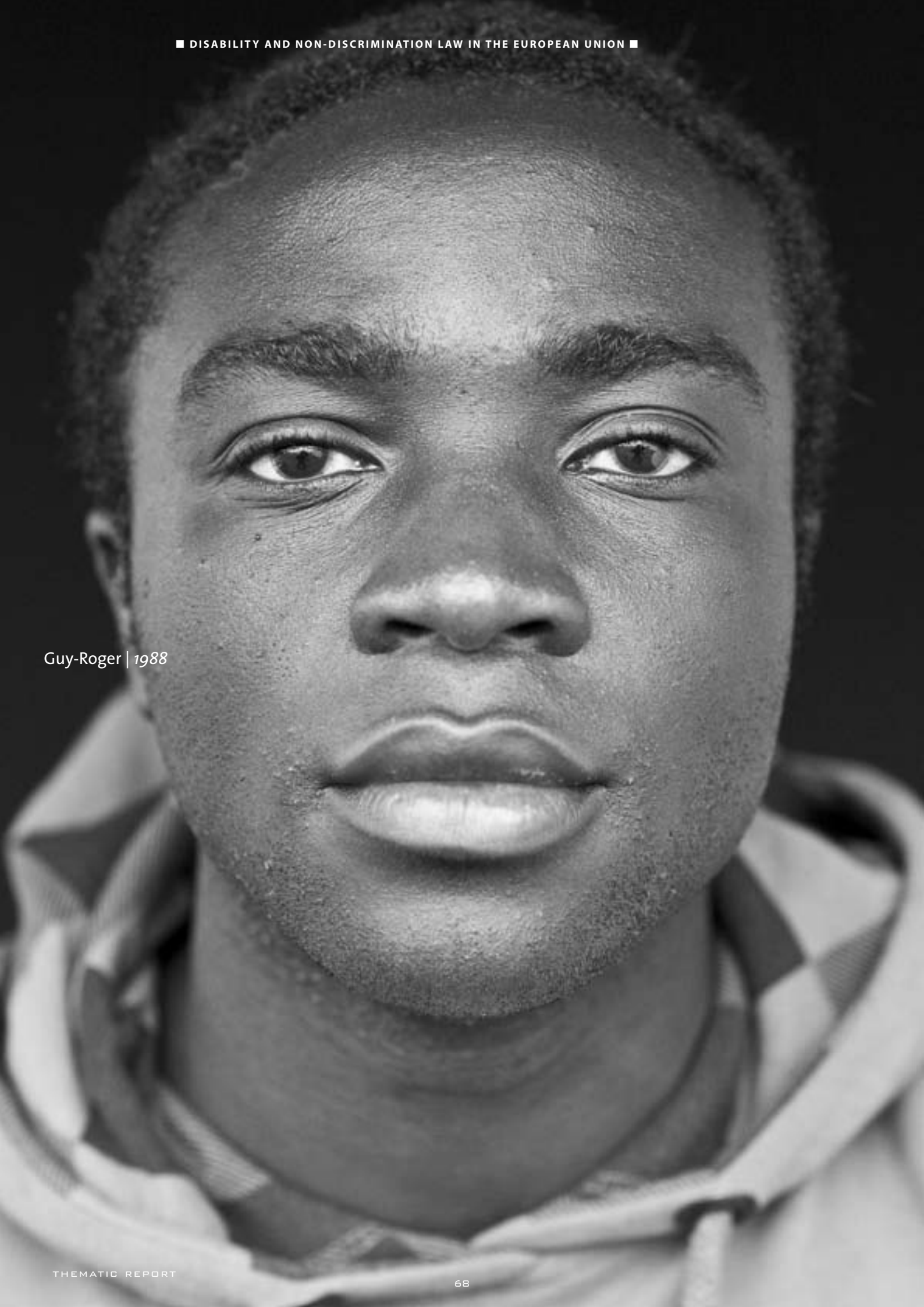
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Guy-Roger | 1988

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Giorges | 1965

Peter | 1968



Annex

General Accessibility & Reasonable Accommodation for People with Disabilities

Summary overview of national legislation¹⁹⁴

¹⁹⁴ This Annex has been drafted by the Migration Policy Group on the basis of information provided by the European Network of Legal Experts in the non-discrimination field.

