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**Implementing and Interpreting the Reasonable Accommodation Provision of the
Framework Employment Directive:
Learning from Experience and Achieving Best Practice**

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I. Introduction

From a disability perspective one of the most challenging and potentially most far-reaching provisions of the Framework Employment Directive is Article 5 that creates an obligation to make reasonable accommodations for disabled individuals. Although similar obligations could be found in various (non-European) disability non-discrimination laws that existed prior to the adoption of the Directive, the concept is relatively new and unexplored in the European arena.¹ The concept raises many questions: ranging from how reasonable accommodation relates to the broader equality principle found in EU law, to complicated matters of interpretation which will determine the limits of the obligation. The Directive itself, with its brevity, is ill placed to provide much insight to these matters.

The goal of this paper, resulting from the work of the European Commission Expert Group on Disability Discrimination, is to provide some preliminary guidance on the reasonable accommodation provision in the Directive. Such guidance can be of value to policy makers who have the task of implementing the reasonable accommodation requirement, and to courts, including the European level courts, which will be called upon to interpret and apply the implementation legislation and, ultimately, the Directive itself. In addition, the paper will provide an overview of the measures which have been taken thus far to implement Article 5 of the Directive. The paper adopts a comparative approach, considering not only relevant instruments and case law from within the EU, including those provisions which have recently been adopted to implement Article 5, but also reflects on the experience of non-European jurisdictions which have a longer history of working with the reasonable accommodation requirement.

1. The Directive and Reasonable Accommodation: Article 5 and the Preamble

The Framework Employment Directive specifies in Article 5:

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 undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Some guidance is provided as to meaning of the concepts "reasonable accommodation" and "disproportionate burden" in preamble paragraphs 20 and 21 respectively:

20. 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.

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 Directive therefore requires employers to make reasonable accommodations to meet the needs of disabled individuals unless this would result in a disproportionate burden being imposed upon the employer. In determining whether any particular accommodation would result in a disproportionate

¹ This is particularly true for civil law countries (continental Europe). Sweden was the only such Member State that had explicitly recognised a duty to make reasonable accommodations in favour of disabled people prior to the adoption of the Directive.

burden one of the factors to be considered is the availability of public funding or support to (partially) meet to the costs of the accommodation.

2. An Introduction to the Theoretical Background

The Framework Employment Directive is based on Article 13 EC, which gives the European Community the competence to take action to combat discrimination. The Directive has the explicit goal of establishing "a general framework for combating discrimination ... with a view to putting into effect in the Member States the principle of equal treatment". In light of this goal, the reasonable accommodation requirement found in the Directive can be characterised as a particular kind of non-discrimination legislative provision, related to, but not synonymous with, the established forms of direct and indirect discrimination. Conventional employment non-discrimination legislation, including the long-standing EC gender based Directives and the Article 13 Race Directive, is based on the premise that employers should not take into account certain characteristics such as gender or race. These characteristics are generally classified as irrelevant, and not pertinent to the employment decision. For this reason non-discrimination legislation usually adopts a symmetric approach, meaning that both the dominant group (e.g. men, ethnic majority) and the disadvantaged group/minority group (e.g. women, ethnic minority) are protected by the discrimination prohibition. This can be regarded as a 'sameness' model of discrimination. Under this model, discrimination occurs when individuals who are fundamentally the same are treated differently for illegitimate reasons.

Disability anti-discrimination legislation also takes as its starting point the premise that impairment is irrelevant to the employment decision and, in this context, can likewise adopt a symmetric approach. However, disability non-discrimination legislation frequently also includes a requirement to make 'reasonable accommodations'. This requirement obliges employers not to ignore disability, but *specifically to take it into account*. A 'reasonable accommodation' requirement prohibits an employer from denying an individual with a disability an employment opportunity, by failing to take account of the protected characteristic, if taking account of it – in terms of changing the job or physical environment of the workplace – would enable the individual to do the work.

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

Modern disability non-discrimination legislation generally recognises this "difference" model of discrimination by creating a requirement to make reasonable accommodations for disabled individuals. Legislation in the US and Canada was at the forefront of this trend, which can now be identified worldwide. It is submitted that the Framework Employment Directive, and Article 5 providing for reasonable accommodation, should also be regarded in this light. This is explored in more detail below, particularly in relation to Issue 2 (relationship between reasonable accommodation and positive action) and Issue 8 (relationship between reasonable accommodation and direct / indirect discrimination).

3. The Issues

The paper addresses eight issues which are relevant for the implementation and interpretation of the reasonable accommodation requirement found in the Framework Employment Directive. Each issue is examined separately, and both theoretical issues and existing legal provisions are addressed. The paper covers the following topics:

Issue 1: What is a ‘Reasonable Accommodation’?

Issue 2: Is ‘Reasonable Accommodation’ a Form of Positive Action?

Issue 3: Is it sufficient to establish a negative duty to accommodate i.e. a failure to accommodate amounts to discrimination, or must a positive duty to accommodate be established?

Issue 4: Who Should be Entitled to a ‘Reasonable Accommodation’?

Issue 5: What is the Best Process by Which Individualised ‘Reasonable Accommodations’ Can be Identified?

Issue 6: What Limits Exist to the Making a ‘Reasonable Accommodation’? When will making a “Reasonable Accommodation” amount to a “Disproportionate Burden”?

Issue 7: What Should be the Role of the Public Sector as an Employer and a Provider of ‘Reasonable Accommodations’? What is the relevance of the public subsidies?

Issue 8: How does a Duty to Accommodate fit into the Non-Discrimination Framework?

In considering these issues particular attention is paid to legal systems where a reasonable accommodation duty already exists. Prior to the adoption of the Framework Employment Directive three Member States, namely the United Kingdom,² Ireland³ and Sweden,⁴ already provided for a duty to make accommodations within national disability non-discrimination law. Although all three countries only adopted such legislation in the 1990s, a broad body of case law in this field has already been established in the United Kingdom and Ireland, and this will receive particular attention in the paper. In addition, those provisions which have been adopted by the remaining Member States in order to implement Article 5 of the Directive will also be considered. Finally, expanding the examination beyond the European Union to include countries which have a longer history of requiring accommodations to meet the needs of disabled individuals, the paper will also draw on research carried out on behalf of the Expert Group which covers the United States⁵ and Australia.⁶ Each section concludes with a concise advice to policy makers and judiciary regarding the implementation and interpretation of the reasonable accommodation provision.

II. What amounts to a ‘Reasonable Accommodation’?

The goal of any accommodation or adaptation is to enable a disabled person “to have access to, participate in, or advance in employment”.⁷ 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 disabled individual and the employment or training at issue. Herein lies the crux of the reasonable accommodation requirement: *it always involves an individual assessment and a tailored individual solution*. Furthermore, this is not only true with regard to determining what kind of accommodation is required, but also with regard to other elements of the provision, such as assessing whether making any particular accommodation will amount to a “disproportionate burden” for any individual employer.

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. Furthermore, case law which establishes the duty to (not) make certain accommodations in specific circumstances can also clarify the requirement.

1. National Approaches

² The Disability Discrimination Act 1995.

³ The Employment Equality Act 1998.

⁴ Law (1999:132) prohibiting discrimination in working life of disabled persons. Lag (1999:132) om förbud mot diskriminering i arbetslivet av personer med funktionshinder. Unofficial English translation. Text of law on file with the author. This statute was amended in 2003 in response to the disability Framework Employment Directive.

⁵ Robert L. Burgdorf, Reasonable Accommodation in Disability Non Discrimination Law in the United States of America.

⁶ Lee Ann Basser, Reasonable Accommodation under the Australian Disability Discrimination Act 1992.

⁷ Article 5 of the Framework Employment Directive.

a) Pre-Directive Legislation and Case Law in the EU

United Kingdom

The provisions defining a 'reasonable accommodation' are contained largely in the Disability Discrimination Act 1995 (DDA), supplemented by a Code of Practice⁸ (guidance rather than law) and have been interpreted by a growing body of case law. The DDA states that the duty to make reasonable adjustments⁹ arises where *either*:

- a) Arrangements made by the employer for determining to whom employment should be offered, or any term, condition, or arrangements on which employment, promotion, transfer, training or other benefit is offered or afforded *or*:
- b) Any physical feature of the premises occupied by the employer

place a disabled person at a substantial disadvantage in comparison with persons who are not disabled.¹⁰

The DDA goes on to spell out in practical terms what, in these circumstances, an employer must do to avoid a claim of discrimination:¹¹

- a) The employer must take such steps as it is reasonable, in all the circumstances of the case, for that employer to take in order to prevent the arrangements or features being deemed discriminatory against a disabled person.
- b) These steps might include (the list is illustrative rather than exhaustive, but it is in statutory form) reallocation of duties; redeployment to an existing vacancy; alteration of working hours; reassignment to a different place of work; allocating absence for rehabilitation, assessment or treatment; training; acquisition of equipment; modification of equipment, instructions, reference manuals and testing or assessment procedures; provision of a reader, interpreter or supervision.

Case-law Examples of Reasonable Adjustments in Practice

In one of the earliest cases decided in the United Kingdom under the DDA, in which a failure to provide reasonable adjustments was successfully pleaded¹² (employee recovering from ME asked to be able to work from home, but was simply offered the same redeployment process as non-disabled employees), the Employment Appeal Tribunal made it clear that the case of a person with an identified disability could not simply be treated as normal redeployment case. Recognition of the special circumstances evoked by the disability is required, thereby affirming that the UK system is based upon the *asymmetric* approach.

A number of cases taken by the Disability Rights Commission in subsequent years illustrate the implementation of this principle in practice:

⁸ *Code of Practice for the Elimination of Discrimination in the Field of Employment Against Disabled Persons or Persons who have a Disability*, 1996, London, HMSO. Although it does not have statutory force, employers must show that they have taken account of its provisions, and it contains extensive provisions on what constitute reasonable adjustments.

⁹ This term was chosen in the UK in preference to 'reasonable accommodation'.

¹⁰ DDA s 6 (1) (2).

¹¹ DDA s 6 (3).

¹² *London Borough of Hillingdon v Morgan*, EAT/1493/98.

Failure to Offer Alternative Employment

*Failure to make reasonable adjustments through changes to the job or any offer of suitable alternative employment, for employee with hand injury, culminating in ill-health retirement.*¹³

Following an injury sustained whilst at work, the complainant experienced a restriction in the strength of and ability to move her hand. Upon returning to work she was given light work duties for a number of months, but was then expected to perform full duties thereafter. She did this for a period of two months before being moved to a number of temporary positions, instead of her employer making adjustments to allow her to return to her original job. She was not advised of or offered any suitable job vacancies that had arisen during this period. The complainant subsequently had an operation on her hand, but upon being certified fit to return to work her employers told her that her original job had changed and now included substantially more lifting tasks and, for this reason, refused to allow her to return to her original job. The complainant wanted *either* to return to work in her original position (with the provision of reasonable adjustments) *or* be given a job of similar status and career prospects. Instead, she was offered jobs of lower status, voluntary redundancy or ill health retirement. She accepted the latter and subsequently commenced a claim of disability discrimination in the Employment Tribunal against her former employers. Terms of settlement were agreed, which included the former employer paying out the sum of £18,000 in compensation.

Failure to Offer Alternative Employment

*Employer decision to terminate employment for reasons relating to employee's stress related illness.*¹⁴

The employee's original job as warehouse assistant covered fork-lift truck driving and computer related tasks. His employer decided to allocate to him other responsibilities such as maintenance, team leader and acting supervisor, the latter for a period of three months. As a result of the amount of work he was required to do coupled with withdrawal of supervisory duties the client developed a stress related illness causing him to take time off work. During the period of absence the employer sought a medical report, but terminated the employee's employment before the report was received on the grounds of urgent operational necessity. The case settled for an undisclosed amount.

Failure to Alter Work Practices

*Failure to make reasonable adjustments for a deaf employee during a disciplinary process leading to termination of employment*¹⁵

The complainant was employed as a sign language tutor. He was alleged to have continued to work with a local organisation teaching sign language after taking sickness absence for reasons not connected to his disability, which according to his employer meant he was in breach of his contract of employment with them. The employer instituted disciplinary proceedings against him, but failed to provide an independent BSL interpreter at all the disciplinary hearings and did not provide him with clear written transcripts, or minutes, of those hearings. This prevented him from being able to adequately present his case, culminating in his dismissal. The case settled for an undisclosed sum shortly before the hearing was due to take place.

Failure at Interview Stage

*Failure to make reasonable adjustments in respect of the recruitment process led to failure of job application submitted by an complainant with learning disabilities*¹⁶

The complainant was 22 years old and had a learning disability. He had volunteered as a porter and general groundsman for a local NHS Trust in order to gain experience in this field to secure employment. The Trust advertised a vacancy, for which he applied. The Trust only informed him

¹³ DRC/00/809.

¹⁴ DRC/01/1053.

¹⁵ DRC/00/195.

¹⁶ DRC/01/4497.

verbally of the interview date and time, without providing written confirmation. Consequently, the client missed the interview but, after enquiring about the recruitment process, he was re-interviewed by his manager alone without the opportunity to have some form of support at the actual interview. His job application was unsuccessful. The case was listed for hearing at the ET over 3 consecutive days. Terms of settlement, including the sum of £2500, were agreed before the hearing took place.

Failures to Adapt Workplace

*Failure of employer to make reasonable adjustments to physical features of premises when employee manager of betting shop, became a wheelchair user.*¹⁷

A betting shop manager had worked for over thirty years for the same employer. He developed a mobility impairment due to a back injury and the side effect of a pre-existing medical condition and he subsequently used a wheelchair to aid mobility. Upon attempting to return to work after a short period of sickness absence, his employer advised him that use of the wheelchair would present them with problems in the work premises, which were not suitably accessible for wheelchair users. The employer proceeded to terminate his employment, only looking into the possibilities of making changes to the premises after he appealed against the decision to dismiss him. A technical access consultant working for the Employment Service prepared a report recommending various reasonable adjustments the cost of which would have been in the region of £7500. However, the employer still decided to uphold the decision to terminate the employment and not make the recommended adjustments to their premises. Employment Tribunal proceedings were subsequently commenced. The case settled before hearing for the sum of £100,000.

Ireland

Irish law has required the making of some form of accommodation by employers to meet the needs of disabled individuals since 1998. The current legislation, the Employment Equality Act 1998 provides in this respect:

16(3)(b) "An employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities to which paragraph (a) relates". (i.e. to allow the individual to complete the duties attached to the employment position. LW).

Following the adoption of the Framework Employment Directive, a proposal has been put forward to amend this statute. The proposal specifies that employers are under an obligation to take "appropriate measures" in order to enable a person who has a disability

- (i) to have access to employment,
- (ii) to participate or advance in employment, or
- (iii) to undergo training, unless the measures would impose a disproportionate burden on the employer.

16 (3)(a)(a). The provision further defines the term 'appropriate measures,' in relation to a person with a disability as:

- (a) "... effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned,
- (b) without prejudice to the generality of paragraph (a), includes the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources, but
- (c) does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself.'

¹⁷ DRC/02/6151.

Irish case-law, decided under the 1998 statute, follows quite similar lines to United Kingdom case-law in determining the kind of accommodations that are required of employers.

Failure at Interview Process

In the case of *Harrington v. East Coast Area Health Board*,¹⁸ the Equality Officer found that an employer had failed to provide reasonable accommodation when organising a job interview. The complainant in this action had notified the employer in advance that she was a wheelchair user and they had assured her that the interview room would be accessible to her. However the first accessible entrance did not give the complainant access to the interview room, and the second accessible entrance did not give her access to the correct floor and the chairlift was broken. Eventually, the interview panel reconvened in another venue. The Equality Officer held that reasonable accommodation had not been provided.

In the case of *A Complainant v. Civil Service Commissioners*,¹⁹ which related to a competition for clerical officers which was restricted to persons with disabilities, the complainant had schizophrenia and argued that the structure of the interview format discriminated against persons with schizophrenia, as compared with those with different disabilities. The Equality Officer relied on statistical data and contended there was insufficient evidence available to support the complainant's case. The Equality Officer also held that reasonable accommodation had been provided as the competition was designed to cater for the needs of candidates with different disabilities.

Failure to Make a Workplace Adaptation

In the case of *Kehoe v. Convertec*,²⁰ Convertec recruited the complainant on probation for a period of six months. He received a negative probation review for failing to meet production targets, which were a condition of his employment. The Equality Officer held that the employer had failed to consider in any way what reasonable accommodation might have assisted the complainant to meet the targets.

In *A Company v. A Worker*,²¹ the Court found that an employer's failure to provide reasonable accommodation to an employee with cerebral palsy grounded an action for constructive dismissal. In this instance, it was held that the tasks which were allotted to the employee were not suited to her disability. The Equality Officer held that the employer had not responded sufficiently to the difficulties she raised. The Equality Officer also contended that the employer had not assessed early enough the effect of her disability, and could have addressed the problems at no cost through an existing policy of task rotation.

Failure to Make a Workstation Adaptation

In *A Motor Co. v. A Worker*,²² the employer had dismissed the complainant, who used a hearing aid, from his job as receptionist because they considered that his hearing impairment interfered with his performance. The respondent had raised the problem with the complainant and had purchased him a headset to reduce the problem, but said that the customer complaints continued. The Court held that the headset provided was not the correct one; a specialised headset, suggested by the complainant, was available and would have eased the problem, and the employer should also have provided induction training.

Failure to Hire a Job Coach

¹⁸ DEC-E2002-001.

¹⁹ EDA024.

²⁰ DEC-E2001-034.

²¹ EED021.

²² EED026

The case of *An Employee v. a Local Authority*,²³ concerned negative assessments of the complainant who had some residual brain damage. He was newly employed in a clerical post. The employee was assessed, and the occupational assessment found that the complainant had good potential for clerical work, but might take longer than usual to become accustomed to new processes or work organisation. The Equality Officer held that on the evidence provided, the difficulties could have been solved by obtaining an expert vocational assessment and providing a professional job coach for some three months.

Failure to Alter Work Practices

In the case of *Fernandez v. Cable & Wireless*,²⁴ while not finding for the complainant in this instance, the Equality Officer did express concerns over the work practice which required people taking time off for medical appointments to be taken as annual leave or unpaid leave where the medical appointment related to the person's disability.

In *A Complainant v. Bus Éireann*,²⁵ the Equality Officer found the respondent had not given any consideration to their obligation to accommodate the complainant. The Equality Officer required the respondent to develop objective and verifiable criteria, for determining the relevance of particular medical conditions to employment in its service. The respondent was also required to develop policies to meet its obligations to provide reasonable accommodation to persons with disabilities.

Sweden

The purpose of the Prohibition of Discrimination in Working Life of People with Disability Act²⁶ is to counteract discrimination in the workplace on the basis of disability.

The law prohibits direct discrimination. An employer cannot treat a disabled employee or job applicant less favourably than he treats a person without such a disability. To constitute discrimination the situation must be similar for the individuals being compared and the disfavourable treatment must have a connection with the disability. Discrimination can also occur if the employer would have given more favourable treatment to a person without a disability. In other words, a fictional or hypothetical comparator can be used.