Information on Member States' legislation outside the field of employment

(covering social security, healthcare, education, access to goods and services available to the public including housing, and public spaces and infrastructure)

Austria

The reasonable accommodation duty constitutes an individual right and is generally not anticipatory. It covers services, including education, housing, social security and healthcare, access to and supply of goods and services which are available to the public, and public spaces and infrastructure.

This duty is fully safeguarded within the legislative competence of the Federation and of most Federal States with the important exception of Vienna and Lower Austria.

Building regulations require all new buildings and means of public transport to be accessible by 2015. New buildings or new reconstructions co-funded with public money had to be accessible from 1 January 2008.

Belgium

The reasonable accommodation duty fully covers social security and partially covers healthcare, education, access to goods and services available to the public including housing, and public spaces and infrastructure. In all the antidiscrimination norms in force, the absence of reasonable accommodation is included within the definition of discrimination; there is consequently an obligation imposed on the different actors concerned to provide such a reasonable accommodation unless the measures would impose a disproportionate (financial) burden on the actor concerned. In that sense, the obligation to provide reasonable accommodation is always dependent on the cost. However, all the legal texts specify that the burden shall not be deemed disproportionate when it is sufficiently remedied by measures existing within the framework of current disability policy.

Building regulations requiring all new buildings open to the public to be accessible are abundant but little known or respected. The most serious issue, without any doubt, is the absence of mandatory regulation applicable to buildings that already exist. Moreover, except in the Region of Brussels-Capital (with the new RRU), the current legislation does not apply to mental and sensory disability (blindness, deafness, dumbness/mutism), but only to physical disability. It should also be stressed that Belgian legislation regarding general accessibility may lack coherence and coordination as special norms are adopted by each regional entity.

Bulgaria

Public authorities and universities have absolute reasonable accommodation duties in education, while other educational authorities have proportionate reasonable accommodation duties. Reasonable accommodation is also provided for in access to goods and services, healthcare, social protection and integration, social security and public housing.

Anti-discrimination law requires that all public architecture and infrastructure be accessible.

Cyprus

Although the law transposing Directive 2000/78/EC does not expressly provide for the right to accessibility or to reasonable accommodation in fields outside employment, the nature of the rights provided (which go well beyond the minimum requirements of the Directive) is such as to imply the duty to provide reasonable accommodation and accessibility as a necessary element of their implementation. Most of these rights, however, are not absolute and are enforceable through the adoption of 'reasonable measures' which are so widely defined that they fall short of creating a mandatory regime. It is nevertheless a fact that if the pre-conditions are satisfied, which is very often the case, there is a clear duty to provide reasonable accommodation and/or accessibility in order to implement the rights guaranteed by the law in several fields outside employment. Furthermore, the mandate of the equality body, which goes well beyond the minimum required by Directive 2000/43/EC, includes the promotion of equality of opportunity irrespective of, *inter alia*, special needs in the fields of social protection, social insurance and healthcare, education and access to goods and services including housing. In its decisions, the equality body has often invoked these provisions, as well as provisions from European instruments and international conventions, in order to establish the right to reasonable accommodation in or accessibility to fields such as education and healthcare. Accessibility to the built environment and infrastructure (streets and buildings) is regulated by special subsidiary legislation, albeit not framed in a manner so as to confer enforceable rights on persons with disabilities.

Czech Republic

The reasonable accommodation duty exists in relation to enumerated areas in the newly approved anti-discrimination law, which is due to come into force three months after its forthcoming publication in the Collection of Laws. In Paragraph 2 of Section 3, the Law requires reasonable accommodation to be provided for persons with disability with respect to access to employment, the carrying out of working duties, promotion, counselling and vocational training and education, and to enable persons with disabilities to use services provided publicly. In determining the reasonableness of accommodation, attention should be paid (according to the Law) to the extent to which the measure would accommodate the needs of the disabled person, financial and other factors, availability of financial assistance and availability of alternative arrangements.

There is no time limit by which the general accessibility of buildings used for particular purposes must be achieved. However, all newly constructed and renovated buildings must be designed so as to ensure the safety of persons with limited mobility and orientation who use them.

Denmark

Disability is one of the least protected grounds of discrimination in Denmark. As a point of departure, the legislation covering this area is not based on 'the principle of rights' but on 'the principle of compensation', which means that disabled people are offered help and other forms of compensation in order to compensate for/reduce the consequences of the disability. The principles of equal treatment for persons with disabilities are integrated into many areas of legislation, but some areas are almost completely unregulated, e.g. access to information and participation in cultural life, leisure and sport. According to the principle of sectoral responsibility, responsibility for equal treatment for persons with disabilities is attributed to the authority generally responsible for the area.

The understanding of disability in Danish social policy is based on an environmental perception of disability. The term used is 'handicap', which refers to limitations to a person's ability to participate in society on equal terms, caused by the inability of that society to meet the needs and requirements of people with disabilities. According

to Regulation no. 1250 of 13 December 2004 regarding accessibility in connection with the rebuilding of existing buildings, a number of accessibility measures should be taken in order to ensure minimum accessibility; the regulation covers all public buildings and commercial buildings for services and administration.

Estonia

In current Estonian legislation there are no specific norms to address the issue of reasonable accommodation in fields outside employment. The new Law on Equal Treatment addressed the issue of reasonable accommodation of disabled people only within the material scope of Directive 2000/78/EC.

The Law on Education guarantees access to education for disabled people.

The Law on Public Transport provides certain benefits for disabled passengers on domestic lines in railway, road and waterway traffic (free services or services for a reduced fare).

The State may pay for the acquisition of public transport vehicles intended for the carriage of disabled persons or for the reconstruction of public transport vehicles for the carriage of disabled persons.

The Law on Electronic Communications specifies that disabled clients should be accorded privileged treatment.

According to the Law on Building, parts of buildings that are for public use must be accessible to and usable by persons with reduced mobility and by visually impaired and hearing impaired persons. Detailed requirements are established in the Decree of 28 November 2002 of the Minister of Economic Affairs and Communications for both public places (including infrastructure) and public buildings (e.g. administrative buildings, hospitals, educational institutions etc.). These rules are equally applicable to existing public buildings if they are renovated and for some existing healthcare/social security facilities.

At present, interested parties may apply for structural funds in order to cover expenses related to the implementation of the requirements of the 2002 Decree.

Finland

The reasonable accommodation duty is only partially anticipatory, covering mainly services, education, social security, building regulations and land use planning. It is required that where necessary any reasonable steps are taken to help a person with disabilities gain access to work or training, to cope at work and to advance in their career.

Building regulations require that all new buildings intended for specified functions also be suitable for people with limited mobility or functioning. For instance, the Land Use and Building Act [*maankäyttö- ja rakennuslaki* (132/1999)] and the Land Use and Building Decree [*maankäyttö- ja rakennusasetus* (895/1999)] require that buildings that are used by the administration, service providers or businesses (subject to certain conditions) have to be accessible to persons with disabilities. The equality laws and their *travaux*, however, do not address the question of whether a failure to comply with this legislation constitutes discrimination.

The objective of land use planning is among other things to promote, through interactive planning and sufficient assessment of impact, a safe, healthy, pleasant, socially functional living and working environment which provides for the needs of various population groups such as children, the elderly and the disabled.

Regarding public services, legislation requires that municipalities ensure that services and assistance for people with disabilities are provided in the form and on the scale needed in the local community.

France

France has adopted a comprehensive reform to shift the emphasis of legislation relating to people with disabilities from compensation to integration, which includes obligations in terms of accessibility, social protection and health. This legislation is also an attempt to adapt the existing legal and social environment in order to ensure full participation by people with disabilities.

Reasonable accommodation is used as a concept only in relation to employment law. However, a number of positive obligations have been framed to ensure accessibility and reasonable accommodation outside employment. In education, the legal obligation of the state to provide access is absolute, but *de facto* limited by resources.