Direct discrimination can only occur if the situation is similar for the person who considers himself to have been discriminated against, and the person who is used for comparison purposes. For a job applicant a similar situation implies that both individuals have applied for the same job and they must have the same merits in terms of education, experience and personal suitability. A similar situation for employees implies equivalent work tasks, education and experience. To determine if there is a similar situation, one must determine if the disability affects the ability to carry out the work. This determination relates to the ability to carry out the most essential tasks. A situation is not similar if the disability limits the ability to carry out the most essential tasks.

In a decision of 4 June 2003,²⁷ the Labour Court applied the Statute and held that an instance of direct discrimination had occurred. The plaintiff was treated less favourably than would have been the case had he not had diabetes. The Court pointed out that the comparison could be with an existing or hypothetical person in a similar situation. A similar situation can be determined to exist if the person with a disability has the capacity to carry out the "most essential" elements of the job. Assuming this is the case, an analysis is to be made of the work tasks, education and experience at issue.

²³ DEC-E2002-004

²⁴ DEC-E/2001/052

²⁵ DEC-E2003-004

²⁶ Lag (1999:132) and the 2003 amendments.

²⁷ (Dom nr 47/03 – Case number 47/03).

In relation to direct discrimination,²⁸ the law requires that the employer, in relation to the decision to employ, promote or provide training for promotion shall, if needed, undertake *reasonable support and accessibility measures* for the person with the disability.²⁹ The issue is whether the individual involved can be placed in a comparable situation. If this can be achieved through *reasonable adaptation of the workplace*, the employer cannot take the disability into account. One prerequisite is that the measures are reasonable and that they can create a comparable situation for the person in comparison with other applicants. The failure to undertake support and accessibility measures under these circumstances amounts to discrimination.³⁰

In general it can be said that it is through § 6 that the issue of ‘reasonable accommodation’ is dealt with under Swedish law. A reasonable accommodation is thus a support or accessibility measure that is intended to place a disabled individual in a position comparable to that of others.

An employer is required to disregard the disability if, due to the relevant support and accessibility measures, a person with a disability is able to carry out the most essential tasks related to the work.

The following are examples of adaptation measures that can be required:

- improvements related to physical accessibility,
- the acquisition of technical support, special tools, or changes in the physical working environment (meaning for example improved lighting for those with sight impairments, good ventilation for those who are allergic, special computer programmes etc.)
- changes in work tasks, time schedules or work methods.

It also seems that the scope of the duty to provide a ‘reasonable accommodation’ goes somewhat beyond the work place or the place where vocational training occurs, and beyond the ‘essential functions’ of the job. However, the extent to which the duty can include such factors as e.g. parking places, accessible transportation, accessible social activities, accessible canteen facilities and accessible toilets, is not completely clear.

In addition, the factors that are considered to go beyond the essential functions of the employment will to some extent be covered by other regulations that relate for example to an employer’s duty to provide an inclusive work environment (see issue 6 below).

b) Non-European Experiences

The United States

The US legal system was one of the first to utilise the concept of reasonable accommodation in the context of disability non-discrimination legislation. The Americans with Disabilities Act of 1990 in particular attracted a great deal of attention worldwide, and has influenced the development of disability non-discrimination legislation in other jurisdictions, including within the EU Member States and the EU itself. The term “reasonable accommodation” was first used in the US in the disability rights context in regulations issued by the Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor to implement Section 503 of the Rehabilitation Act in 1977.³¹ The

²⁸ § 3 of the law.

²⁹ § 6 of the law.

³⁰ (See Förbud mot diskriminering i arbetslivet av personer med funktionshinder SOU 1997:176 (Ban against discrimination against persons with a disability in working life SOU 1997:176); Förbud mot diskriminering i arbetslivet: På grund av funktionshinder (Ban against discrimination in working life: Due to disability) on the Disability Ombudsman’s website www.handikappombudsman.se ; and Regeringens proposition 1997/98:179, Lag om förbud mot diskriminering i arbetslivet av personer med funktionshinder (Government Bill 1997/98:179, Act on a ban in working life against discrimination of persons with a disability). Also see Regeringens proposition, 2002/03:65, Ett utvidgat skydd mot diskriminering (Government Bill 2002/03:65, An Extended Protection Against Discrimination)).

³¹ 29 U.S.C. § 793.

OFCCP regulations required federal contractors having contracts or subcontracts of \$2500 or more to “make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor’s business.”³² The following year, the Department of Health, Education, and Welfare (HEW) included a similar requirement in regulations³³ that implemented Section 504 of the Rehabilitation Act of 1973.³⁴ Subsequent Section 504 regulations followed HEW’s example in enunciating a reasonable accommodation requirement.³⁵ In 1978, the implementing regulations for Section 501 of the Rehabilitation Act also incorporated a reasonable accommodation mandate.³⁶

Section 505 of the Rehabilitation Act,³⁷ which was added in 1978, acknowledged the requirement of reasonable accommodations in the workplace, albeit somewhat obliquely, by including the following sentence among provisions establishing remedies, procedures, and rights for enforcing Section 501: “In fashioning an equitable or affirmative action remedy under such section, a court may take into account *the reasonableness of the cost of any necessary workplace accommodation*, and the availability of alternatives therefore or other appropriate relief in order to achieve an equitable and appropriate remedy.”³⁸

The first direct federal statutory mandate of reasonable accommodation for individuals with disabilities did not occur until the Fair Housing Amendments Act of 1988 (FHAA).³⁹ The FHAA amended Title VIII of the Civil Rights Act of 1968,⁴⁰ often referred to as the Fair Housing Act, which prohibited discrimination in selling or renting private housing on the basis of race, religion, national origin, or sex. It added “handicap” to the proscribed types of discrimination and, among other specific obligations on covered entities, established a requirement “to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such persons equal opportunity to use and enjoy a dwelling.”⁴¹

Two years later, Title I of the Americans with Disabilities Act (ADA) established the first explicit statutory reasonable accommodation requirement in the employment context and provided considerably more statutory guidance about the requirement’s content and implications. Included as discriminatory employment practices made unlawful by the Act were:

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity

³² 41 Fed. Reg. 16,148 (1976) (codified at 41 C.F.R. § 60-741.6(d) (1993)). The minimum contractual amount was increased to \$10,000 in 1992. Pub. L. No. 102-569, §§ 102(p)(31)(A) and 505(a), 106 Stat. 4360, 4427 (1992).

³³ 42 Fed. Reg. 22,676, 22,677 (1977) (codified at 45 C.F.R. § 84.12 (1994)).

³⁴ 29 U.S.C. § 794.

³⁵ See, e.g., 7 C.F.R. §§ 15b.18, 15b.19 (1994) (covering programs and activities conducted by Department of Agriculture); 15 C.F.R. §§ 8c.50, 8c.51 (1994) (covering programs and activities conducted by Department of Commerce); 32 C.F.R. § 56.8 (1994) (covering programs and activities conducted by Department of Defense); 28 C.F.R. §§ 39.150, 39.151 (1993) (covering programs and activities conducted by Department of Justice); 24 C.F.R. §§ 8.11, 8.20 (1994) (covering activities of recipients of federal financial assistance from Department of Housing and Urban Development); 29 C.F.R. § 32.13 (1994) (covering activities of recipients of federal financial assistance from Department of Labor); 22 C.F.R. §§ 142.12, 142.16 (1994) (covering activities of recipients of federal financial assistance from Department of State).

³⁶ 43 Fed. Reg. 12,295 (1978) (codified as redesignated at 29 C.F.R. §§ 1614.101(8), 1614.203(c) (1993)).

³⁷ 29 U.S.C. § 794a(a)(1).

³⁸ *Id.* (emphasis added).

³⁹ Pub. L. No. 100-430, 102 Stat. 1619 (codified at 28 U.S.C. §§ 2341, 2342; 42 U.S.C. §§ 3601 and 3602 n., 3604–08, 3610–14, 3614a, 3615–19, 3631).

⁴⁰ 42 U.S.C. §§ 3601–19.

⁴¹ *Id.* § 3604(f)(3)(B).

to make reasonable accommodation to the physical or mental impairments of the employee or applicant.⁴²

Analogous to this reasonable accommodation requirement in employment is an obligation to make “reasonable modifications” imposed in the public accommodations and services titles of the ADA. Title III of the Act lists as a prohibited act of discrimination by places of public accommodation a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.⁴³

The public services title makes reference to “reasonable modifications to rules, policies, or practices.”⁴⁴ The U.S. Supreme Court has used the terms “reasonable accommodations,” “reasonable modifications,” and “reasonable adjustments” interchangeably.⁴⁵

The Department of Labor regulations that implemented Section 503 of the Rehabilitation Act of 1973 - the original source of the reasonable accommodation requirement - did not define the term “reasonable accommodation.” An appendix to the regulations, however, included a sample notice to employees that referred to “the accommodations which we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, or other accommodations.”⁴⁶

The Section 504 regulations provided a definition of “reasonable accommodation” through examples: “Reasonable accommodations may include: (1) making facilities used by employees readily accessible to and useable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.”⁴⁷ Section 501 regulations reiterated the identical list of examples with one addition: “appropriate adjustment or modification of examinations.”⁴⁸

The employment title of the ADA followed the Section 504 and Section 501 approach of defining reasonable accommodation by listing examples. The ADA formulation, however, adds a couple of additional types of accommodations - reassignment and modifications of examinations, training materials, or policies - to the Section 504 regulation list:

The term “reasonable accommodation” may include -

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.⁴⁹

⁴² *Id.* § 12112(b)(5)(A).

⁴³ *Id.* § 12182(b)(2)(A)(ii).

⁴⁴ *Id.* § 12131(2).

⁴⁵ *Alexander v. Choate*, 469 U.S. 287, 299–301 (1985).

⁴⁶ 41 C.F.R. 208 (app. B to pt. 60-741) (commentary on pt. 60-741.6(d)) (1993).

⁴⁷ 45 C.F.R. § 84.12(b) (1993).

⁴⁸ 29 C.F.R. § 1614.203(c)(2) (1993).

⁴⁹ 42 U.S.C. § 12111(9).

This provision was merely meant to provide examples of reasonable accommodations⁵⁰ and to be illustrative but not exhaustive.⁵¹

The definition-by-examples approach to reasonable accommodation, which is employed in the ADA's statutory definition and in the regulations under Section 504 of the Rehabilitation Act and in many European statutes, is not a true definition in the rigorous, scientific, genus-and-species sense. One attempt at a more traditional definition was generated by the U.S. Commission on Civil Rights in 1983, when it defined reasonable accommodation as "providing or modifying devices, services, or facilities or changing practices or procedures in order to match a particular person with a particular program or activity. Individualizing opportunities is this definition's essence."⁵² While not expressly incorporating this definition, the ADA shares its focus on individualized matching of persons and opportunities. The House Judiciary Committee observed that the reasonable accommodation requirement is "central to the non-discrimination mandate of the ADA" and added that "[a] reasonable accommodation should be tailored to the needs of the individual and the requirements of the job."⁵³ The Senate Committee and House Education and Labor Committee reports both concurred that reasonable accommodation involves a "fact-specific, case-by-case approach."⁵⁴

The ADA regulations issued by the EEOC significantly advanced the evolution of reasonable accommodation analysis because they set forth a concise and proper definition of the concept:

The term *reasonable accommodation* means:

- (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 applicant 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.⁵⁵

The prongs of this definition share a common focus - they define a reasonable accommodation as a "modification or adjustment" of any type that is needed to enable a person with a disability to participate equitably in the employment process. The prongs differ only in their direction to different parts of the hiring and employment continuum: the application process, the job site and performance of work tasks, and the enjoyment of job benefits and rewards. While the EEOC promulgated this definition for purposes of the ADA, it is also consistent with the reasonable accommodation concept under Sections 501, 503, and 504 of the Rehabilitation Act. In addition, consistent with the mandate of the Rehabilitation Act Amendments of 1992⁵⁶ - that the standards for employment discrimination under Sections 501, 503, and 504 are the standards of Titles I and V of the ADA relating to

⁵⁰ The appendix to HEW's Section 504 regulations provided: "The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed." 42 Fed. Reg. 22,688 (1977) (codified as reissued at 45 C.F.R. 375 (app. A to pt. 84) (commentary on § 84.12(b)) (1993)).

⁵¹ S. REP. NO. 116, 101st Cong., 1st Sess. 31 (1989) [hereinafter SENATE REPORT]; H.R. REP. NO. 485, 101st Cong., 2d Sess. pt. 3, at 39 (1990) (Committee on the Judiciary) [hereinafter HOUSE JUDICIARY COMMITTEE REPORT].

⁵² U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 102 (1983) [hereinafter *Accommodating the Spectrum*].

⁵³ HOUSE JUDICIARY COMMITTEE REPORT at 39.

⁵⁴ SENATE REPORT at 31; H.R. REP. NO. 485, 101st Cong., 2d Sess. pt. 2, at 62 (1990) (Committee on Education and Labor) [hereinafter EDUCATION & LABOR COMMITTEE REPORT].

⁵⁵ 29 C.F.R. § 1630.2(o)(1) (1993).

⁵⁶ Pub. L. No. 102-569, 106 Stat. 4344 (1992).

employment⁵⁷ - this definition also applies to reasonable accommodation issues under Sections 501, 503, and 504.

The EEOC's Interpretive Guidance explains that "[t]he reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated" and adds that those barriers may consist of physical or structural obstacles, rigid schedules, inflexible procedures, or undue limitations in the ways tasks are accomplished.⁵⁸ The obligation to make reasonable accommodation applies to all types of services and programmes provided in connection with employment and to all non-work facilities provided or maintained by an employer for use by employees.⁵⁹ Thus, the obligation to accommodate applies to employer-sponsored placement or counselling services and to cafeterias, lounges, gymnasiums, auditoriums, transportation, and other services and facilities provided by employers.⁶⁰

Australia

Unlike the statutes considered above, the Australian Disability Discrimination Act 1992 does not explicitly impose a separate duty to provide reasonable accommodations in favour of disabled individuals. The obligation to provide such accommodations must be implied from the provisions of the Act dealing with discrimination. The Act recognises that disabled people may need accommodations or adjustments to enable them to participate equally in the community and specifies that the need for accommodations is not a factor which makes the position of a disabled person "materially different" to a non-disabled person when making comparisons and determining whether conduct is discriminatory or not (Section 5(2)). In the employment context, discrimination against a disabled person is not unlawful if that individual is unable to carry out the inherent requirements of the job. To determine whether this is the case it is necessary to take account of the ability of the disabled person to perform the requirements of the job when provided with "services or facilities" - in other words when his or her needs are accommodated (Section 15(4)). The Disability Discrimination Act does not elaborate further on the kinds of services or facilities which an employer could provide in order to enable a disabled individual to carry out the job. However, case law provides some further guidance.

Failure to Provide Appropriate Specialised Equipment

In *McNeill v Commonwealth*⁶¹ the complainant, a university graduate, obtained employment in the Australian Public Service (APS). Her initial appointment was to a clerical position for which she was somewhat overqualified. The complainant had a visual impairment and could only fulfil her duties if provided with special equipment. The equipment provided in this case was inadequate to enable the complainant to carry out her duties properly and this had a significant impact on her work performance and concentration, and was generally frustrating. It also affected those working around her and her relationship with her co-workers. These relationships were further exacerbated because her co-workers were never briefed on the social impacts of her disability. The complainant's limited vision meant she was unable to read or model social cues. Consequently she did not behave as others expected and was unable to respond appropriately to body language, particularly facial expressions. The employer responded to the complainant's deteriorating work performance with intense monitoring and supervision. As a consequence her work performance and her relationship with her co-workers continued to deteriorate. Ultimately, she was dismissed from her employment. The Human Rights and Equal Opportunity Commission found that the employer had discriminated against the complainant in failing to provide necessary equipment, in the imposition of onerous monitoring procedures and in exposing her to an adverse work environment. As a consequence she was awarded \$50,900.00

⁵⁷ *Id.* §§ 503(b)(g), 505(c)(d), and 506(d), 106 Stat. 4424, 4427, 4428 (codified at 29 U.S.C. §§ 791(g) (§ 501), 793(d) (§ 503), and 794(d) (§ 504).

⁵⁸ 29 C.F.R. 414-15 (app. to pt. 1630) (commentary on § 1630.9) (1993).

⁵⁹ *Id.* at 414.

⁶⁰ *Id.*

⁶¹ [1995] EOC 92-714

damages for loss of earnings and general damages including loss of future earnings and aggravated damages.

Failure to Provide Appropriate Work Environment, Adequate Training, and Appropriate (Flexible) Work Roster

*Garity v Commonwealth Bank of Australia*⁶², concerned a complainant who had diabetes and various complications including a visual impairment. In this case the Human Rights and Equal Opportunity Commission found that the employer had breached its duty of ‘reasonable accommodation’ in its treatment of the complainant. The Commission found that the Bank failed to provide the complainant with: an appropriate work environment; adequate training to deal with changes that were taking place in the bank; a career path and opportunity for transfer to other positions or for promotion. The Commission also found that the Bank failed to provide the complainant with a proper system for dealing with the symptoms of her diabetes, including a roster to enable her to take the breaks she needed and education of those involved in the roster about the importance of the breaks for the complainant. Consequently, the employer was ordered to pay \$153,500 damages.

Provision of Inappropriate Specialised Equipment and Failure to Provide Appropriate Equipment

In *Commonwealth v Humphries*, another case involving a complainant with a visual impairment, the employer failed to assess the needs of the complaint after appointing her to a clerical position. The employer did provide her with some equipment to assist her in carrying out her duties but the equipment was inadequate and faulty. At the inquiry in the Human Rights and Equal Opportunity Commission, Commissioner Charlesworth found that the employer had failed to meet its obligation under the DDA to make ‘reasonable adjustments’. However, on review in the Federal Court, Kiefel J held that there is no positive duty to provide accommodation although she recognised that a failure to provide accommodations may lead to a finding of unlawful discrimination.⁶³

2. Examples of Provisions Adopted by European Union Member States to Implement Article 5 of the Framework Employment Directive

a) Adopted Legislation

Finland

The Equality Act [yhdenvertaisuuslaki (21/2004)] was adopted in December 2003 in order to transpose into national law both Article 13 equality Directives. Section 5 of the Act, entitled “Promotion of the Conditions Necessary for Disabled Persons to Obtain Employment or Education”, reads as follows:⁶⁴

In order to promote equal treatment in accordance with section 2.1 [of the same act, which deals with the material scope of the act], an employer or education provider shall, when necessary, take reasonable measures in order to enable a disabled person to have access to employment or education, to keep his or her work, and to advance in his or her career. In assessing what is reasonable, account must be taken especially of the costs arising thereof, the financial situation of the employer or education provider, and the availability of public funding or other resources.