As regards the built environment, there is a duty to insure accessibility. According to Law no. 2005-102 of 11 February 2005, the built environment including pavements, buildings, streets, and public facilities must allow total accessibility for disabled persons within ten years of publication of the Law on Disability and public transport must offer complete accessibility within three years, or offer substitute transport services to disabled persons. Decrees relating to application of the law foreseeing the adaptation of public infrastructure, were adopted in the course of 2006. Reasonable accommodation and accessibility is enforced through the Penal Code Article 225-2, which provides for an obligation to provide access to goods and services that has been interpreted as including a positive obligation to conform to existing construction and accessibility legislation relating to housing and public places.

Germany

The reasonable accommodation duty is partly anticipatory, regulated through specific legislation, and covers social security, healthcare, education, goods and services, including public services, and access to and mode of provision of infrastructure. Actual requirements are dependent on the area regulated. As far as state services are concerned, according to the Law on Promoting the Equality of the Disabled, the principle of *Barrierefreiheit* (lack of barriers) is the leading principle for organising public services, including the requirement that new Federation buildings and major changes of existing Federation buildings should accommodate the needs of disabled persons. The same principle holds for other buildings, public streets and squares and public transport. The existing regulations may be interpreted to cover the complete provision of reasonable accommodation, subject to judicial interpretation.

Greece

The recent specific Law 3699/2008 Special action and education for persons with disabilities provides a series of measures concerning general accessibility and reasonable accommodation. The obligation is absolute.

Law 3549/2007 (article 12 par. 1) provides that in every Greek university department a special unit to 'support' disabled students must be established. The obligation is absolute.

Law 2646/1998 provides for the establishment of a 'National System for Community Care', including, *inter alia*, social resettlement.



Alain | 1974

According to the detailed Ministerial Decision no. 3046/304/1988, new buildings should provide reasonable access to people with disabilities. Also, according to Ministerial Decision no. 1051240/385/A0013/2004, disabled persons have the right to buy their own (first) house without paying property tax. Both obligations are absolute.

According to Ministerial Decision no. 44867/1637/1.8.2008, the providers of mobile phones are obliged to provide reasonable accommodation (special telecommunication programmes) to users with disabilities. The obligations are dependent on the number of users.

There are specific constitutional provisions directly addressing persons with disabilities: above all, the significant Constitutional Revision of 2001 stipulates in Article 21.6 that: 'People with disabilities are entitled to benefit from measures ensuring their self-sufficiency, professional integration and participation in the social, economic and political life of the Country'. Article 21(2) and (3) specify that 'families with many children, disabled war and peace-time veterans, war victims, widows and orphans, as well as persons suffering from incurable bodily or mental ailments are entitled to the special care of the State' and that 'The State shall care for the health of citizens and shall adopt special measures for the protection of youth, old age, disability and for the relief of the needy'.

Hungary

The Hungarian system does not contain the concept of reasonable accommodation to the particular needs of individuals with disabilities outside employment - with the exception of elementary education, where, if a pupil with a disability may be educated in an integrated manner and there is no school in the particular settlement where the personal and material conditions are in place, the local council is obliged to make the necessary accommodation measures.

In all other areas the legislation approaches the issue from the point of view of general and anticipatory accessibility. There is an overlap in the regulation of publicly available goods and services (including social and health services as well as education) and public spaces as the definition of an accessible service includes the accessibility of the space (building) where the service is provided. Different deadlines have been set for making the services of different entities accessible. For all state activities the deadline is 31 December 2010, for all private actors 31 December 2013, whereas in the case of local councils different deadlines have been specified for different services: 31 December 2008 for health services, 31 December 2010 for client services and 31 December 2009 for any other service (social care, child protection, education, etc.)

Ireland

The reasonable accommodation duty is anticipatory and covers services, education and social security. It is required that reasonable accommodation is made unless the cost would be more than nominal, taking into account whether the body in question is public or private, its size, resources and whether State grants are available and availed of. There is a broad general exception of unknown scope where any other statutes apply and an exception in education where reasonable accommodation would be detrimental to the education of other students.

The equality legislation does not require buildings and infrastructure to be designed and built in a disability-accessible way. However, building regulations require all new buildings including houses to be accessible, and all public buildings, public spaces and state services 'where possible/ practicable' to be accessible by year 2015.

Italy

Reasonable accommodation is not used as a legal concept in Italy, although there are of course pieces of legislation imposing obligations to take account of the needs of persons with disabilities in specific areas.

Certain minimal standards are imposed on the construction of new private buildings. Buildings to be used for providing public services are subject to stricter standards that must ensure full accessibility.

Latvia

Latvian law does not provide for reasonable accommodation outside the sphere of employment.

Construction law requires that buildings be designed in a way guaranteeing accessibility, yet this requirement is not formulated so as to make it a clear obligation. Hence this requirement is regarded as merely declaratory and is often disregarded.

Lithuania

The duty to provide reasonable accommodation is not directly established in Lithuanian law.

The Law on Equal Treatment obliges the employer to take appropriate measures to provide conditions suitable for people with disabilities in employment, and similar provisions apply to education. Although these obligations are set out in this law, their content is not detailed in it or in other laws.

The Law on the Social Integration of the Disabled (*Neįgalųjų socialinės integracijos įstatymas*, Žin., 2004, No. 83-2983) states that the social integration of people with disabilities comprises the provision of medical, professional and social rehabilitation services, provision for special needs using special equipment, support for the employment of disabled people, social assistance, the award and payment of pensions and benefits from the State Social Insurance Fund, the award and payment of benefits from the Compulsory Health Insurance Fund, the provision of education services, and ensuring equal opportunities to participate in culture, sports and other areas of public life.

The Law on Construction¹⁹⁵ does not provide any requirements regarding accessibility for people with disabilities, but the Regulation of the Minister for the Environment 'Buildings and Territories. The Requirements regarding the Special Needs of Disabled People'¹⁹⁶ lays down detailed requirements for all public buildings to be made accessible to disabled people.

Article 11 of the Law on the Basics of Transportation Activity¹⁹⁷ provides that public transport facilities which are intended for passengers must be thoroughly adapted for comfortable and safe use by people with physical disabilities. The law does not include any qualifications. The same provision may be found in Article 33 of the Railway Transportation Code.¹⁹⁸

¹⁹⁵ The Law on Construction (Statybos įstatymas), No. IX-583, 2001-11-08, Žin., 2001, Nr. 101-3597 (30-11-2001).

¹⁹⁶ Regulation of the Minister for the Environment 'Buildings and Territories. The Requirements regarding Special Needs of Disabled People' (*Aplinko ministro įsakymas 'Statiniai ir teritorijos. Reikalavimai žmonių su negalia reikmėms'*, 2001-06-14, No. 317, Žin., 2001-06-22, Nr. 53-1898).

¹⁹⁷ The Law on the Basics of Transportation Activity (*Transporto veiklos pagrindų įstatymas*), revised version of 28 February 2002. No. IX – 747, Žin., 2002-03-20, Nr. 29-1034.

¹⁹⁸ The Railway Transportation Code (*Geležinkelių transporto kodeksas*), 22 April 2004 No. IX-2152, Žin., 2004-04-30, Nr. 72-2489.

Article 8 of the Law on Equal Treatment lays down requirements for salespersons, manufacturers, and service providers according to which regardless of a person's age, sexual orientation, disability, racial or ethnic origin, religion or belief, they must create equal conditions for all consumers to access products, goods and services (including the provision of housing) and apply equal cost terms and guarantees.

Luxembourg

There is no duty of reasonable accommodation in fields outside employment and occupation i.e. social security and healthcare, education, access to and supply of goods and services which are available to the public and housing, public spaces and infrastructure.

Legislation grants accessibility to disabled people vis-à-vis public administration by providing for an obligation for newly built or refurbished buildings to be adapted to the needs of the disabled.

A Grand-Ducal Regulation specifies the kind of sites that must be accessible to the disabled and covers roads and other open spaces for pedestrians as well as buildings such as: schools and kindergartens, universities, touristic sites, hospitals, sports fields and playing grounds, religious buildings and cemeteries, prisons, train/bus stations and airports, public administration buildings, hotels and buildings deemed similar, public banks, including parking places, toilets and telephone facilities.