The concept used is “kohtuulliset toimet”, which literally translates as “reasonable measures”, not reasonable accommodation. Such measures are to be taken “when necessary”, which according to the

⁶² [1999] EOC 92-966

⁶³ *Commonwealth v Humphries* (1998) 86 FCR 324

⁶⁴ Unofficial translation by Timo Makkonen.

preparatory works (HE 44/2003) means that the need for reasonable accommodation is to be determined on a case-by-case basis.

Additional legislation also exists which may have a bearing on the issue, we might take note of the following:

According to the Employment Contracts Act [työsopimuslaki (55/2001)] the employer shall “strive to further the employees’ opportunities to develop themselves according to their abilities so that they can advance in their careers”.⁶⁵ This obligation extends also to disabled employees. Pursuant to section 28 of the Occupational Safety and Health Act [työturvallisuuslaki (738/2002)], an employer has to take employee’s physical and psychological ability into account when planning the work to be carried out, in order to eliminate or decrease any potential danger or harm that the work may inflict on the health or safety of the employee.

The Netherlands

The Dutch implementation legislation, *Wet gelijke behandeling op grond van handicap of chronische ziekte* (Act on Equal Treatment on Grounds of Disability and Chronic Illness),⁶⁶ does not specify what kinds of measures will be regarded as an appropriate accommodation. However, the terminology used in the Statute to define the relevant concept may itself provide some guidance. The implementation Statute provides:

Article 2. The prohibition on differentiation⁶⁷ also means that the persons on whom this prohibition is imposed are obliged to make effective modifications according to need, unless this would impose a disproportionate burden on them.

The Statute does not follow the Dutch language version of the Directive by referring to the obligation to make a "reasonable accommodation" ("redelijke aanpassing"), but instead requires an "effective accommodation" ("doeltreffend aanpassing"). This must be provided “according to need”, meaning that an individual assessment is required. The Dutch government regarded the term 'effective' as more appropriate because it emphasizes that any accommodation must have the desired effect – namely of allowing the disabled individual to carry out the employment or training related task or tasks. Effective accommodation is not defined in the Statute, and thus far no case law has arisen on this term. However, from the Explanatory Memorandum, it follows that the question whether an accommodation is 'effective', calls for a two-staged test. It must first be established, that the accommodation is appropriate (i.e. does the accommodation enable the disabled person to do the job?) and necessary. It must in a second, subsequent step be established, whether the accommodation would result in a disproportionate burden on the employer.

Spain

At the end of 2003 a general equality law, which was not specifically designed to implement the Framework Employment Directive. Law 251/2003, 2 of December (BOE 3/12/03), on equal opportunities, non-discrimination and universal accessibility for disabled people, art. 7.c establishes the requirement:

Adapting measures in the physical, social and attitude environment to those specific requirements of disabled people that, in an efficient and practical way and without the cost being disproportionate, make accessibility or participation easier for a disabled person in equal conditions with the rest of his fellow citizens.

⁶⁵ Section 2:1 of the Act.

⁶⁶ *Wet gelijke behandeling op grond van handicap of chronische ziekte*, Wet van 3 april 2003 tot vaststelling van de *Wet gelijke behandeling op grond van handicap of chronische ziekte*. Staatsblad [Law Gazette] 2003, 206.

⁶⁷ Dutch legislation uses this term in preference to the term discrimination.

In addition, specific provisions apply in the employment field. Law 13/1982, 7th April, on Social Integration of persons with disabilities, modified by Law 62/2003, 30 December (BOE 31/12/03)⁶⁸, art. 38 bis states:

1. In order to guarantee full equality at work, the principle of equality of treatment does not impede specific measures being adopted or maintained which are aimed at preventing or compensating disadvantages due to disability.

2. Employers are obliged to adopt adequate measures to adapt the work place and accessibility of the company, as far as the necessities of each concrete situation, to permit disabled persons access to employment, carry out their work, progress professionally and access or to undergo training, unless such measures would impose a disproportionate burden on the employer.

To determine if the burden is excessive it is necessary to keep in mind if it is compensated sufficiently with the measures or public support for disabled persons, the costs of the measures, including the financial ones, and the size of the organization or the company.

Germany

The scope of the right to accommodation under German law is wide: the German provision in *Section 81 (4) Sozialgesetzbuch IX (SGB IX – Social Law Code Book 9)*⁶⁹ covers all aspects mentioned in Article 5 of the Directive. It specifies in particular that disabled employees have a right to be employed in a way that they can fully utilize and improve their skills and knowledge. In addition disabled employees have a right to adjusted work site, work place, work organization and technical equipment according to their disability specific needs. This also includes the provision of accessible toilets, canteens etc. Finally disabled employees have a right to be provided by the employer with the necessary technical employment aids.

Belgium

The Federal Law implementing the Framework Directive

Article 2, § 3, of the Federal Law of 25 February 2003⁷⁰ now reads:

L'absence d'aménagements raisonnables pour la personne handicapée constitue une discrimination au sens de la présente loi.

Est considéré comme aménagement raisonnable l'aménagement qui ne représente pas une charge disproportionnée, ou dont la charge est compensée de façon suffisante par des mesures existantes.

⁶⁸ On tax, administrative and social measures.

⁶⁹ Section 81 (4) SGB IX:

Die schwerbehinderten Menschen haben gegenüber ihren Arbeitgebern Anspruch auf

1. *Beschäftigung, bei der sie ihre Fähigkeiten und Kenntnisse möglichst voll verwerten und weiterentwickeln können (...)*

4. *behinderungsgerechte Einrichtung und Unterhaltung der Arbeitsstätten einschließlich der Betriebsanlagen, Maschinen und Geräte sowie Gestaltung der Arbeitsplätze, des Arbeitsumfeldes, der Arbeitsorganisation und der Arbeitszeit, unter besonderer Berücksichtigung der Unfallgefahr,*

5. *Ausstattung ihres Arbeitsplatzes mit den erforderlichen technischen Arbeitshilfen unter Berücksichtigung der Behinderung und ihrer Auswirkung auf die Beschäftigung. Bei der Durchführung der Maßnahmen nach den Nummern 1, 4 und 5 unterstützen die Arbeitsämter und Integrationsämter die Arbeitgeber unter Berücksichtigung der für die Beschäftigung wesentlichen Eigenschaften der schwerbehinderten Menschen. (...)*

⁷⁰ Loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme, *Mon. b.*, 17.3.2003; Wet van 25 februari 2003 ter bestrijding van discriminatie en tot wijziging van de wet van 15 februari 1993 tot oprichting van een Centrum voor gelijkheid van kansen en voor racismebestrijding.

Het ontbreken van redelijke aanpassingen voor de persoon met een handicap vormt een discriminatie in de zin van deze wet.

Als een redelijke aanpassing wordt beschouwd de aanpassing die geen onevenredige belasting betekent, of waarvan de belasting in voldoende mate gecompenseerd wordt door bestaande maatregelen.

Although the notion of “reasonable accommodation” was directly borrowed by the government from the Framework Directive 2000/78/EC, it seems to be understood rather broadly as going beyond the adaptation of the working post or even the “essential functions” of the job. It is not, however, unlimited, and remains confined to the working environment. According to the explanation offered by the government in support of its Amendment⁷¹ :

Par ‘aménagements’, il convient d’entendre entre autres : les aménagements architecturaux garantissant par exemple l’accès aux fauteuils roulants, les dispositifs techniques permettant aux sourds et aux aveugles de communiquer, l’utilisation d’un langage simplifié pour les personnes atteintes d’un handicap mental, la réorganisation de la répartition des tâches, l’octroi d’une assistance aux personnes handicapées, bref : toutes les mesures concrètes nécessaires, susceptibles de contribuer de manière raisonnable à ce que les personnes handicapées ne soient pas lésées par des facteurs environnementaux.

The inclusion of the absence of reasonable accommodation in the definition of discrimination will represent a true innovation. The legislations in force before the adoption of the Federal Law of 25 February 2003, although they do not ignore the concept of reasonable accommodation, define this concept as the accommodation the employer may be compensated for if it is deemed necessary for the employment of a disabled person, but *without there being an obligation imposed on the employer to provide such a reasonable accommodation* or, for that matter, to seek compensation for whichever investment he/she decides – voluntarily – to make. This is the status of “reasonable accommodation”, for instance, under Title VIII of the Executive Decree of 5 November 1998 on the promotion of the equality of chances of persons with disabilities on the employment market (*Arrêté du Gouvernement wallon du 5 novembre 1998 visant à promouvoir l’égalité des chances des personnes handicapées sur le marché de l’emploi*)⁷²: the employer may request compensation for the adaptation costs of the working post occupied by a disabled person insofar as such an adaptation is considered necessary, but he is not obliged to provide for such an adaptation.

In the Flemish Region/Community

The only exception is the *Decreet houdende evenredige participatie op de arbeidsmarkt*,⁷³ although even in this Decree, the concept of “reasonable accommodation” has a rather ambiguous status : although their adoption is described as a requirement entailed by the principle of equal treatment, the reasonable accommodations mentioned in Art. 5 § 4 do not appear under the definitions either of direct discrimination, or of indirect discrimination⁷⁴. The hesitation of the Flemish legislator, in this respect, may be attributed to the vague character of the “reasonable accommodations” called for by the *Decreet houdende evenredige participatie op de arbeidsmarkt*. This vagueness, in turn, is explained by the rather remarkable definition of the concept of reasonable accommodation (“redelijke aanpassingen”), which is mentioned without a specific reference to disability, but as a *general* requirement of equal treatment. According to Art. 5 § 4 of the Decree, the concept entails that the employer or the persons or organisations acting as intermediates on the labour market should take

⁷¹ Projet de loi tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l’égalité des chances et la lutte contre le racisme, *Ch. Repr.*, sess. 2001-2002, 22 mai 2002, Amendement n°3 du Gouvernement.

⁷² This Title of the Executive Decree of 5 November 1998 is based on Article 15 of the Decree of 6 April 1995 on the integration of persons with disabilities, which states the Agence wallonne pour l’intégration des personnes handicapées (AWIPH) may subsidize, under the conditions defined by the Walloon Government, “l’achat, la construction, la transformation d’infrastructures ou d’équipements spécifiques destinés aux personnes handicapées”, *Mon. b.*, 6.1.1999.

⁷³ *Mon. b.*, 26.7.2002, p. 33262.

⁷⁴ Comp. with Art. 2 § 2, b), ii) of the Framework Directive.

appropriate measures where needed in a particular case, to enable a person to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden, according to the same clause, shall not be disproportionate when it is sufficiently remedied by existing measures. The wording of this provision is of course borrowed from Article 5 of the Framework Directive 2000/78/EC, except for its extension beyond disabled persons.

In the Region of Brussels-Capital

Article 26, 4°, of the *Décret relatif à l'intégration sociale et professionnelle des personnes handicapées*, adopted on 4 March 1999 by the Commission Communautaire française de la Région de Bruxelles-Capitale⁷⁵ provides that the Executive of that organ will stipulate the conditions under which its administration will be authorized to compensate the employer for the costs of the accommodation of the working post, which is recognized as necessary (“d'accorder à l'employeur une intervention dans les frais d'adaptation du poste de travail justifiée par la déficience du travailleur en vue, soit d'engager une personne handicapée, soit de favoriser l'accession du travailleur à une fonction qui répond mieux à ses capacités, soit de maintenir au travail une personne qui devient handicapée”). The compensation should cover the full cost of the accommodation provided for, if it is deemed necessary (Art. 31). Like under the Decree of the Walloon Government of 5 November 1998, however, the employer is under no obligation to provide this form of reasonable accommodation to his/her disabled employee. Nevertheless, such provisions on the possibility for employers to draw upon public grants for the provision of reasonable accommodation indirectly does influence the level of the obligation of the employer to provide such an accommodation : indeed, under the Federal Law of 25 February 2003, under the Flemish *Decreet houdende evenredige participatie op de arbeidsmarkt*, and under the *Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt* proposed for the German-speaking Community (see hereunder), the burden imposed on the employer because of the obligation to provide reasonable accommodation will not be considered disproportionate if the employer may request the aid of public funds.

German-speaking Community

The *Dekret bezüglich der Sicherung der Gleichbehandlung auf dem Arbeitsmarkt* adopted by the German-speaking Community comprises a provision on the obligation to provide reasonable accommodation the wording of which paraphrases that of the Council Directive 2000/78/EC (Art. 5) and of the Federal Law of 25 February 2003. Like in these instruments, the use of the notion is reserved to persons with disabilities. Article 13 of the *Dekret* (“Angemessene Vorkehrungen für Personen mit Behinderung”) states :

Um die Anwendung des Grundsatzes der Gleichbehandlung für Personen mit Behinderung zu gewährleisten, sind angemessene Vorkehrungen zu treffen. Das bedeutet, dass die zwischengeschalteten Dienstleister und die Arbeitgeber die geeigneten und im konkreten Fall erforderlichen Maßnahmen ergreifen, um den Personen mit Behinderung den Zugang zur Berufsorientierung, zur Berufsberatung die Teilnahme an Aus-, Weiterbildungs- und Umschulungsmaßnahmen zu ermöglichen, es sei denn, diese Maßnahmen würden diesen zwischengeschalteten Dienstleister oder diesen Arbeitgeber unverhältnismäßig belasten. Diese Belastung ist nicht unverhältnismäßig, wenn sie durch existierende Maßnahmen ausreichend kompensiert wird.⁷⁶

⁷⁵ *Mon. b.*, 3.4.1999.

⁷⁶ According to an unofficial French translation of Article 13 :

Afin de garantir la mise en oeuvre du principe de l'égalité de traitement à l'égard des personnes handicapées, des aménagements raisonnables doivent être réalisés. Cela signifie que les intermédiaires et les employeurs prennent les mesures appropriées et nécessaires dans une situation concrète pour permettre aux personnes handicapées d'accéder à un emploi ou à un stage professionnel, d'exercer une profession, d'y progresser, d'accéder à l'orientation professionnelle, à l'information sur les professions, de participer à des mesures de formation, de perfectionnement et de reconversion, sauf si ces mesures

French-speaking Community

Article 8 of the *Décret relatif à la mise en oeuvre du principe de l'égalité de traitement* adopted on 19 May 2004 by the French-speaking Community⁷⁷ provides that:

Afin de garantir le respect du principe de l'égalité de traitement à l'égard des personnes handicapées, des aménagements raisonnables sont effectués.

La personne responsable prend les mesures appropriées, en fonction des besoins dans une situation concrète, pour permettre à une personne handicapée de se voir dispenser une formation, sauf si ces mesures imposent à la personne responsable une charge disproportionnée.

The emphasis on education or training (“formation”) as a means to provide effective accommodation is regrettable. Read *a contrario*, this implies that a failure to provide other forms of accommodation as may be required were not considered to constitute a form of discrimination under the terms of Article 8 of the Decree. However, the Decree applies, for instance, to all services of the French-speaking Community⁷⁸, and not only to those services or institutions which provide education or training. All the addressees of the requirement of non-discrimination as imposed by the Decree should be imposed an obligation to provide reasonable accommodation, *under whichever form appears to be required*. This requirement should not be confused with a very different question, which is to which entities, public or private, the Decree is addressed, i.e., what is the scope of application *ratione personae* of the Decree.

Walloon Region

Under Article 6 of the *Décret relatif à l'égalité de traitement en matière d'emploi et de formation professionnelle* adopted on 27 May 2004 by the Walloon Region:⁷⁹

Afin de garantir le respect du principe de l'égalité de traitement à l'égard des personnes handicapées, des aménagements raisonnables doivent être effectués. Cela signifie que l'opérateur prend les mesures appropriées, en fonction des besoins, dans une situation concrète, notamment pour permettre qu'une formation ou toute aide à l'insertion socio-professionnelle soit dispensée à une personne handicapée, sauf si ces mesures imposent à l'opérateur une charge disproportionnée.

Le Gouvernement wallon est habilité à définir la notion d'aménagement raisonnable et à préciser les modalités d'application du principe contenu dans l'alinéa précédent.

This formulation may be criticized for the same reasons as the one offered in the Decree of the French-speaking Community, recalled here above. There appears to be no reason to restrict the forms under which effective accommodation may have to be provided: although the definition retained in the Decree of the Walloon Region is slightly broader, as it refers not only to training but also to assistance in order to facilitate socio-professional integration, it is doubtful whether this extends, for instance, to the removal of certain architectural barriers impeding access to the workplace or occupation within a particular occupation. Of course, this restrictive approach is to be explained by the limited scope of application, *ratione materiae*, of the Decree, which restricts itself to implementing the principle of equal treatment as defined in the Race Directive and the Framework Directive with respect to the employment policy of the Region⁸⁰. However, to the extent that the Decree applies to certain persons,

imposent à l'intermédiaire ou à l'employeur concerné une charge disproportionnée. Cette charge n'est pas disproportionnée lorsqu'elle est suffisamment compensée par des mesures en vigueur.

⁷⁷ *M.B.*, 7.6.2004.

⁷⁸ See Article 3, 1°, of the Decree.

⁷⁹ *M.B.*, 23.6.2004.

⁸⁰ See Article 8 of the Decree : “Dans le respect de la compétence en matière d'emploi exercée par la Région, le présent décret s'applique à toute personne, tant dans le secteur public que dans le secteur privé, en ce qui concerne l'orientation professionnelle, l'insertion socio-professionnelle, le placement des travailleurs et l'octroi d'aides à la promotion de l'emploi”

whether private (for instance private employment agencies) or public administrations, it would have been preferable to stipulate that these persons are discriminating where they do not provide accommodation, if this does not impose on them a disproportionate burden. Another relevant consideration is that a broader approach of the requirement to provide reasonable accommodation would have created the risk of a conflict with the requirements of the Federal Law of 25 February 2003, which also contains such a requirement. However, it can be argued that the Federal legislator has legislated beyond its competences, in adopting a provision on reasonable accommodation whilst disability policy is a competence of the Communities (delegated to the Walloon Region with respect to the French-speaking Community). The current situation may create the source of confusion, as those to whom the Decree of the Walloon Region is addressed may be led to believe that the form of accommodation they must provide should not go beyond training and assistance.

b) Proposed Legislation

In spite of the fact that the deadline for transposing the Framework Directive has already passed,⁸¹ a number of Member States are still considering draft legislation. Relevant provisions of a number of proposals are considered below:

Austria

In January 2004, the Secretary of State for Social Security released a tentative draft for a bill on equal treatment of people with disabilities, inviting a number of other departments, the *Länder* (states), political parties, the social partners, and disability groups to participate in consultations (the consultations were due to end on March 19, 2004).⁸² The *January 2004 draft* was in fact composed of three different draft bills: a bill on equal treatment of disabled people (*Behindertengleichstellung*), a bill on the establishment of an arbitration committee (*Schlichtungsstelle*) and an ombudsman, and a bill to amend the *BEinstG 1969* (*Änderung des BEinstG*). The draft bill on equal treatment of disabled people launches a truly far reaching political initiative. The draft proposes to introduce a general prohibition of discrimination on account of disability, (covering both direct and indirect discrimination, yet exempting positive discrimination). The draft bill on equal treatment goes far beyond of what is required by the Framework Employment Directive. The Framework Employment Directive is specifically confined to “equal treatment in employment and occupation”. In contrast the draft is general in terms. When enacted, the prohibition will extend to all possible areas of disability discrimination, with one exception only: the prohibition will not apply to work (*Arbeitswelt*). Disability discrimination in employment and occupation will be addressed by a number of provisions to be inserted in the *BEinstG 1969*, as proposed by the draft bill to amend the *BEinstG 1969*. Finally, the draft bill on an arbitration committee is basically confined to rules on organic structures and functions of the committee and an ombudsman, as well as to procedural rules.

With regard to reasonable accommodation, Austrian law does not currently impose upon employers the duty to provide reasonable accommodation. Over the last decades, however, courts have developed guidelines involving aspects of “reasonable accommodation”, at least in the context of dismissal. When ruling upon the lawfulness of a dismissal, the Administrative Court (*VwGH*) as well as the Supreme Court (*OGH*)⁸³ have consistently held that an employer may not dismiss instantaneously if

⁸¹ However, the Directive did allow for Member States to request an additional 3 years, i.e. to end 2006, to implement the disability provisions of the Directive. In order to avail themselves of this possibility, Member States should have submitted a formal request to the Commission by 3 December 2003 explaining the need for the extension and providing information on when full implementation would occur. It is clear that not all Member States which failed to meet the 2003 implementation deadline submitted such a request.

⁸² Bundesministerium für soziale Sicherheit, Generationen und Konsumentenschutz, Entwurf eines Behindertengleichstellungsgesetzes, eines Schlichtungsstellengesetzes und einer BEinstG-Novelle: Vorbegutachtungsverfahren, GZ. 44.001/56-1/03, 19. Jänner 2004 [Department for Social Security, draft of a bill on equal treatment of people with disabilities, a bill on the establishment of an arbitration committee and an ombudsman, and a bill to amend the *BEinstG 1969*, No. 44.001/56-1/03, January 19, 2004].

⁸³ It is up to the *VwGH* (Administrative Court) to decide upon the lawfulness of a dismissal if the employee is covered by the *BEinstG 1969*; otherwise the decision lies with the Supreme Court.

the employee has lost the physical or mental aptitude necessary to carry out the job.⁸⁴ The employers' duty to care for the employees (*Fürsorgepflicht*) demanded - so the courts ruled - otherwise. Under that duty, employers must first try to adjust the employee's duties (adjustments with regard to physical requirements of the job, stress factors, time, place, working environment, colleagues, technical appliances, etc.). Dismissal ought to be regarded as a last resort: "Dismissal on account of incompetence must take place only if the employee has lost the ability to do his or her former job and the ability to perform well in another position that is reasonable and adequate, both from the perspective of the employer and the employee".⁸⁵

Although "reasonableness" (of the adjustment) is certainly not a clear-cut concept, case law offers some important elements: The employers' duty to care (*Fürsorgepflicht*) is activated only when employees can be expected (if necessary: after re-training) to be able to fulfil the new terms of their contract.⁸⁶ The greater the number of employees, the stricter the employer's duty to make reasonable adjustments.⁸⁷ Dismissal must never be pronounced solely on account of an employee's disability.⁸⁸ If (suitable) other positions are in principle available the employer must even consider assigning a post that gives title to an increased rate of pay.⁸⁹ Allowances and grants available under the *BEinstG 1969* are to be taken into account when the "reasonableness" of adjustments is to be judged.⁹⁰ However, the employer is not obliged to create a "new" post in the company, specifically tailored to meet the needs of the employee.⁹¹ In addition, if dismissal seems necessary to prevent the company's bankruptcy or other grave disturbances, the employee's interests are usually outweighed by the interests of the employer.⁹²

To enhance foreseeability and publicity, parliament decided in 1998 to convert some of the courts' principles into statutory law. Since January 1999, the *BEinstG 1969* explicitly demands that support available under Sec. 6(2) *BEinstG 1969* (grants, loans) is to be taken into account when the employers' and the employees' interests are to be balanced.⁹³ The *BEinstG 1969* also provides that an employer cannot reasonably be expected to continue employment if

- the work formerly allotted under contract becomes redundant and assigning a new position involved a heavy burden (*erheblicher Schaden*);
- the disabled person is no longer able to fulfil the contract and assigning a new position involved a heavy burden;
- the disabled person persistently breaches the terms of the contract and continuing employment undermined work discipline.⁹⁴

Existing case law and statutory law, therefore, do to some extent cover "reasonable accommodation". However, case law and statute law are concerned with dismissal only. The Framework Employment Directive goes further and, as a result, further (implementation) legislation is necessary. Nevertheless, none of the provisions of the *January 2004 draft* expressly requires employers to provide reasonable accommodation. The *January 2004 draft* avoids open language. Instead, the authors of the draft

⁸⁴ See, e.g., *OGH 29/04/1992*, 9 ObA 18/92; *OGH 11/01/2001*, 8 ObA 188/00f; *VwGH 22/02/1990*, 89/09/0147; *VwGH 25/04/1991*, 90/09/0139; *VwGH 04/10/2001*, 97/08/0469.

⁸⁵ *OGH 11/01/2001*, 8 ObA 188/00f: Der Dauertatbestand der mangelnden Eignung aus körperlichen und geistigen Gründen ist "nur dann erfüllt, wenn der Vertragsbedienstete sich auf Grund seiner körperlichen und geistigen Fähigkeiten als ungeeignet erweist, nicht nur die bisherige Tätigkeit zu verrichten, sondern auch alle anderen Tätigkeiten, die unter Bedachtnahme auf seine Kenntnisse und Fähigkeiten sowie die Natur des Unternehmens und der Fürsorgepflicht des Arbeitgebers beiden Vertragsteilen zumutbar und angemessen sind". Similar *OGH 29/04/1992*, 9 ObA 18/92.

⁸⁶ *OGH 29/04/1992*, 9 ObA 18/92.

⁸⁷ *OGH 29/04/1992*, 9 ObA 18/92.

⁸⁸ *VwGH 22/02/1990*, 89/09/0147.

⁸⁹ *OGH 29/04/1992*, 9 ObA 18/92.

⁹⁰ *VwGH 14/12/1999*, 99/11/0246.

⁹¹ *OGH 11/01/2001*, 8 ObA 188/00f: Der Arbeitgeber ist nicht verpflichtet, "auf Dauer einen der Arbeitsfähigkeit des Arbeitnehmers entsprechenden neuen Posten zu schaffen".

⁹² See, e.g., *VwGH 22/02/1990*, 89/09/0147; *VwGH 11/06/2000*, 2000/11/0096; *VwGH 04/10/2001*, 97/08/0469.

⁹³ Sec. 8(3) *BEinstG 1969*.

⁹⁴ Sec. 8(4) *BEinstG 1969*.

assumed that the employer's failure to provide reasonable accommodation could and should be classed as a form of indirect discrimination as defined by the proposed Sec. 7a(2) *BEinstG 1969*. Therefore, when an employer fails to adapt the physical working environment according to the needs of a disabled employee (or an applicant for a job vacancy), the employer will basically violate the prohibition of (indirect) discrimination on account of disability. This "negative" approach to "reasonable accommodation" is considered in more detail under Issue 3.

France

The only provisions regarding reasonable accommodation in employment which currently exist are Art. R. 232-1-8 and Art. R. 232-2-6 of the Labour Code, according to which employers have a duty to provide accommodation in the work place for disabled workers. The new bill on disabled people (*Projet de loi pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées*) which is being examined in Parliament at present has brought about a wide public debate.⁹⁵ Several hundreds of amendments were examined in the *Sénat* (where the bill was adopted on 1st March 2004) and the *Assemblée Nationale* (where the bill was adopted on 15th June 2004 and returned to the *Sénat*).

To facilitate participation of disabled people in all aspects of social life, the third part of the bill deals with accessibility especially in education, employment and surroundings (transports, buildings, new technologies). Chapter II, *Emploi, travail adapté et travail protégé* begins with Section I *Principe de non-discrimination*. Its first article is Article 9, which adds a paragraph to the discrimination section of the Labour Code (instead of the disabled workers section as in the draft text). It takes up the words of Art. 5 of the Framework Employment Directive and It specifies that, to guarantee the respect of the principle of equality, all employers, including the State and public employers must provide reasonable accommodation for disabled workers.

It reads:

Article 9

I « Après l'article L. 122-45-3 du code du travail, il est inséré un article L. 122-45-4 ainsi rédigé:

« Afin de garantir le respect du principe d'égalité de traitement à l'égard des personnes handicapées telles que définies au chapitre IV du titre Ier du livre Ier du code de l'action sociale et des familles, les employeurs, notamment l'Etat, les collectivités territoriales et leurs établissements publics, prennent, en fonction des besoins dans une situation concrète, les mesures appropriées pour permettre aux travailleurs handicapés mentionnés à l'article L. 323-3 d'accéder à un emploi ou de conserver un emploi correspondant à leur qualification, de l'exercer ou d'y progresser ou pour qu'une formation adaptée à leurs besoins leur soit dispensée, sous réserve que les charges consécutives à la mise en place de ces aménagements ne soient pas disproportionnées, notamment compte tenu des aides qui peuvent compenser en tout ou en partie les dépenses supportées à ce titre par l'employeur.

Le refus de prendre des mesures appropriées au sens de l'alinéa précédent peut être constitutif d'une discrimination indirecte. En cas de litige, la personne handicapée concernée présente des éléments de fait laissant supposer l'existence d'une telle discrimination. Au vu de ses éléments, il incombe à la partie défenderesse d'établir le caractère disproportionné des charges consécutives à ces mesures et de prouver que sa décision est justifiée par des éléments objectifs étrangers à toute discrimination. Le juge forme sa conviction après avoir ordonné, en cas de besoin, toutes les mesures d'instruction qu'il estime utiles. »

I « Following Article L. 122-45-3 of the Labour Code, Article L. 122-45-4 is inserted which reads :“In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities (...), employers, in particular the State, local communities and their public-owned

⁹⁵ For example, with regard to accessibility in transports, the duty of the RATP (which runs public transports in Paris) to ensure accessibility to all buses as a compensation for the inaccessibility of the underground which cannot be remedied, was insisted upon.

corporations take, as necessary in concrete cases, appropriate measures to enable disabled workers mentioned in Art. 323-3 to have access to, or keep a job corresponding to their qualification, to practise or advance in it, or to undergo suitable training provided such measures do not impose a disproportionate burden on the employer, taking into account the subsidies which may compensate totally or partly the costs born on that head by the employer.

Refusal to take such appropriate measures may constitute an indirect discrimination. In case of litigation, the disabled person presents factual elements which suggest such a discrimination. It then belongs to the defendant to prove that the measures constitute a disproportionate burden and that his decision was not discriminatory but justified by objective criteria. To make his decision, the judge may order all the investigation measures he thinks useful”

According to Art. 9-II, disabled persons or members of their families who help them are entitled to adjustment of working hours, « *bénéficient d'aménagements d'horaires individualisés* ». Art. 14, 15 and 16 also provide special adjustments in civil service recruitment competitions: « *des dérogations aux règles normales de déroulement des concours peuvent être prévues afin, notamment, d'adapter la durée et le fractionnement des épreuves aux moyens physiques des candidats ou de leur apporter les aides humaines et techniques nécessaires...* ». Adjustments may also concern the age of a disabled candidate when there is a limit. The bill does not contain any other definition of reasonable accommodation. Such a definition may be included in the regulations which will be adopted to implement the law or, more probably, judges will be left to decide what amounts to a reasonable accommodation or a disproportionate burden, taking public subsidies into account.

Greece

As in France, the proposed legislation borrows heavily from the wording of Article 5 of the Directive. The bill has adopted quasi literally the text of the Article in the Directive. Earlier legislation is not relevant as it merely allowed employers the possibility to obtain financial support from the State to make (only) ergonomic adjustments to the workplace, but did not create any subjective rights enforceable by individual disabled people.

Luxembourg

The Luxembourg authorities have not yet adopted implementing legislation to transpose the disability provisions of the Framework Employment Directive. A bill, projet de loi portant transposition de la directive 2000/78/CE du Conseil du 27 novembre 2000, has however been proposed in this respect. Article 11 of this bill is designed specifically to implement the reasonable accommodation provision of the Directive, and reads:

" L'employeur prendra les mesures appropriées, en fonction des besoins dans une situation concrète, pour permettre au travailleur handicapé d'accéder à un emploi, de l'exercer et d'y progresser, ou pour qu'une formation lui soit dispensée, sauf si ces mesures imposent à l'employeur une charge disproportionnée. Cette charge n'est pas disproportionnée lorsqu'elle est compensée de façon suffisante par les mesures prévues au règlement grand-ducal modifié du 14 avril 1992 déterminant la forme et le contenu visés aux paragraphes (2) et (3) du présent article.

Of relevance are also certain pre-existing instruments of Luxembourg law:

Article B, 3, (3) de la loi du 12 novembre 1991 sur les travailleurs handicapés 1 provides:

"Le directeur de l'Administration de l'Emploi fixe les mesures à prendre en vue de l'intégration ou de la réintégration professionnelles. La forme et le contenu de ces mesures, qui peuvent comporter notamment l'attribution d'une participation au salaire, d'une participation aux frais de formation, d'une prime d'encouragement ou de rééducation, l'aménagement des postes de travail ou des accès au lieu de

travail, ou la mise à la disposition d'équipements professionnels adaptés sont déterminés par règlement grand-ducal.

La participation au salaire visée à l'alinéa qui précède peut être limitée dans le temps et est fixée, suivant la gravité du handicap, sans qu'elle puisse être inférieure à 40% ni supérieure à 60% du salaire versé au travailleur handicapé, y compris la part patronale des cotisations de sécurité sociale. "

Article 3 of the règlement grand-ducal modifié du 14 avril 1992 refers to the form and content of measures envisaged in Article 3, par (2) and (3) of la loi du 12 novembre 1991 sur les travailleurs handicapés.

" Aménagement des postes de travail.

Pour assurer le succès de tout reclassement professionnel, l'Administration de l'emploi peut prendre en charge en tout ou partie, notamment:

- l'aménagement des postes de travail ;
- l'acquisition d'équipement professionnel et de matériel didactique;
- l'acquisition de prothèses et de matériel orthopédique et ergothérapeutique dans la mesure où il n'est pas pris en charge par l'organisme de sécurité sociale compétent.

Pour le suivi de ces mesures, un représentant du service des travailleurs handicapés ou d'un autre service concerné s'assurera sur place des mesures à prendre et aura le contrôle du déroulement technique en collaboration avec un des responsables de l'entreprise."

It is worth noting that the pre-existing legal system will not change as a result of the adoption of Article 11 of loi portant transposition de la directive 2000/78/CE du Conseil, and that the new requirement will not be integrated into this system.

3. Recommendation to Policy Makers and Judiciary

Legislation should seek to provide a broad and inclusive definition of reasonable accommodation, and provide illustrative examples of the kind of accommodations that can be required.

Legislators might consider modelling the generic definition of reasonable accommodation on the ADA regulations issued by the EEOC. This definition defines a reasonable accommodation as a "modification or adjustment" of any type that is needed to enable a person with a disability to participate equitably in the employment process, and covers the job (or training) application process, the job (or training) site and performance of work tasks, and the enjoyment of job (or training) benefits and rewards.

The accompanying illustrative list should include examples of different kinds of accommodations, which should be relevant to different kinds of disabilities (e.g. physical disabilities, sensory disabilities, intellectual disabilities and psychological disabilities). The list may refer to the following examples:

modifying premises, equipment, instructions, reference manuals and testing, assessment or selection procedures; altering patterns of working time or the distribution of tasks; providing training or integration resources; redeployment to an existing vacancy, reassignment to a different place of work; allowing absence for rehabilitation assessment or treatment; acquiring equipment; providing a reader, interpreter or supervision.

The relevant legislation should also stress that the reasonable accommodation provisions extends to all benefits provided by the employer, including those not directly related to the core employment tasks, e.g. canteen, social events, housing, transport.

Courts should recognise the individual nature of the determination and provision of an appropriate reasonable accommodation, and recognise the many forms which an accommodation can take. It is to be expected that over time case-law will provide clarification of the concept of 'reasonable accommodation'. Accommodations imposed, or approved, in prior cases should simplify the process of later negotiations of accommodations for other employers and employees. With the accumulation of decisions, the adequacy of any particular accommodation should become better known to the parties and more easily evaluated by courts. To further this process steps should be taken to disseminate information about good practice within the European Union.

III. Is 'Reasonable Accommodation' a Form of Positive Action?

It has been argued above that reasonable accommodation should be perceived as an element of the non discrimination requirement. However, one should note that some commentators have argued that the concept is better regarded as a form of positive or affirmative action. Doyle,⁹⁶ writing in the British context, argues that the duty to make a reasonable adjustment 'is an example of legally mandated positive action rather than a requirement of reverse or positive discrimination'. Meanwhile Karlan and Rutherglen⁹⁷ have described the 'reasonable accommodation' requirement in the ADA as conferring a right to 'insist upon discrimination in their (persons with disabilities) favor' and regard the obligation as a form of affirmative action, albeit an unusual and distinct form. Tucker also argues that 'reasonable accommodations' are one form of affirmative action, in that entities are required to spend money and/or reorganise their policies to treat a person with a disability differently – i.e. to take affirmative action on the behalf of people with a disability.⁹⁸ She regards the perception of the obligation to make 'reasonable accommodations' in the ADA as a form of affirmative action (which is a justified perception in her opinion) as problematic for the Act's enforcement. She argues that courts view the ADA as going beyond the traditional civil rights approach to combating discrimination, and as imposing costs on employers in the form of affirmative 'reasonable accommodation' requirements. These obligations are perceived as unjustified, and courts have responded by seeking to limit the scope of the ADA in a variety of ways, including through the development of a restricted definition of a person with a disability. Given the many instruments providing public support to finance accommodations which are available in the Member States of the EU, it is submitted that this problem is less likely to arise in Europe.

Authors who regard 'reasonable accommodations' as a form of positive or affirmative action sometimes recognise that, unlike most forms of positive action which are aimed at members of a vulnerable or underrepresented group, 'reasonable accommodations' possess an individualised character. For this reason statistical data, revealing a numerical imbalance of a particular group of workers, such as women or ethnic minorities, in a particular employer's workforce are largely irrelevant for decisions concerning 'reasonable accommodations'. In addition, accommodations can involve regular and ongoing expenditure, such as a provision of personal assistance, rather than a one off decision to award a woman or a member of an ethnic minority a job or training. For these reasons the 'reasonable accommodation' obligation is not susceptible to the problems of under-inclusiveness or over-inclusiveness which can dog classical positive action measures. In addition, the failure to render the obstacle or barrier irrelevant by adapting the environment can actually be regarded as a form of discrimination where it is possible for the employer to make such an accommodation.

Karlan and Rutherglen argue that a revised model of affirmative action can be developed from an understanding of jobs as contingent assemblies of tasks and responsibilities that can be changed, to accommodate the needs of individual employees. The individualised adjustments required by the duty

⁹⁶ Brian Doyle, 'Enabling Legislation or Dissembling Law? The Disability Discrimination Act 1995', *Modern Law Review*, Volume 60, 1997, 64 at 74.