The Law of 23 July 2008 '*relative à l'accessibilité des lieux ouverts au public aux personnes handicapées accompagnées de chiens d'assistance*' entered into force on 11 September 2008 and allows dogs assisting people with disabilities to enter any public space and any site open to the public.

Malta

The obligation to provide reasonable accommodation explicitly exists only in the field of employment. Building regulations require all new buildings (except private offices other than banks) to which the public have access to be accessible to persons with disabilities – apart from exemptions which may be granted on the basis of the reasonableness test under the provisions of the Equal Opportunities Persons with Disability Act, 2000.

Netherlands

The reasonable accommodation duty is mainly applicable in the fields of employment and vocational education. The Dutch legislature has passed bills to extend the scope of the Disability Discrimination Act to housing from 15 March 2009 and to primary and secondary education (new Articles 6a-6c of the DDA) from 1 August 2009.¹⁹⁹ However the obligation to provide reasonable accommodation covers the fields of primary and secondary education but not housing. In education, there are already social security provisions which provide a certain amount of money for parents of children with disabilities in order to enable their schools to provide reasonable accommodation for their children and to give them with special attention.²⁰⁰

¹⁹⁹ Kamerstukken Tweede Kamer, 2008/2009, 30 859 *Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen*.

²⁰⁰ This provision is nicknamed '*het rugzakje*' (the rucksack).

There is no legal obligation to grant accessibility to disabled persons in a general and anticipatory manner. As far as public spaces and buildings (in which public offices and social services are located), and education, healthcare and infrastructure are concerned, there are some specific (building) regulations laying down requirements, e.g with respect to ramps and the width of doors.

Poland

Duties to make reasonable accommodation are not detailed, but are rather general in nature. They cover education and healthcare and, to some extent, social security. It is required that schools are accessible and accommodate the needs of disabled people if necessary. Within the healthcare system, as well as in relation to social security, there are special procedures, benefits and institutions for disabled people.

There are not many provisions explicitly indicating a binding obligation to grant accessibility to goods, services, public spaces and infrastructure. However, a large number of laws mention the provision of reasonable accommodation for people with disabilities, some of them in a very vague manner, while others, like the legislation on buildings, in quite a detailed and technical manner.

Portugal

The reasonable accommodation duty is anticipatory and covers education, employment and goods and services. All areas (including but not confined to these) are covered by specific National Plans (e.g. the National Plan for Employment - 2005/2008; the National Plan for vocational training and employment for disabled people; the Intervention Programme for an inclusive labour market; and the Plan of Action for the integration of people with disabilities or those who are incapacitated) which do not contain mandatory rules. Law No. 33/2008 of 22 July 2008 'establishing measures to promote access to information about specific goods by blind and visually impaired people'²⁰¹ requires large retail spaces to provide blind and visually impaired people with information in Braille about products on sale by 22 January 2009. This law is applicable to retailers who own at least five establishments, each one with a surface area greater than 300m² and where both food and non-food goods are sold. Such retailers should in at least one shop per municipality provide individual assistance to visually impaired people. Retailers do not have to offer such assistance in the other four establishments.

Concerning education, Decree-law 3/2008 of 7 January 2008 specifies special support to be given to students at pre-school, basic and secondary level education in the public, private and cooperative sectors and aims to create appropriate conditions for the learning process to be adapted to the special learning needs of students with significant limitations on their activity and level of participation in one or more areas of life.

The obligations depend on cost. There is no definition of reasonableness.

As regards accessibility, a specific National Plan for the Promotion of Accessibility is being implemented. This plan focuses on the promotion of accessibility to buildings and public premises, to transport, and to information and communication technologies. The social aim of this plan is to integrate disabled people into society to enable them to take an active part in society and lead a normal life. The environment created by this plan should be barrier-free and suitable to fulfil the needs of all people equally.

²⁰¹ *Lei n. º 33/2008 de 22 de Julho Estabelece medidas de promoção da acessibilidade à informação sobre determinados bens de venda ao público para pessoas com deficiências e incapacidades visuais.*

Decree-law 163/2006 of 8 August 2006 which sets out the accessibility regime applicable to buildings and public premises foresees in Article 9 stipulates that:

- 1 - Buildings and premises built before August 1997 should be adapted within a period of ten years from its entry into force (2017);
- 2 – Buildings and premises built after August 1997 should be adapted within a period of five years from its entry into force (2012);
- 3 – Those buildings and premises which were built under Decree-law 123/97 of 22 May 1997 are exempt from this obligation.