⁹⁷ Pamela S. Karlan and George Rutherglen, 'Disabilities, Discrimination, & 'reasonable accommodation'', *Duke Law Journal*, Volume 46, Number 1, 1996, 1.

⁹⁸ Bonnie Poitras Tucker, 'The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm', *62 Ohio State Law Journal*, 2001, 335.

of 'reasonable accommodation' leads away from the formalities and generalisations that have plagued traditional forms of affirmative action on the basis of race and sex and does not perpetuate the stereotypes.

In spite of these arguments, and the plea for a revised approach to positive action with regard to reasonable accommodation put forward by authors such as Karlan and Rutherglen, it seems inappropriate to view the reasonable accommodation requirement found in the Framework Employment Directive in this light. Even though the Directive does not explicitly define a failure to make a reasonable accommodation as a form of discrimination, or enunciate on the relationship between 'reasonable accommodation' and positive action, it seems implicit in its wording that the two kinds of instruments are regarded as distinct. This can be surmised from the fact that 'reasonable accommodation' is a requirement under the Directive whilst Member States are given the freedom (but not the obligation) to allow for, and adopt, positive action measures in favour of people with disabilities under Article 7 of the Directive. This distinction arguably strengthens the argument that the obligation to make a 'reasonable accommodation' should be fitted into the non-discrimination framework.

This argument is reinforced by a theoretical analysis of the concept of and motivation behind reasonable accommodation norms. It is recalled that the reasonable accommodation requirement is designed to secure the removal of barriers which would otherwise prevent disabled individuals from benefiting from employment opportunities.⁹⁹ Such barriers arise because, on occasions, the interaction between the physical or social environment and an individual's impairment result in the inability to perform a particular function or job in the conventional manner. Ignoring (by failing to accommodate) the impairment would result in denying a person equal employment opportunities. The reasonable accommodation requirement therefore recognises that where people's impairments result in them being differently situated regarding employment opportunities, identical treatment may be a source of discrimination, and different treatment may be required to eliminate it. Recognition of this need for real, not merely formal, equality is the basis of the obligation to make individualised adjustments to permit particular disabled individuals to participate in particular employment related activities. In this situation inaction, as opposed to action, can amount to discrimination, and this is expressly recognised in the reasonable accommodation requirement which prohibits an employer from denying an individual with a disability an employment opportunity by failing to take account of the impairment when taking account of it – in terms of changing the job or physical environment of the workplace – would enable the individual to do the work.¹⁰⁰

Burgdorf has argued in the US context that the failure by some to recognize reasonable accommodation as an element of not discriminating on the basis of disability, or, stated conversely, the failure to recognize that one discriminates by failing to make reasonable accommodations to limitations resulting from disabilities, stems from a lack of in-depth understanding of the dynamics by which employers disadvantage some applicants and workers because of their disabilities. One basic oversight is an unawareness of the extent to which employers accommodate to the needs of employees without disabilities.¹⁰¹

Burgdorf argues that what is often ignored is that, in almost all circumstances, employers, businesses, and government agencies put a great deal of money and energy into "accommodating" the users of their services, facilities, and programmes without denominating their actions as such. He takes the simple example of offices for employees. Before any worker occupies a particular office, many features have to be installed to facilitate comfort and efficiency: electric lights will be installed; the

⁹⁹ See the section entitled theoretical background at the beginning of this paper.

¹⁰⁰ P.S. Karlan, and G. Rutherglen, 'Disabilities, Discrimination, and Reasonable Accommodation', 46, *Duke Law Journal*, 1996, pp. 1-41 at p. 9.

¹⁰¹ The material in the paragraphs that follow is derived from Robert L. Burgdorf Jr., "'Substantially Limited' Protection From Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability," 42 *Villanova Law Review* 409, 529-32 (1997). For a similar view, see Harlan Hahn, "Accommodation and the ADA: Unreasonable Bias or Biased Reasoning?" 21 *Berkeley Journal of Employment and Labor Law* 166, 189-90 (2000).

floor may be carpeted; telephones are installed; a desk and a chair are purchased; perhaps pictures are hung on the walls; a computer and other office equipment may be provided; pens, pencils, and writing paper are purchased; bookshelves may be installed, and possibly stocked with a dictionary, reference works, and other relevant books, journals, and reports; there will usually be a table, filing cabinets, and other furniture in the room; in most places, heating and air conditioning are put in; if the employer's resources permit and the employee is lucky, there may be a window with some kind of view.

External to the particular office, other accommodations are supplied: access to a toilet is provided and the toilet, sink, and other fixtures are installed in that room; there may be a coffee-maker (and in some office suites even a refrigerator or a mini-kitchen); photocopy and facsimile machines are provided; possibly parking spaces or some other arrangements for parking are provided. In addition to office configuration and accessories, many policies, practices, and procedures are based upon expectations of the usual needs of workers. The work week schedule, meal breaks, coffee breaks, holiday schedules, office outings, and public holidays are all arranged with an eye to the presumed needs and wishes of workers (to a greater or lesser degree depending upon the solicitousness or austerity of the particular employer). Burgdorf notes that the number and type of such furnishings, amenities, and benefits vary greatly depending upon the type of business, available resources, and employer attitudes; some will not have all of the accommodations listed here, while others may be more generous, with exercise facilities, day care services, expensive antique furniture, educational subsidies and leave, and numerous other perks. But no matter how sparse or plush a workplace may be, almost all provide some type of facility, and equipment and supplies to enable employees to perform their job duties; most provide some types of benefits or services; and nearly all make at least some concession to human needs.

In making these accommodations for workers generally, employers engage in assumptions about the characteristics and needs of employees, and most of the time the assumption is that workers will have ordinary mental and physical abilities. The choices of office furnishings, equipment, accessories, services, benefits, policies, procedures, and perquisites are made with the standard employee in mind. Even the heights and location of work and counter-tops, tables, light switches, electric outlets, and controls are chosen based on the presumed ability of employees to use them.

Burgdorf argues that for many people whose mental and physical abilities deviate from the norm, some of the various accommodations ordinarily provided for workers may be largely useless or even counterproductive. Thus, for a worker with quadriplegia, the desk chair may be useless, the desk itself may not accommodate the wheelchair, the toilet facility may not be accessible, the filing cabinet and other additional furniture in the office may be of less use and perhaps impede movement into and within the room, and the fancy treadmill and the step machine may not be of much value; if the carpeting is too plush, it may impede the individual's ability to traverse the room. Similarly, the parking space, pictures on the wall, the nice view, the photocopy machine, and even the lights may be of considerably less importance to a worker with no vision.¹⁰² The standard computer, without adaptations, may be essentially useless to both of these workers. Likewise, without adaptation, the standard office telephone and intercom system, a loudspeaker system, and audio fire alarm will be basically worthless for a worker who cannot hear.

Burgdorf's point is not that employers should somehow anticipate the actual physical or mental limitations of all future employees and have the work environment ready to meet their specific needs. It is, rather, that employers routinely devote considerable energy and money providing accommodations for employees based upon assumptions that workers will have standard physical and mental characteristics. He concludes that reasonable accommodation for workers with disabilities, then, is simply the same type of accommodation that is provided generally, but is tailored to the actual needs of the particular worker for whose benefit it is made. Moreover, Burgdorf refers to US evidence

¹⁰² Burgdorf notes this is not to suggest that a worker who is blind might not wish to have paintings, a good view, etc., for the benefit of visitors, fellow workers, or clients, and to signify a level of success or status.

which indicates that the costs of accommodation for workers with disabilities are not significantly different from the expenses associated with the employment of other workers.¹⁰³

Burgdorf argues that in addition to recognising that employers routinely accommodate employees not having disabilities, an informed analysis of the nature of reasonable accommodation must also take into account two other significant considerations - the inherent flexibility that often exists for structuring job tasks and the foreseeability of people with disabilities as part of the workforce. In this context he refers to the U.S. Commission on Civil Rights which has noted the potential flexibility that employers have in structuring tasks:

It is often incorrectly assumed that there is only one way of doing something - the customary way that "normal" people do it. But programs, activities, and facilities may actually be organized and structured in a variety of ways. The assignment of tasks and the methods of performing them can be changed in response to the abilities and characteristics of the person involved. ...

Although it is sometimes difficult to see alternatives when "things have always been done that way," the tasks that comprise most jobs are often easily changed.¹⁰⁴

The Commission provided a concrete illustration of this inherent flexibility in structuring tasks:

A secretarial position, for example, frequently requires filing, answering the telephone, taking dictation, and ordering supplies. But no factor inherent in the position of secretary demands that all secretaries in the same office be able to do the same things. In an office with several secretaries, these tasks might be assigned in various ways to achieve the same results despite different functional limitations. For example, a person with no hearing might perform typing, filing, and ordering supplies (and perhaps take dictation by lip-reading) but not answer telephones.

In addition, there are several different ways of performing each secretarial task. Dictation, for example, may be taken with a tape recorder instead of shorthand; letters can be typed on a word processor that vocalizes letters or words that appear on the screen instead of a standard typewriter. In each case, one functional ability substitutes for another that may be impaired or missing.¹⁰⁵

Burgdorf compares this theoretical fact pattern with a recent decision of a United States Court of Appeal holding that a deaf person had stated a valid ADA claim by alleging that he had been denied a reasonable accommodation in the form of restructuring the non-essential voice phone functions of a position he was seeking.¹⁰⁶

Burgdorf argues that the need for employers to be flexible in the ways in which they structure their policies, practices, and workplaces is paramount because it is completely foreseeable that, in the absence of discrimination in employment, transportation, and public services, disabled people will comprise a substantial portion of the workforce. For employers to ignore the existence of disabled people in planning and structuring their jobs, and in designing and erecting their facilities, goes well

¹⁰³ See, e.g., National Council on Disability, *Voices of Freedom: America Speaks Out on the ADA* 19-20 (1995), citing Peter Blanck, *Communicating the Americans with Disabilities Act-- Transcending Compliance: A Case Report on Sears, Roebuck, and Co.* (1994) (reporting that average reasonable accommodation cost \$121, 69% cost nothing, 28% had a cost but less than \$1,000, and 3% exceeded \$1,000), and Job Accommodation Network, *Accommodation Benefit/Cost Data 4* (1994) (businesses making reasonable accommodations got \$15.34 in benefit from each \$1 spent); Louis Harris and Associates, *The ICD Survey II: Employing Disabled Americans* (1987) at 9 (75 percent of managers reported that the average cost of hiring an employee with a disability is about the same as the cost of employing a worker without a disability), discussed in National Council on the Handicapped, *On the Threshold of Independence* 15 (1988).

¹⁰⁴ *Accommodating the Spectrum* at 90-91.

¹⁰⁵ *Id.*

¹⁰⁶ *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1192 (10th Cir. 2003)

beyond inadvertence and simple negligence and amounts to reckless indifference or a form of intentionality - a looking away and denying the existence of disabled people in the face of abundant evidence to the contrary. As a congressional task force noted when the ADA was being considered in Congress, "[d]isability has become a predictable part of the normal life cycle for a large and increasing proportion of human beings."¹⁰⁷ Or, in the words of a federal statute, "disability is a normal part of the human experience"¹⁰⁸ In the ADA, Congress found that the people with disabilities comprise a substantial portion of the U.S. population - "some 43,000,000 Americans" - and that "this number is increasing as the population as a whole is growing older."¹⁰⁹

Burgdorf notes that disabled people are inevitably part of the pool of potential workers from whom employers must hire. It is totally foreseeable that some potential employees will, because of disabilities, need reasonable accommodations to facilities and practices designed, with one-size-fits-all assumptions, for those without disabilities. As a matter of prudent planning and simple social justice, employers should anticipate the participation of disabled workers and should incorporate more flexibility into their facilities and practices. As a concrete example, if an employer takes into account that some workers who use wheelchairs may be hired, then it might be prudent to utilize tables and desks whose height can be adjusted to accommodate use by those in wheelchairs. Likewise, employers should recognize that certain employees may need to take time off for medical appointments and prepare work schedules with this possibility in mind; other workers may need facilities and time to take their medications during the work day; still others may need to receive verbal instructions and announcements in written form because of hearing impairments. Burgdorf argues the failure to anticipate the presence of disabled people in designing and implementing workplace policies and facilities is not a neutral, rational act; it is based upon prejudice, stereotypes, and callous indifference - an assumption, and often a self-fulfilling prophecy, that disabled people will not participate.

Burgdorf concludes that reasonable accommodation was not devised and does not operate as a special service programme for disabled individuals. It responds to forms of discrimination that are often habitual and presumably thoughtless, but that nonetheless present very real, direct obstacles to the participation of those whose physical and mental abilities fall below the expected norm. Thus, individualized adjustments or modifications of opportunities, i.e., reasonable accommodations, are necessary to permit disabled people to participate equally in the workplace. This requirement is an essential element of prohibiting discrimination on the basis of disability.

1. National Approaches

a) Pre-Directive Legislation and Case Law

United Kingdom and Ireland

Within the European Union, the obligation to make a reasonable accommodation can be found in some national disability non-discrimination law which predated the Directive. The requirement has generally been situated within the non-discrimination framework. The UK Disability Discrimination Act 1995 establishes a duty to make "reasonable adjustments", and defines a failure to comply with this duty as discrimination where the failure cannot be justified. The Irish Employment Equality Act 1998 similarly defines an unjustified failure to make a reasonable accommodation as a form of discrimination.

Sweden

The obligation to make a 'reasonable accommodation' is not a form of positive action. The Prohibition of Discrimination in Working Life of People with Disability Act requires a consideration of whether

¹⁰⁷ Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 19 (1990).

¹⁰⁸ 29 U.S.C. § 701(a)(3), as amended by Pub. L. No. 102-569, tit. I, § 101, 106 Stat. 4346.

¹⁰⁹ 42 U.S.C. § 12101(a)(1).

the individual can be regarded as having been discriminated against if the employer fails to provide a 'reasonable accommodation'.

Furthermore, providing a reasonable accommodation is required by law. In contrast, positive actions are generally voluntary undertakings by an employer. It should also be pointed out that it is generally assumed that positive action in regard to disabled people is allowed in Sweden.

The issue of positive action is usually regulated in laws, other than the law against discrimination. There are a number of special measures that are available in relation to the disabled in regards to working life. Their purpose is to directly or indirectly compensate for disadvantages linked to disability (see below under Issue 7).

b) Non-European Experiences

The United States

The ADA likewise defines a failure to make a reasonable accommodation as a form of discrimination.¹¹⁰ The relevant provisions provides:

'the term "discriminate" includes – ...

not making a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) Denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;'

The Supreme Court of the United States has recognized the importance of a reasonable accommodation requirement in eliminating discrimination against disabled individuals. In *Alexander v. Choate*,¹¹¹ the Court declared that the non-discrimination mandate of Section 504 of the Rehabilitation Act of 1973 requires that disabled individuals be provided "meaningful access" and that such access would be effectively denied unless reasonable accommodations are required.¹¹² Accordingly, the Court endorsed a legal mandate for "those changes that would be reasonable accommodations."¹¹³ The Court noted with approval that "[t]he regulations implementing § 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access."¹¹⁴ The Court at various times referred to "reasonable accommodations," "reasonable adjustments," and "reasonable modifications" in describing the concept.¹¹⁵ While the *Alexander* case did not involve employment discrimination, the Court specifically cited with approval the reasonable accommodation provisions of employment regulations under Section 504 as an example of the need for a reasonable accommodation requirement to ensure meaningful access.¹¹⁶

In its subsequent decision in *School Board of Nassau County v. Arline*,¹¹⁷ the Court had occasion to explicitly recognize the reasonable accommodation requirement in the employment context. The Court declared unequivocally that "[e]mployers have an affirmative obligation to make a reasonable

¹¹⁰ Section 102(b), 5(A) and (B).

¹¹¹ 469 U.S. 287 (1985).

¹¹² *Id.* at 301.

¹¹³ *Id.*

¹¹⁴ *Id.* at 301 n.21.

¹¹⁵ *Id.* at 299–301.

¹¹⁶ *Id.* at 301 n.21.

¹¹⁷ 480 U.S. 273 (1987).

accommodation for a handicapped employee.”¹¹⁸ In outlining the legal issues that courts are to resolve in employment discrimination cases under Section 504, the Court declared that “[t]he basic factors to be considered in conducting this inquiry are well established”;¹¹⁹ among these is determining “whether any ‘reasonable accommodation’ by the employer would enable the handicapped person to perform [the essential functions of the job in question].”¹²⁰ The Court, in remanding the case, called on the district court to determine, *inter alia*, “whether the School Board could have reasonably accommodated” the plaintiff.¹²¹ Likewise, in its decision in *U.S. Airways, Inc. v. Barnett*,¹²² to be discussed in more detail below, the United States Supreme Court recognized reasonable accommodation as a key requirement of the Americans with Disabilities Act in the employment context. In addition, in a slightly different, but related, context, the Supreme Court upheld the application of a requirement of “reasonable modifications of policies, practices, or procedures” under the ADA’s Title III¹²³ to a professional golfer, and ruled that the PGA Tour had to permit him to use a golf cart even though other competitors were required to walk during golf tournaments.¹²⁴

The acknowledgment that U.S. disability non-discrimination laws impose a requirement that employers make reasonable accommodations has not prevented ongoing debates in American journals and law reviews about whether this requirement is an element of not discriminating on the basis of disability or whether it goes beyond non-discrimination to provide something extra or “special” to workers with disabilities.¹²⁵ The latter view has been articulated as follows:

Fundamentally the ADA is not an antidiscrimination law. By forcing employers to pay for work site and other job accommodations that might allow workers with impairing conditions defined by the law to compete on equal terms, it would require firms to treat unequal people equally, thus discriminating in favour of the disabled.¹²⁶

Others declare that the reasonable accommodation requirement is “in essence, a form of affirmative action for individuals with disabilities.”¹²⁷

In its decision in *U.S. Airways, Inc. v. Barnett*,¹²⁸ the Supreme Court provided some clarification that reasonable accommodation is part of the broader obligation not to discriminate on the basis of disability. US Airways had argued that reassignment rights of an employee with a disability under the ADA could not prevail over the seniority rights of other employees to fill a vacant position; otherwise, the airline contended, the Act would give “preferential treatment” to workers with disabilities when it

¹¹⁸ *Id.* at 289 n. 19.

¹¹⁹ *Id.* at 287.

¹²⁰ *Id.* at 287 n. 17.

¹²¹ *Id.* at 289.

¹²² 122 S.Ct. 1516, 1521 (2002).

¹²³ 42 U.S.C. § 12182(b)(2)(A)(ii).

¹²⁴ *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

¹²⁵ See, e.g., Samuel R. Bagenstos, “‘Rational Discrimination,’ Accommodation, and the Politics of (Disability) Civil Rights,” 89 *Virginia Law Review* 825 (2003); Sharon Rabin-Margalioth, “Antidiscrimination, Accommodation, and Universal Mandates -- Aren’t They All the Same?” 24 *Berkeley Journal of Employment & Labor Law* 111 (2003); Christine Jolls, “Antidiscrimination and Accommodation,” 115 *Harvard Law Review* 642 (2001); Samuel Issacharoff and Justin Nelson, “Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?” 79 *North Carolina Law Review* 307 (2001); Bonnie Poitras Tucker, “The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm,” 62 *Ohio State Law Journal* 335 (2001); Pamela S. Karlan and George Rutherglen, “Disabilities, Discrimination, and ‘Reasonable Accommodation,’” 46 *Duke Law Journal* 1 (1996). The Bagenstos article contains a good overview and sampling of the prior legal literature; see especially 89 *Virginia Law Review* pp. 828-830 n. 9.

¹²⁶ Sherwin Rosen, “Disability Accommodation and the Labor Market,” in *Disability and Work: Incentives, Rights, and Opportunities* 18, 21 (Carolyn L. Weaver, ed. 1991). Professor Bagenstos quotes this excerpt as a “typical” representation of commentators “who are skeptical of the ADA.” Bagenstos, at 827.

¹²⁷ Stephen F. Befort and Holly Lindquist Thomas, “The ADA in Turmoil: Judicial Dissonance, the Supreme Court’s Response, and the Future of Disability Discrimination Law,” 78 *Oregon Law Review* 27, 75 (1999). Similarly, a newspaper opinion piece declared that “the law does far more than bar simple discrimination; it also requires expensive affirmative action on behalf of the disabled.” Doug Bandow, “Regulatory Reach of Disabilities Act,” *The Washington Times*, Feb. 7, 1992, p. F4.

¹²⁸ 122 S.Ct. 1516 (2002).

was intended only to confer "equal" treatment.¹²⁹ In U.S. Airways' view, the ADA "does not require the employer to grant a request that, in violating a disability-neutral rule, would provide a preference."¹³⁰

The Supreme Court, however, responded as follows:

While linguistically logical, this argument fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.

Were that not so, the "reasonable accommodation" provision could not accomplish its intended objective. Neutral office assignment rules would automatically prevent the accommodation of an employee whose disability-imposed limitations require him to work on the ground floor. Neutral "break-from-work" rules would automatically prevent the accommodation of an individual who needs additional breaks from work, perhaps to permit medical visits. Neutral furniture budget rules would automatically prevent the accommodation of an individual who needs a different kind of chair or desk. Many employers will have neutral rules governing the kinds of actions most needed to reasonably accommodate a worker with a disability. Yet Congress, while providing such examples, said nothing suggesting that the presence of such neutral rules would create an automatic exemption.

In sum, the nature of the "reasonable accommodation" requirement, the statutory examples, and the Act's silence about the exempting effect of neutral rules together convince us that the Act does not create any such automatic exemption. The simple fact that an accommodation would provide a "preference" - in the sense that it would permit the worker with a disability to violate a rule that others must obey - cannot, *in and of itself*, automatically show that the accommodation is not "reasonable."¹³¹

While the Supreme Court's use of the terms "special," "preference," and "preferential" may generate some confusion, the Court's basic ruling in the *Barnett* is that the reasonable accommodation requirement is part of and essential to non-discrimination, in the form of real equality that comprises "the Act's basic equal opportunity goal."¹³² Moreover, the *Barnett* ruling makes it clear that the duty of making reasonable accommodations is not restricted simply to modifying rules and practices that directly disadvantage disabled workers, and can necessitate exceptions even to practices and policies that are disability-neutral and applied uniformly to all workers.

Accordingly, an enlightened view of the reasonable accommodation requirement in American disability non-discrimination statutes is that this requirement is an essential component of not discriminating on the basis of disability, and should not be characterized as "affirmative action" or "positive action" - concepts that address obligations over and above the duty of employers not to engage in discrimination.¹³³

¹²⁹ *Id.* at 1520-21.

¹³⁰ *Id.* at 1521.

¹³¹ *Id.*

¹³² *Id.*

¹³³ The scholarly case for reasonable accommodation as part of the prohibition of discrimination has been convincingly made by various commentators. See, e.g., Samuel R. Bagenstos, "'Rational Discrimination,' Accommodation, and the Politics of (Disability) Civil Rights," 89 *Virginia Law Review* 825 (2003); Sharon Rabin-Margalioth, "Anti-Discrimination, Accommodation, and Universal Mandates - Aren't They All the Same?" 24 *Berkeley Journal of Employment & Labor Law* 111 (2003); Christine Jolls, "Antidiscrimination and Accommodation," 115 *Harvard Law Review* 642 (2001).

Some twenty years ago, the U.S. Commission on Civil Rights sought to provide a clear conceptual framework in this regard.¹³⁴ It sharply distinguished reasonable accommodation from the category of initiatives referred to as "affirmative action." The Commission declared:

[A] key component of non-discrimination toward [people with disabilities] is the requirement of reasonable accommodation. The non-discrimination mandate and its reasonable accommodation component address acts, policies, and barriers that currently operate to exclude, segregate, or impede [people with disabilities].

Affirmative action, on the other hand, in the context of [disability] discrimination, refers to some effort beyond non-discrimination and reasonable accommodation to increase the participation of [people with disabilities]. It does not focus upon eliminating current discrimination, but rather on removing the present effects of past discrimination. The premise underlying such an affirmative action requirement is that the class of [persons with disabilities] has been so seriously underrepresented in the past, wither by the particular individual or agency involved or on a broader societal basis, that extra efforts are required to achieve an equitable level of participation. Typically this takes the form of outreach and recruiting efforts designed to increase the numbers of ... applicants and participants [with disabilities].¹³⁵

Nevertheless, the distinction between non-discrimination measures and affirmative action, with reasonable accommodation falling clearly into the former, has often been ignored, leading to considerable confusion and unnecessary controversy in the United States.

Australia

As will become clear in the discussion under Issue 3, the Australian Disability Discrimination Act does not impose a positive duty on employers to make accommodations to the needs of disabled individuals. However, an examination of case law under the DDA does reveal the attitude of the High Court of Australia towards the question of whether such a duty should be regarded as positive action or as an element of the non-discrimination norm. Following the recent judgment in *Purvis*¹³⁶ it has become clear that High Court of Australia regards 'reasonable accommodation' as a positive form of action. Five of the seven judges in *Purvis* held that a separate statutory provision imposing a duty to accommodate would be a form of positive action. Ironically, the High Court specifically referred to the provisions contained in the UK Disability Discrimination Act 1995 and the EC Framework Employment Directive as examples of the imposition of a positive obligation to make 'reasonable adjustments' to accommodate people with disabilities.¹³⁷ Basser argues the current position in Australia highlights the absurdity which can arise when the duty to accommodate is treated in a reactive fashion. The failure to make accommodations may render discrimination unlawful, but there is no positive obligation to provide accommodation and services to effect equality for people with disabilities (see Issue 3 below).

The need for a positive duty has been raised by the Productivity Commission. The Commission recognises that the Australian approach, in the area of employment, has had a limited and disappointing impact. While rejecting the need for a general duty to accommodate in all areas under the Act, the Commission is currently exploring the possibility of introducing a limited positive duty on employers to identify and eliminate barriers that restrict employment opportunities for people with disabilities.¹³⁸ This duty would require employers to take 'reasonable steps' to identify and eliminate barriers which limit the opportunities for people with disabilities. The 'reasonable steps' could include: examining recruitment practices for potential indirect discrimination; identifying current staff

¹³⁴ *Accommodating the Spectrum*, at 154-156.

¹³⁵ *Id.* at 155-56.

¹³⁶

¹³⁷ per Gummow, Hayne & Heydon JJ, [203]

¹³⁸ Productivity Commission *Review of the Disability Discrimination Act: Draft Report* 368-371

profiles and assessing reasons for any under-representation of people with disabilities; undertaking an access audit; and developing a voluntary action plan to address systemic issues.¹³⁹ This limited duty appears to operate within the non-discrimination framework.

2. Examples of Provisions Adopted by European Union Member States to Implement the Framework Employment Directive

a) Adopted legislation

a.1) A Clear Separation of Reasonable Accommodation from Positive Action

Finland, The Netherlands and Spain

Most of the national legislation which has been adopted to implement the disability provisions of the Framework Employment Directive defines an unjustified failure to make a reasonable accommodation as a form of discrimination, and clearly separates this requirement from positive action measures. For example, the provision on positive action in the recently adopted Finnish Equality Act (section 7(2) of the Act) is separate from that on reasonable accommodation (section 5), and the preparatory works do not in any way make a connection between the two.

The Dutch Equal Treatment Act on grounds of Disability or Chronic Disease provides that “the prohibition of differentiation” entails that the addressee of this norm is bound to provide “an effective accommodation”, unless this would impose a disproportionate burden for the addressee. This clearly places the reasonable accommodation obligation within the non-discrimination norm.

Reasonable accommodation is also clearly an element of the non discrimination principle in the recently adopted Spanish legislation. Article 5 of the Law 51/2003, 2 of December (BOE 3/12/03), of equal opportunities, non-discrimination and universal accessibility for disabled people differentiates two kinds of measures: non discrimination measures and positive actions. Article 6 defines non-discrimination measures as those that are aimed at preventing a disabled person from being treated in an unfavourable manner, directly or indirectly, in a comparable or analogous situation, or correcting such treatment. Article 8 defines positive action as those supports of specific character aimed at preventing or compensating the disadvantages or special difficulties that disabled persons have integrating and participating fully in all aspects of life.

a.2) Ambiguity

Germany

German law is ambiguous in this respect. Historically, the right to reasonable accommodation in German law has not been linked to the right not to be discriminated against. The right to reasonable accommodation as a subjective right of a severely disabled employee was already entailed in the Severely Disabled Act of 1974 which preceded SGB IX, which did not contain an anti-discrimination provision. Thus, some commentators view this right as a form of positive action, referring directly to Art.7 of the EU Framework Directive.¹⁴⁰ Others consider the duty to accommodate (especially the duty to provide technical aids and accessible worksite) as a protection against indirect discrimination as it prohibits the employer from arguing that the employment of a disabled worker is impossible because the work place is inaccessible.¹⁴¹ On the other hand, the right to reasonable accommodation is located

¹³⁹ *ibid* 368

¹⁴⁰ Dopotka-Ritz, § 81 Randzeichen 35 in: Bühr, Dietrich/Fuchs, Harry/Krauskopf, Dieter/Lewering, Eckhart (Hg.), Sozialgesetzbuch – Neuntes Buch – (SGB IX) (Loseblatt), München, Stand: Mai 2003

¹⁴¹ Düwell, § 81 Randzeichen 32 in: Dau, H. Dirk/ Düwell, Franz Josef / Haines, Hartmut: Rehabilitation und Teilhabe behinderter Menschen, Lehr- und Praxiskommentar (LPK – SGB IX), Baden-Baden: Nomos, 2002

in the same sub-paragraph as the right to preferential treatment concerning internal vocational training designed to promote career development¹⁴², which clearly is a positive action right.

a.3) A Perceived Link between Reasonable Accommodation and Positive Action

Belgium

In spite of these legislative recognitions of the link between reasonable accommodation and non-discrimination, some problems have arisen in the European context. In Belgium there was initially a reluctance to include any reasonable accommodation provision in the federal statute implementing the Framework Employment Directive. A proposal to include such a provision, the wording of which was heavily based on Article 5 of the Directive, was rejected. One of the reasons given for this by the Minister of Employment was that the proposal amounted to a form of positive action, whilst the national statute in question was only an anti-discrimination measure.¹⁴³ It is worth noting in this context that the Belgian federal government does not have the competence to legislate on positive action, and this perception of reasonable accommodation amounted to a significant hurdle to legislation at the federal level (although would not restrict implementation at other levels of government).¹⁴⁴ Ultimately a way was found round this impasse through the inclusion of the following government amendment:

"The denial of a reasonable accommodation for a person with a disability is discrimination in the sense of this statute.

A reasonable accommodation is an accommodation that does not create a disproportionate burden, or where the burden is sufficiently compensated for by existing measures" Art. 2(3).

b) Proposed Legislation

In some Member States, such as Greece the wording of Article 5 of the Directive has in essence been directly incorporated in the proposed implementation legislation. The result is that, just as the Directive, a failure to make a reasonable accommodation is not explicitly defined as a form of discrimination, but nor is it incorporated within the notion of positive action.

The proposed implementation legislation in Austria (to amend the *BeinstG 1969*) does not make a connection between reasonable accommodation and positive action, and this is also true for the existing case law on dismissal. The proposed implementation legislation in France (*Projet de loi pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées*) does provide that a failure to accommodate will be considered a breach of the principle of equality - in other words, such (in)action will amount to discrimination. The duty to accommodate will be included in the discrimination section of the Labour Code (Art. L. 122-45-4) and it is specified that refusal to accommodate may constitute indirect discrimination.

3. Recommendations to Policy Makers

¹⁴² § 81 (4) nr. 2 : „bevorzugte Berücksichtigung bei innerbetrieblichen Maßnahmen der beruflichen Bildung zur Förderung ihres beruflichen Fortkommens“

¹⁴³ *Parl. St.* Senaat 2001-2002, nr. 2-12/15, 149-152. Further reasons included the future adoption of specific legislation on this topic, and the need to discuss the measure with the social partners. See also Van den Langenberg, *Vrijheid en Gelijkheid, De horizontale werking van het gelijkheidsbeginsel en de nieuwe antidiscriminatiewet*, Maklu, 2003, 573 at 601-604.

¹⁴⁴ The Belgian constitutional structure divides the task of promoting equal opportunities for people with disabilities between: the Federal level, which has the responsibility for defining non discrimination requirements in criminal and labour law and by regulating the contract of employment;

the Regional level, which has the responsibility for promoting the professional integration of people disabilities in employment policy;

and the Communities, which have the responsibility for promoting the rehabilitation and vocational training of people with disabilities.

However, some recent developments have brought about more coherence at the Regional and Community level.

Following the distinction made in the Framework Employment Directive, national legislators should clearly specify that the obligation to make a reasonable accommodation is an element of the non-discrimination principle, and quite separate from positive action measures. Legislation should stress that the reasonable accommodation obligation is a tool to remove barriers which hamper the employment and training of disabled people.

Courts should also interpret any implementation legislation in this way, and reiterate the role which reasonable accommodation norms play in combating disability discrimination. Courts should not be swayed by any argument raised by those obliged to make reasonable accommodations that such measures amount to positive action, and are therefore an exception to the non-discrimination norm and only to be required in exceptional cases.

IV. Is it sufficient to establish a negative duty to accommodate i.e. a failure to accommodate amounts to discrimination, or must a positive duty to accommodate be established?

The issue which is being addressed here concerns a distinction between a positive duty to accommodate, which will usually confer a right to accommodation, and a negative provision which simply specifies that an unjustified failure to discriminate amounts to discrimination. Article 5 of the Framework Employment Directive clearly establishes a positive duty to accommodate, although it does not explicitly provide that an unjustified failure to comply with this duty should amount to discrimination. Nevertheless, many Member States have made this link in their implementation legislation. In contrast, the Australian High Court has recently established that the Australian Disability Discrimination Act only contains a negative duty to accommodate. The problems associated with the creation of a negative duty to discriminate can be illustrated by an examination of the Australian experience.

1. National Experiences

a) Outside the EU

Australia

The High Court of Australia has recently held that the requirement to accommodate found in various provisions of the DDA operates in a passive way. In *Purvis v State of NSW* the Court found that it was not possible to imply a positive duty to accommodate from the terms of the Act. McHugh and Kirby JJ considered whether the adjustments required under the Act incorporated a concept of 'reasonable accommodation' referred to in earlier cases. They rejected this approach finding that any 'adjustments' were limited to those which are 'necessary' and that the only other qualifying factor was 'unjustifiable hardship'. Therefore necessary requirements need only be provided to the point of 'unjustifiable hardship'.

Consequently, the terms of the Act create an ironic situation. On the one hand, there is a recognition in the DDA that failure to make accommodations will lead to an adverse finding of unlawful disability discrimination. On the other hand, there is no positive obligation to provide 'reasonable accommodation'.¹⁴⁵ This approach is the result of a strict textual interpretation of the general provisions prohibiting direct¹⁴⁶ and indirect discrimination¹⁴⁷ and specific provisions relating to particular areas of life such as work,¹⁴⁸ education,¹⁴⁹ access to premises,¹⁵⁰ provision of goods and services¹⁵¹ housing¹⁵² and clubs and associations.¹⁵³

¹⁴⁵ Per Gleeson, Hayne & Heydon JJ [203], [217]-[21]8; per McHugh & Kirby [104]

¹⁴⁶ DDA s 5

¹⁴⁷ DDA s 6

¹⁴⁸ DDA ss 15- 18

¹⁴⁹ DDA s 22

The approach of the High Court is consistent with the outcomes of the cases in the employment area. While some cases have implied a duty to accommodate, the remedy in all cases has been to award damages for unlawful discrimination rather than to order an employer to provide specific accommodations.¹⁵⁴ This has been the case even where it is clear that the employee could perform the inherent requirements of the job. *Daghlian v Australian Postal Corporation*¹⁵⁵ provides an illustration of this. In that case a postal worker was dismissed from her employment and was not reinstated even though the Court found that she was able to perform the inherent requirements of the job with minimal accommodation. The worker had a physical disability which limited her ability to stand for long periods of time. The main accommodation she required was a stool at her counter to allow her sit from time to time. With this accommodation she was able to perform her job satisfactorily for a little over ten years. Shortly before her dismissal, the employer introduced a 'no stool' policy and refused to make any accommodation for worker's disability. Instead, the worker was redeployed and when this new position proved unsuitable, was subsequently dismissed. The Court found that the employer's conduct amounted to unlawful discrimination under section 6. The Court also found that the provision of a suitable stool to accommodate the worker's disability would not have imposed an unjustifiable hardship on the employer. Nevertheless, the Court ordered compensation by way of damages rather than reinstatement of the worker to her former position.

Basser, in her report for the expert group, argues the inevitable conclusion to be drawn from the Australian cases is that the goals of the DDA are undermined by the lack of a separate duty to accommodate.

b) European Union

The argument has been made above that the Framework Employment Directive requires the establishment of a positive duty to make an accommodation, and that Member States would be failing in their duty to fully implement the Directive if they did not adopt this approach in their implementation legislation. Evidence from the Member States which have thus far taken steps to implement the Directive suggest that, in most cases, a positive duty to accommodate has been incorporated into national legislation. However, in some instances, Member States have opted to merely establish a negative duty to accommodate, or are considering doing so.

Sweden

Currently there is only a negative duty to accommodate under the non-discrimination law. The employer must have been informed or should have known about the individual's disability for the issue to arise. A failure to 'reasonably accommodate' in these circumstance thus amounts to discrimination. However, there are other regulations that require an employer to provide more accessible working conditions and an accessible work environment (see below under Issue 7).

Belgium

A negative duty to accommodate has been provided for in Belgian implementation legislation which has been adopted at the federal level. As noted above, the relevant legislation provides:
"The denial of a reasonable accommodation for a person with a disability is discrimination in the sense of this statute. ..." Art. 2(3).