All new buildings and premises should follow the technical rules and measures laid down by this decree-law and must be accessible.

Romania

The reasonable accommodation duty is anticipatory, covers work relations and, partially, education. No appropriate sanctions are provided for the failure to enforce legal provisions.

Public authorities also have a duty to establish conditions for access to all types of services through specific measures. Building regulations require all new buildings to be accessible, otherwise no building permit is issued. Regarding state services, legislation requires that central and local authorities take special measures to ensure accessibility in the areas of public transportation, education, communications, hotels, and social services. No sanctions are provided in case of failure to comply with the deadlines established in the law.

Slovak Republic

The reasonable accommodation duty is general and partially covers education. Universities and colleges are required to create appropriate conditions for students with disabilities, meaning that they must provide an individual course of study, prolongation of study where appropriate and exemption from fees.

Building regulations have required all new buildings to be accessible since December 2002. The same applies to infrastructure, phone boxes, post boxes and ATMs.

State services are covered by the Anti-discrimination Act's general prohibition of discrimination on the ground of disability in access to and provision of social security, healthcare, education, and goods and services available to the public including housing. The Anti-discrimination Act does not separately list public spaces and infrastructure.

Slovenia

The reasonable accommodation duty is not imposed explicitly by national legislation. It is imposed indirectly by the Vocational Rehabilitation and Employment of Disabled Persons Act, but only in the area of employment.

The duty to grant accessibility covers only the area of employment. Other areas are not covered.

Spain

The reasonable accommodation duty covers public spaces and buildings, transport, goods and services available to the public, and relations with the public administration.

Reasonable accommodation is defined as ‘measures to adapt the physical, social, and attitudinal environment to the specific needs of persons with disability which effectively and practically, without involving a disproportionate burden, facilitate accessibility or participation for a person with disability on the same terms as for other citizens’. Existing goods and services ‘liable to reasonable adjustment’ must be adjusted before 2018 if they are public and before 2021 if they are private.

Existing developed public areas and housing ‘liable to reasonable adjustment’ must be adjusted before 2021. New goods and services must comply with the accessibility conditions before 2011 if they are public, and before 2021 if they are private.

New developed public spaces and housing must comply with the accessibility conditions before 2011.

Sweden

Building regulations require all new buildings to be accessible as a necessary condition of being granted a building permit. In older buildings, and in public places to which the general public have access, easily removed obstacles must be removed at the property owner’s expense. Housing is not regarded as an area to which the general public have access.

The burden of accessibility in individual cases rests with the disabled person. Social law offers assistance in meeting this burden and discrimination law plays a truly marginal role. The exceptions are employers and providers of higher education. Here discrimination law clearly states that a refusal to undertake reasonable accommodation can amount to discrimination. This is probably also the case with basic education, although it is not stated clearly in discrimination law.

United Kingdom

Duties to make reasonable accommodation cover access to goods and services, education (with some limited exceptions for individual schools), infrastructure, new housing, vehicles with a link to public transport provision (including taxis), some elements of rental property and the performance of public functions (including the provision of public services which includes the maintenance of public places).

There is no general obligation to provide reasonable accommodation for persons with disabilities through social security and state healthcare provision. However, public authorities (including health authorities) are required to take all reasonable steps to change practices, policies or procedures which make it ‘impossible or unreasonably difficult’ for persons with disabilities to receive a benefit. Various specific forms of state aid and healthcare are provided through social and healthcare services. Also, providers of social security and healthcare services, which include government welfare offices, hospitals, care homes and so on, are treated as suppliers of goods and services and are therefore subject to the general accommodation duty imposed on all service providers. All of these accommodation duties are broadly anticipatory. A standard approach to defining ‘reasonableness’ exists (which can include cost factors) and justification defences are also available, to which substantial reform is proposed by the UK government.

European Commission

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