¹⁵⁰ DDA s 23

¹⁵¹ DDA s 24

¹⁵² DDA s 25

¹⁵³ DDA s 27

¹⁵⁴ This appears to be true in conciliated cases as well as those which have been determined by the Human Rights and Equal Opportunities Commission or a court.

¹⁵⁵ [2003] FCA 759.

This provision therefore defines a failure to make a reasonable accommodation as a form of discrimination, but does not actually create a positive duty to accommodate. Van den Langenbergh has also argued that this provision does not amount to an obligation to make an accommodation, but makes it clear that a refusal to take account of the situation of a person with a disability, specifically by declining to make an accommodation, is a form of discrimination. She argues that the provision should not be regarded as direct or positive, and that, by adopting this approach, the legislator hoped to avoid the competence problems discussed under the previous heading. She is however doubtful as to whether the Belgian Constitutional Court will accept such a position.¹⁵⁶ One should also note that this federal legislation is complemented by a number of provisions adopted by the regional governments, and that these may in fact they establish a positive duty to accommodate.

Austria

In Austria the bill which has been proposed to implement the employment related provisions of the Framework Employment Directive with regard to disability may also present similar problems. The bill, which will amend the *BEinstG 1969 (Anderung des BeinstG)* and which was proposed in January 2004, does not expressly require employers to provide reasonable accommodation. The bill instead provides that a failure to provide reasonable accommodation is a form of indirect discrimination. If adopted in its current form, the bill will insert a new Sec. 7a(4) into the *BeinstG 1969* which will provide:

A disadvantage within the meaning of para. 2 [i.e. indirect discrimination LW]¹⁵⁷ shall not constitute discrimination if the elimination of the causes of the disadvantage imposes a disproportionate burden. ...

Ulrike Davy, in her report for the expert group, argues that the proposed amendments to *BEinstG 1969* are unlikely to fully implement Article 5 of the Directive. She argues that the concept underlying the Directive implies that disabled people may demand that employers comply with the duty to provide reasonable accommodation. However, according to the current Austrian proposal, disabled people will not be able to claim such a right. The sanctions proposed by the draft legislation basically consist of the payment of compensation to the victims of discrimination, and the law will not allow enforcement agencies to order employers to make appropriate accommodations, although a failure to comply with the reasonable accommodation obligation will amount to indirect discrimination. In addition, under Article 5 of the Directive an employer might be obliged to shift some of the disabled employee's duties to another employee, to allocate the disabled employee a different workplace, to change working hours, to allow the employee to be absent during working hours for treatment or rehabilitation, or to arrange for training or re-training. Davy does not believe that failure in these respects necessarily constitutes indirect discrimination, although it would violate the employers' duty under Article 5. One should however stress at this stage that consultations are ongoing with regard to the draft bill, and the Austrian Secretary of State for Social Security intends to issue another (possibly revised) draft bill.

Luxembourg

The bill, projet de loi portant transposition de la directive 2000/78/CE du Conseil du 27 novembre 2003, only provides for a negative duty to accommodate. No individual right to claim an accommodation will be provided for under the new law. An obligation will be imposed on employers with regard to making accommodations though.

¹⁵⁶ op.cit., 603.

¹⁵⁷ Sec. 7a(2) of the draft provides:

“Indirect discrimination shall be taken to occur where apparently neutral provisions, criteria, practices, or characteristics of built environment can put people with disabilities at a particular disadvantage unless the provisions, criteria, practices, or characteristics of built environment are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

2. Recommendations to Policy Makers and Judiciary

Implementation legislation should clearly establish a positive duty on employers to make a reasonable accommodation to meet the needs of disabled individuals. This is line with the clear wording of Article 5 of the Framework Employment Directive. In addition individuals should be able to enforce a right to benefit from an accommodation and, in addition, an unjustified failure to make an accommodation should render the employer liable to a prosecution for discrimination.

V. Who Should be Entitled to a ‘Reasonable Accommodation’?

National legislation implementing the Framework Employment Directive could arguably *either* prohibit disability discrimination against the group of people who are defined as ‘disabled’, as in the United Kingdom, *or* prohibit discrimination on the grounds of disability irrespective of whether the alleged victim has a disability or not, as in the Netherlands. However, with regard to ‘reasonable accommodation’ it is clear from the wording of Article 5, that a strict asymmetric concept is required, since only ‘persons with disabilities’ may profit from a ‘reasonable accommodation’.

National implementation legislation could therefore either limit protection from disability discrimination to the group of people who are classified as having a disability (which could include family members or associates of disabled people) and entitle individuals falling within this group to a ‘reasonable accommodation’ where necessary; or, allow an open-ended protection from disability discrimination, but a limited entitlement to a ‘reasonable accommodation’.

Whichever option is chosen, an employer must be aware of the need for a reasonable accommodation in order to activate the accommodation requirement. In the absence of such knowledge no such accommodation obligation exists. This raises the question of at what point an employer will be deemed to have this knowledge. Clear examples, such as requests from a disabled individual or occupational doctor will not present problems; however, employers also may be deemed to have constructive knowledge based on the behaviour of employment record of an individual.

A further, and more difficult, issue also arises with regard to assessing entitlement to claim a reasonable accommodation. The reasonable accommodation requirement should not be regarded as a tool to require the employment of individuals who are not qualified or able to perform the work in question. Instead, as an element of the non-discrimination requirement, it is designed to remove the discriminatory barriers which impede disabled individuals’ chances on the labour market. Therefore, only qualified individuals should be able to claim a reasonable accommodation – but, in the absence of such an accommodation, those individuals will be unqualified. To overcome this vicious circle, non-discrimination legislation generally provides that only those individuals with a disability who are “otherwise competent, capable and available” to carry out the job, *with* or without an accommodation, are entitled to claim a ‘reasonable accommodation’. This assessment presupposes that the core or essential elements of the work in question have been identified, since the disabled individual should only be judged on his / her ability to carry out such tasks.

This is the stand point of the Directive, which states in preamble paragraph 17:

It does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide ‘reasonable accommodation’ for people with disabilities.

The Directive therefore only prohibits discrimination against ‘qualified individuals’, i.e. those who are “competent, capable and available to perform the essential functions of the post”. Two groups of individuals fall into this category:

- a) A person (with a disability) who can perform the job in its current form.
- b) A person with a disability whose impairment prevents them from performing the job in its current form, but who could perform the job if it were adapted in an appropriate fashion through the making of a ‘reasonable accommodation’.

The qualification and ability of the individual should be assessed on the basis of their expected performance following, if necessary, the making of the reasonable accommodation, with the latter element playing no further role in the assessment of suitability. An employer cannot therefore argue that the cost of the accommodation is a relevant consideration at this stage.¹⁵⁸

In making this assessment the question as to whether any particular function of a particular job is ‘essential’ to that job may be one area likely to be contested. The ‘essential functions of the post’ can be changed by job restructuring, which is a possible ‘reasonable accommodation’. Arguably, since virtually any job can be changed to compensate for any disability - by tailoring its requirements to what the disabled individual can do - the crucial question is whether some particular job modification is reasonable? As almost a definitional matter, this comes down to the question: Would the job restructuring causes a disproportionate burden to the employer? Recently adopted legislation designed to implement the Framework Employment Directive is particularly vague on the means by which “essential functions of the post” can be identified.

A final point concerns the personal scope of Article 5 of the Directive. This is determined by the Article 3 of the Directive, which specifies in the areas in which discrimination is prohibited. Current employees and job applicants are clearly covered, as are former employees when they continue to receive benefits from the employer,¹⁵⁹ such as pension rights or access to social events.

1. National Approaches

a) Pre-Directive Legislation and Case Law in the EU

The United Kingdom

The Disability Discrimination Act specifies

- 6 (1): Where any arrangements made by or on behalf of an employer or any physical feature of premises occupied by the employer place the disabled person concerned at a substantial disadvantage, in comparison with persons who are not disabled, it is the duty of the employer take such steps as it is reasonable in all the circumstances of the case for him to have to take in order to prevent the arrangements or feature having that effect.
- s 15 applies the same duty to trade organisations

Those disabled individuals who are placed at a “substantial disadvantage” by arrangements or physical features associated with the employment are therefore entitled to request a reasonable accommodation. The Act further elaborates this provision by stating that the following groups of individuals may claim an accommodation:

- 6 (5): (a) In the case of arrangements for determining to whom employment should be offered, any disabled person who is, or has notified the employer that he may be, an applicant for that employment, or
- (b) In any other case, a disabled person who is an applicant for the employment concerned or an employee of the employer concerned.

¹⁵⁸ Although the cost will be relevant in assessing whether making the accommodation amounts to a disproportionate burden.

¹⁵⁹ See Case 12/81 *Garland v British Rail* [1982] ECR 359.

Case law initiated by the Disability Rights Commission in the United Kingdom, provides some guidance as to how this issue has been approached:

*Refusal to employ client with severe hearing impairment on the grounds that he could not deal adequately with incoming phone calls*¹⁶⁰

The complainant had a severe hearing impairment and was interviewed for a post as a Medical Records Clerk working within a NHS Trust. He was informed that he had failed to get the job because he was not able to take incoming telephone calls due to his disability. Out of a job description outlining 15 separate duties and responsibilities only one related to the answering of telephone calls. He felt that the Trust failed to properly consider making reasonable adjustments. They did not contact an organisation providing specialist assistance or fully consider reallocating tasks within the team so that the client could undertake the role. The Employment Tribunal found that the complainant was without lawful justification treated less favourably for a reason relating to his disability and there was a failure to make a reasonable adjustment, which was not justified. They went on to find that the adjustment to the job duties could have been made without any great inconvenience or expense.

*Refusal to provide alternative duties for an employee with a painful eye condition after he had an operation to improve his sight.*¹⁶¹

The employee developed cataracts in both eyes and had an operation to remove them from his left eye, which was more severely affected. He returned to work but was transferred to the cargo area where the outdoor conditions aggravated his post-operative condition. He requested that he be placed on lighter duties, which would be easier on his eyes, and produced a doctor's letter to that effect, but was told by his employer that nothing was available. Although the employers had a policy on disability, there was little evidence that any steps were taken properly to assess the employee's condition and accommodate his needs. The employee then went on a period of sick leave to recover from an operation on the other eye. The Employment Tribunal found that the employer had discriminated against the employee on the grounds of his disability by not making reasonable adjustments to accommodate his visual impairment and by subjecting him to the detriment of transferring him to a post that was less suitable to his condition. They reached an agreement on a 'substantial compensation package'.

*Refusal to employ a person with repetitive strain injury in a position involving use of a computer keyboard.*¹⁶²

The complainant successfully applied for the post of Promotion and Information Worker employed by a local authority. He did not disclose his precise disability and whether he would require any reasonable adjustments in the workplace should he secure the job, as the job application form did not ask for this information. He was offered the job subject to a medical assessment. After the assessment, upon discovery of his disability, the job offer was withdrawn on the ground that up to 60% of the duties of this post involved computer keyboard use. He wrote asking the respondent to explain what consideration if any had been given to making reasonable adjustments, such as voice-activated software or an adapted keyboard. A response was received which stated that suitable equipment was not available. Suitable equipment could have been identified – facilitating the complainant's employment - had the employer consulted the complainant, or a relatively well known organisation providing adapted computer keyboards. The case settled for £5000.

*Failure to shortlist job complainant on the ground she did not hold a driving licence due to her disability.*¹⁶³

¹⁶⁰ DRC/01/253.

¹⁶¹ DRC/01/123.

¹⁶² DRC/01/338.

¹⁶³ DRC/01/4156

The complainant had epilepsy. She applied for the post of Social Work Assistant employed by a local authority but was not short-listed because she did not have a driving licence as a result of her disability. Driving did not constitute a significant proportion of the work in the particular role. The lack of a driver's licence could have easily been accommodated as a reasonable adjustment by the Access to Work scheme either paying taxi fares for occasional journeys out of the office or by providing a driver. Employment Tribunal proceedings were commenced claiming disability discrimination. The local authority admitted liability for treating the client less favourably. The complainant accepted a payment of £2000 and the Respondents agreed to take steps to review their recruitment and selection procedures.

Ireland

Under the Employment Equality Act 1998, people with disabilities are entitled to claim a reasonable accommodation. Disability is broadly defined and the definition used in the Irish legislation has never resulted in a person being denied the chance to litigate a case for a failure to prove their disability.¹⁶⁴ In fact in the one instance where the definition was challenged it was agreed that an alcoholic was disabled for the purposes of the legislation.¹⁶⁵

With regard to identifying core job tasks which must be carried out following the making of an accommodation, the Employment Equality Act does not use the term 'essential functions' but rather the term 'duties of the post.' This term has received some attention. In a *Computer Component Company v. A Worker*,¹⁶⁶ the company terminated the complainant's employment because she had epilepsy. The company maintained that their policy was to ensure that employees should be competent to undertake all tasks associated with the production function in which they were employed. In this instance it may have required the complainant to operate heavy machinery, and working in this environment could pose a danger to a person with epilepsy. The Labour Court contended that the use of such machinery was a minor part of the production system and that not all employees were required to use the machinery all of the time. The Court contended that it was possible to put in place arrangements whereby she would not be required to use the machinery. Finding against the company, the Labour Court felt it was necessary to have a full assessment before determinations of competence or capacity could be decided.

In the case of *A Company v. A Worker*¹⁶⁷ the Labour Court again referred to the necessity to have an expert assessment carried out to understand what exactly were the capabilities and competences of the complainant. The necessity for a vocational assessment of the employee to determine whether they were fully competent or capable of performing the necessary duties of the post was also referred to in *An Employee v. A Local Authority*.¹⁶⁸

Sweden

Any disabled person covered by the Prohibition of Discrimination in Working Life of People with Disability Act can claim an accommodation. According to § 2 "Disability means every permanent physical, mental or intellectual limitation of a person's functional capacity that as a consequence of an injury or illness that existed at birth arose thereafter or may be expected to arise."

Illnesses that can be expected to limit functional capacity in the future are covered by the law according to the legislative history and the Disability Ombudsman (HO). Among others this includes HIV, cancer and multiple sclerosis (MS).

¹⁶⁴ See under Issue 1.

¹⁶⁵ *A Complainant v. Café Kylemore*, DEC-S2002-024.

¹⁶⁶ ED/00/8

¹⁶⁷ ED/01/11

¹⁶⁸ DEC-E/2002/4.

The limitations in functional capacity must be long-lasting. For example, a person with a broken arm will not be covered by the law since the disability caused is of a passing nature. However, limited disabilities are covered by the law.

The law protects both employees and job applicants against discrimination by employers. The recent amendments to the 1999 working life discrimination Acts (including the disability act) have extended the scope of the legislation to cover the situation when an employer decides on or takes action that concerns practical work experience, training or vocational guidance. The legislation was extended so that the prohibitions of discrimination and the prohibition of reprisals will also benefit a person who is applying for or receiving practical work experience at a workplace but is not employed there (§§ 2a and 2b).

Furthermore, the employer must have been made aware of the disability and the need for a 'reasonable accommodation'. It is worth noting that an individual is only entitled to a 'reasonable accommodation' if the accommodation would place the person involved in a comparable position.

b) Non-European Experiences

United States

The ADA requires employers to make a reasonable accommodation to "the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."¹⁶⁹ Another provision makes it a violation of the ADA for an employer to deny employment opportunities based on the need "to make reasonable accommodation to the physical or mental impairments of the employee or applicant."¹⁷⁰ Accordingly, to be entitled to a reasonable accommodation, a person must: (A) have a physical or mental limitation or impairment that is known to the employer; (B) be a qualified individual with a disability; and (C) be an employee or an applicant for a job with the employer.

Under ADA and Rehabilitation Act regulations, "physical or mental impairment" means

- (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
- (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.¹⁷¹

This definition is obviously a broad and inclusive one.

The ADA follows the pattern established by regulations under Sections 501 and 504 of the Rehabilitation Act by requiring an employer to accommodate only to "known physical or mental limitations."¹⁷² An employer is not expected to accommodate conditions of which it is unaware.¹⁷³ As a United States Court of Appeals observed, "If a ... limitation is not 'known' to the employer, then any failure to accommodate that limitation is not discrimination within the meaning of the ADA."¹⁷⁴

The employer's knowledge or awareness of impairment/limitation can occur in various ways. Some impairments will be obvious and visible to employers. An employer may learn of other impairing

¹⁶⁹ 42 U.S.C. § 12112(b)(5)(A).

¹⁷⁰ *Id.* § 12112(b)(5)(B).

¹⁷¹ 29 C.F.R. § 1630.2(h); 45 C.F.R. § 84.3(j)(2)(i).

¹⁷² 42 U.S.C. § 12112(b)(5)(A); 45 C.F.R. § 84.12(a) (1993); 29 C.F.R. §§ 1614.102(a)(8), 1614.203(c)(1) (1993).

¹⁷³ 29 C.F.R. 414 (app. to pt. 1630) (commentary on § 1630.9) (1993).

¹⁷⁴ *Whitney v. Board of Educ. of Grand County*, 292 F.3d 1280, 1285 (10th Cir. 2002).

conditions as a result of medical examinations, transfers of records, or as part of insurance transactions; or by being told about a condition by the worker or applicant who has it, or by other workers, supervisors, or other persons. When a worker or applicant initiates a request for a reasonable accommodation, unless the impairment is already obvious or known, the individual can be required to designate the condition that necessitates the accommodation. Except where it is obvious that an employee has a disability that interferes with performance of job duties, the individual with a disability has a responsibility to inform the employer that an accommodation is needed.¹⁷⁵ Once the employer knows about the disability, its responsibility to consider possible accommodations comes into play. If an employer feels that it needs additional information to justify an accommodation, it is the employer's responsibility to ask for it.¹⁷⁶

In *Lutter v. Fowler*,¹⁷⁷ the plaintiff claimed that he was entitled, under Section 501 of the Rehabilitation Act, to be transferred to another unit as a reasonable accommodation for his mental condition.¹⁷⁸ The court denied his claim and declared that:

[T]he court can find no support for such a transfer because neither the plaintiff nor his doctor described the nature of his illness. Without such information, such a transfer may only have exacerbated the plaintiff's mental condition, whatever it was. It is undisputed that the defendant requested additional information so that an informed judgment could be made by the agency. Such information was never forwarded by the plaintiff or his doctor.¹⁷⁹

Additional guidance for applying the "known physical or mental limitations" requirement was provided in *Langon v. Department of Health and Human Services*,¹⁸⁰ which involved a computer programmer with multiple sclerosis who sought, as a reasonable accommodation, to be allowed to work at home.¹⁸¹ The district court had granted summary judgment for the defendants on the grounds, *inter alia*, that the plaintiff had failed to furnish sufficient information to the agency regarding her disability.¹⁸² Relying on the district court's decision in *Langon*, another federal district court had declared that "an agency can only accommodate an individual based on 'what is known about the individual's handicapping condition.'" ¹⁸³ The circuit court in *Langon*, however, reversed, and observed: "True, under section 501 and the EEOC regulation . . . employees are obligated to make their handicap known to the federal employer. In Ms. Langon's case, everyone was aware that she suffered from multiple sclerosis."¹⁸⁴ The court recognized that a changing or worsening condition might require the employee to notify the employer and perhaps to provide medical information relevant to provision of accommodations by the employer.¹⁸⁵ The employee's obligation to provide information about the disability does not apply in circumstances where the disability and the accommodation needs are apparent:

[A]n employee confined to [sic] a wheelchair would not need a doctor's report to show that she needed help in getting to her workstation if this were accessible only by climbing a steep staircase. A blind employee would not have to furnish medical records to establish that he needed some accommodation to be able to review written reports.¹⁸⁶

¹⁷⁵ *Id.*

¹⁷⁶ *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 314 (3rd Cir. 1999) ("If there was any further information that the school district felt it needed to justify an accommodation, it was incumbent on the school district to ask for it.").

¹⁷⁷ 1986 WL 13138 (D.D.C. 1986), *aff'd*, 808 F.2d 137 (D.C. Cir. 1986).

¹⁷⁸ *Id.*, slip op. at 4.

¹⁷⁹ *Id.* (citation omitted).

¹⁸⁰ 749 F. Supp. 1 (D.D.C. 1990), *rev'd*, 959 F.2d 1053 (D.C. Cir. 1992).

¹⁸¹ 959 F.2d at 1054.

¹⁸² *Id.* at 1058.

¹⁸³ *Doe by Lavery v. Attorney Gen.*, 814 F. Supp. 844, 849 (N.D. Cal. 1992) (quoting *Langon v. United States Dep't of Health & Human Servs.*, 749 F. Supp. 1, 6 (D.D.C. 1990)).

¹⁸⁴ 959 F.2d at 1059.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

The Department of Health and Human Services (HHS) argued that Langon did not supply them with “medical evidence” or “medical records” regarding her condition and the need for the accommodation (working at home) that she was seeking.¹⁸⁷ The circuit court noted that there was nothing in Section 501, the regulations, previous judicial decisions, or HHS policies and practices that indicated that individuals seeking reasonable accommodations were required to present medical records.¹⁸⁸ The court ruled that the question of medical records was rather an issue of whether the plaintiff had adequately alerted the defendants of the severity of her condition and thereby triggered the agency’s obligation to accommodate her.¹⁸⁹

In a related but slightly different context, one federal circuit judge suggested that an employee’s or applicant’s obligation to notify the employer of a disability should not apply in situations where a “reasonable” employer “would or should have known” of the disability.¹⁹⁰ Outside the employment context, a “knew or had reason to know” standard has been applied regarding the duty to provide reasonable accommodations.¹⁹¹

The criterion of being a qualified individual with a disability is the overall standard for protection by the employment provisions (Title I) of the ADA. “Qualified” is defined to mean that a person must be able (with reasonable accommodation if needed) to perform “the essential functions of the employment position”. There is a large body of case law, regulations and regulatory guidance addressing what “essential functions” are. This cannot be summarised in a paper of this nature; however one can note that “essential” has been distinguished from non-essential or marginal tasks that can be ignored or reassigned.

More generally, the standard of being a qualified individual with a disability has been subjected to extremely restrictive interpretation by American courts and particularly by the Supreme Court of the United States. The National Council on Disability, which originally proposed the ADA and developed the initial version of the Act introduced in Congress, has decried what it calls “the Court’s ‘miserly’ approach to the definition of disability.”¹⁹² The National Council elaborated as follows:

The Court’s position that the definition of disability is to be construed narrowly ignores and contradicts clear indications in the statute and its legislative history that the ADA was to provide a “comprehensive” prohibition of discrimination based on disability, and legislative, judicial, and administrative commentary regarding the breadth of the definition of disability. It also flies in the face of an established legal tradition of construing civil rights legislation broadly. Congress knowingly chose a definition that to that time had been interpreted broadly in regulations and the courts; it was entitled to expect the definition to continue to receive a generous reading. The Court’s harsh and restrictive approach to defining disability - an approach that places difficult, technical, and sometimes insurmountable evidentiary burdens on persons who have experienced discrimination - was unwarranted and highly unfortunate.¹⁹³

An in depth discussion of the interpretation of the definition of disability in American law is beyond the scope of this paper, and is being addressed in other papers. Additional information about this issue and other problematic court rulings in the U.S. can be found in a series of policy briefing papers on the

¹⁸⁷ *Id.* at 1058.

¹⁸⁸ *Id.* at 1058–59.

¹⁸⁹ *Id.* at 1058.

¹⁹⁰ *Blackwell v. United States Dep’t of Treasury*, 656 F. Supp. 713 (D.D.C. 1986), *judgment aff’d and opinion vacated*, 830 F.2d 1183, 1184 (D.C. Cir. 1987) (Nies, J., concurring in judgment) (“would require a showing that a reasonable interviewer would or should have known or been aware of the applicant’s handicap. Otherwise, the applicant must affirmatively have put the agency on notice.”).

¹⁹¹ *Nathanson v. Medical College of Pa.*, 926 F.2d 1368, 1386 (3d Cir. 1991) (accommodations, under Section 504 of the Rehabilitation Act, for medical student with back and neck injuries).

¹⁹² National Council on Disability, “Broad or Narrow Construction of the ADA,” at p. 6 (December 16, 2002), published on the NCD website at <http://www.ncd.gov/newsroom/publications/broadnarrowconstruction.html>

¹⁹³ *Id.* at p. 7.

NCD website¹⁹⁴ under the title *Righting the ADA*. For present purposes, it is sufficient to note that the overly restrictive construction of who is an individual with a disability under the ADA has narrowed the class of persons eligible for reasonable accommodation and other rights under the Act.

The application of reasonable accommodation to "applicants" and "employees" is straightforward. The ADA defines "employee" to mean "an individual employed by an employer."¹⁹⁵ Though not expressly defined in the statute, an applicant would likewise refer to an individual who applies for or seeks to apply for a job with an employer.

Australia

The Australian legislation defines disability very broadly in section 4:

disability, in relation to a person, means:

- (a) total or partial loss of the person's bodily or mental functions; or
 - (b) total or partial loss of a part of the body; or
 - (c) the presence in the body of organisms causing disease or illness; or
 - (d) the presence in the body of organisms capable of causing disease or illness; or
 - (e) the malfunction, malformation or disfigurement of a part of the person's body; or
 - (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
 - (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
- and includes a disability that:
- (h) presently exists; or
 - (i) previously existed but no longer exists; or
 - (j) may exist in the future; or
 - (k) is imputed to a person.

The definition covers both the underlying impairment and the functional limitations that arise from the interplay of the impairment with the social or physical environment.¹⁹⁶ Read in the context of the Act as a whole, the definition is inclusive and does not allow artificial distinctions to be made between disability and behaviour which is a manifestation of disability.¹⁹⁷ The Act also protects close associates of persons with disabilities from discrimination. These include the spouse or domestic partner of the person with a disability as well as relatives and carers and those in business, sport or recreational relationships with the person with a disability.¹⁹⁸ The anti-discrimination provisions of the DDA therefore apply to both people with disabilities and their associates. In the employment context, there is a strong argument to be made for extending a requirement of 'reasonable accommodation' to both groups provided the accommodation relates to the presence of 'disability' and the employer is unable to raise the defence of unjustifiable hardship (objectively assessed). For example, a person associated with a person with a disability may be able to perform the inherent requirements of the job, but may need regular working hours rather than a rotating shift in order to do so. Failure to provide this 'accommodation' would be discrimination on the ground of disability and would be 'unreasonable' unless it imposed an unjustifiable hardship.

This paper also raises two related questions under this heading. The first is how the employer assesses whether the person with a disability is otherwise 'competent, capable and available' to carry out the job if the 'reasonable accommodation' is made. The second question is how the essential requirements of the job are to be determined. The Australian experience provides some guidance in answering these

¹⁹⁴ At <http://www.ncd.gov/newsroom/publications>

¹⁹⁵ 42 U.S.C. § 12111(4).

¹⁹⁶ Jones, M & L A Basser Marks (1999) "Disability, Rights and Law" in M Jones and LA Basser Marks (eds) *Disability, Diversity-ability and Legal Change* 189, 190; *Purvis v State of NSW* per McHugh & Kirby JJ [67], [78]-[80]

¹⁹⁷ *Purvis v State of NSW* per Gummow, Hayne & Heydon JJ [209] -[212]; McHugh & Kirby JJ [67]- [80]

¹⁹⁸ DDA s 4.

two questions. For example in *Daghlian v Australian Postal Corporation*, the postal worker could clearly carry out the job if her physical disability was accommodated through the provision of a stool at her counter. The employer made no attempt to assess her needs and ignored the expert and other evidence available to it. Employers have considerable experience in assessing the ability of potential employees to carry out particular jobs. It may be that in assessing the capabilities and needs of a person with a disability the employer will have to consult with the individual concerned about their perceived needs and in some cases seek expert advice. A necessary first step, however, is to identify the essential requirements of the job.

Under the DDA the ‘inherent requirements’ of the ‘particular’ employment are determined in an objective fashion on a case by case basis. In *X v Commonwealth*¹⁹⁹, a case concerning an HIV positive soldier, McHugh J considered the ways in which the ‘inherent requirements’ of the job are to be assessed under the DDA. The following dicta provide guidance in answering the second question raised above:

the inherent requirements of employment embrace much more than the physical ability to carry out the physical tasks encompassed by the particular employment. Thus, implied in every contract of employment are obligations of fidelity and good faith on the part of the employee with the result that an employee breaches those requirements or obligations when he or she discloses confidential information or reveals secret processes. Furthermore, it is an implied warranty of every contract of employment that the employee possesses and will exercise reasonable care and skill in carrying out the employment. These obligations and warranties are inherent requirements of every employment. If for any reason - mental, physical or emotional - the employee is unable to carry them out, an otherwise unlawful discrimination may be protected by the provisions of s 15(4).²⁰⁰

The other members of the High Court made points which throw further light on the requirement:

The reference to ‘inherent’ requirements invites attention to what are the characteristics or essential requirements of the employment as opposed to those requirements that might be described as peripheral. Further, the reference to ‘inherent’ requirements would deal with at least some, and probably all, cases in which a discriminatory employer seeks to contrive the result that the disabled are excluded from the job. But the requirements that are to be considered are the requirements of the particular employment, not the requirements of employment of some identified type or some different employment to meet the needs of a disabled employee or applicant for the work.²⁰¹

In Australia the assessment of the essential features of the job is made on a case by case basis focusing on the particular job, rather than jobs of a particular category. This has the advantage of flexibility and is consistent with the goal of achieving substantive equality. It also goes some way to addressing the issue raised by job restructuring. Where a job is restructured a failure to consider the employee’s needs in the restructured environment would amount to a failure to make ‘reasonable accommodation’. The employer’s interests could be protected by limiting the accommodation to the point of undue hardship. *Garity v Commonwealth Bank* provides an example of this approach. There, the employer’s failure to make accommodations for an employee in a changing work environment amounted to unlawful discrimination.

2. Examples of Provisions Adopted by European Union Member States to Implement Article 5 of the Framework Employment Directive

¹⁹⁹ (1999) 200 CLR 177.

²⁰⁰ 187-188.

²⁰¹ per Gummow and Hayne JJ, 208 (with whom Gleeson CJ and Callinan J agreed).

Finland

Neither the Equality Act [yhdenvertaisuuslaki (21/2004)] nor its preparatory works, make any reference to who is entitled to a reasonable accommodation. There is no definition of e.g. “disability” or “disabled person” for the purposes of non-discrimination law. As the application of the provision on reasonable accommodation in the Equality Act requires a case-by-case approach, it seems to be necessary to compare the particular abilities of an employee/prospective employee/student/prospective student *vis-à-vis* the requirements posed by the particular job/education at hand in order to determine if that person is entitled to reasonable accommodation.

The Netherlands

The Dutch implementation legislation, the WGB h/cz is symmetric in nature and thus, both disabled and non-disabled people fall within the Act's personal scope. Thus, theoretically, also non-disabled people are entitled to a claim a reasonable accommodation. However the Parliamentary Comments on the right to a reasonable accommodation enshrined in the WGB h/cz, make clear that the rationale of this right is to achieve equality for disabled people and to explicitly take account of the 'physical component' of discrimination of disabled people. Thus, the reasonable accommodation rights are intended to be asymmetrical. There is no definition of “disability” or “disabled person” in the statute.

Spain

Persons with disabilities are entitled to claim a reasonable accommodation from their employers according to Art. 37 bis Law 13/1982, 7th April, on Social Integration of persons with disabilities, modified by Law 62/2003, 30 December (BOE 31/12/03), about tax, administrative and social measures.

Germany

Only *severely* disabled employees have a right to accommodation. This is true for both the public and the private employment sector. A person is severely disabled if he or she has a disability of 50%.²⁰² Persons with a 30% disability may apply to be placed in the same situation as severely disabled persons.²⁰³ The percentage of a given disability is determined according to a list of impairments and diseases²⁰⁴ and according to guidelines prepared by a group of medical and legal experts.²⁰⁵

3. Proposed Legislation

Austria

Whilst existing case law on dismissal relates exclusively to disabled people who qualify as "*Schwerbehinderte*" (degree of disability is at least 50%). The January 2004 draft bill to amend the *BEinstG 1969* proposes *not* to confine entitlement to *Schwerbehinderte*. All persons who are disabled will qualify. The scope of the definition of disability is, however, still unclear.

France

The bill (*Projet de loi pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées*) provides that any disabled person who qualifies as disabled worker is entitled to reasonable accommodation, provided his/her disability is not declared incompatible with the job

²⁰² Section 2 (2) *SGB IX*.

²⁰³ Section 2 (3) *SGB IX*.

²⁰⁴ GdB/MdE-Tabelle zu Section 30 *Bundesversorgungsgesetz*.

²⁰⁵ Bundesministerium für Arbeit und Sozialordnung (Hg.) Anhaltspunkte für die ärztliche Gutachtertätigkeit im sozialen Entschädigungsrecht und nach dem Schwerbehindertengesetz (1996).

after a medical examination. Disability is defined in Art. 1 of the bill, which modifies Art. L.114 of the *Code de l'action sociale et des familles*:

“Constitue un handicap au sens de la présente loi, toute limitation d’activité ou restriction de participation à la vie en société subie dans son environnement par une personne en raison d’une altération substantielle, durable ou définitive d’une ou plusieurs fonctions physiques, sensorielles, mentales, cognitives ou psychiques, d’un polyhandicap ou d’un trouble de santé invalidant.”

Is considered a disability any limitation of activity or restriction to social participation suffered in his environment by a person because of a substantial alteration, durable or definitive, of a physical, sensorial, mental, cognitive or psychic function, a multiple disability or an incapacitating health trouble.

It is worth noting that all these Statutes and draft bills seem to go little further than to specify that disabled individuals are entitled to claim a reasonable accommodation, and do not address the many other complex questions related to establishing an entitlement to an accommodation. European implementation legislation therefore leaves many important and vital issues unaddressed, and it is likely that case law will develop in this area.

Luxembourg

As noted under the previous heading, an individual right to accommodation will not exist under Luxembourg law. Employers are only obliged to accommodate the needs of workers or job applicants who have a disability of at least 30%. This implies that it will be very difficult for a disabled person who has a disability of less than 30% to benefit from an accommodation.

4. Recommendation to Policy Makers and Judiciary

Irrespective of the approach adopted with regard to other elements of the non-discrimination (i.e. symmetric or asymmetric), the entitlement to reasonable accommodation should be limited. However, this does not necessarily mean that only disabled people (however disability is defined) should be entitled to claim such accommodations. In certain circumstances family members and associates of disabled people can also require an accommodation, and, where appropriate, should be entitled to claim such a provision.

Legislation and case law should stress that the reasonable accommodation requirement is not a tool to require the employment of individuals who are not qualified, but rather a tool designed to remove discriminatory barriers. Therefore, only qualified individuals should be able to claim a reasonable accommodation. Specifically, non-discrimination legislation should provide that only those individuals who are "otherwise competent, capable and available" to carry out the job, with or without an accommodation, are entitled to claim a reasonable accommodation. Such an approach requires, firstly, the identification of core or essential elements of the work, and secondly, that the individual be judged according to his or her ability to perform those tasks following the making of an accommodation. Qualification and ability of the individual should be assessed on the basis of their expected performance following, if necessary, the making of a reasonable accommodation, with the latter element playing no further role in the assessment of suitability. An employer should not be able to argue that the cost of the accommodation is relevant at this stage. This is the standpoint of the Directive.²⁰⁶

The assessment therefore require two separate steps:

²⁰⁶ Preamble paragraph 17.

Step 1. Identifying essential functions of the job. this should be done in an objective manner and on a case-by-case basis. The essential functions for the particular job should be identified, rather than those of a particular job category.

Step 2. Identifying an appropriate accommodation. The individual requiring the accommodation should be consulted and expert advice should be obtained if necessary.

In order to be bound by the accommodation requirement, an employer must know of disability and the consequent need for an accommodation. However, medical records should not always be required to establish this situation as, in many situations, the disability and need will be obvious. In order to establish whether an employer knew of the disability legislators and the judiciary might consider applying an objective test based on whether the employer “knew or had reason to know” about the disability and the need for an accommodation, or an objective test based on whether a “reasonable” employer would have known about the disability and the need for an accommodation.

Once the employer is aware of the need for an accommodation, he or she should be obliged to investigate suitable accommodation.

In summary, an individual should be entitled to a reasonable accommodation if:

1. They require an accommodation because of their own disability or the disability of a family member or associate.
2. The employer was aware of the need for an accommodation, or have been deemed to have been made aware.
3. The individual must be qualified to do the job, if necessary following the making of a reasonable accommodation. This last test consists of two elements:
 - The identification of the essential or core elements of the particular job.
 - The identification of an appropriate accommodation.

VI. What is the Best Process by Which Individualised ‘Reasonable Accommodations’ Can be Identified?

A successful accommodation often requires ongoing negotiation and co-operation between the employer and the employee. According to the ADA Interpretive Guidance, the focus should be on a flexible, interactive process of employer-employee negotiation and liberal modification of physical, logistic, and attitudinal barriers that preclude full equality of opportunity when determining an appropriate ‘reasonable accommodation’.²⁰⁷

The procedural process for allocating the burden of proof between the individual with a disability and an employer in such cases, may be of relevance for negotiations concerning a ‘reasonable accommodation’. The individual with a disability should arguably bear the burden of showing a ‘reasonable accommodation’ is possible. Once such an accommodation is identified, the employer should bear the burden of showing that it would result in a disproportionate burden. This reflects the differences in the parties’ access to information. The individual with a disability is better acquainted with how his disabilities can be overcome, the employer will know (or can find out), how much various accommodations cost. Apart from the procedural consequences of allocating the burden of proof on these issues, an important goal might be to encourage the parties to share this information in negotiations over possible accommodations. However, one should note in this context that the Framework Employment Directive does not require a partial reversal in the burden of proof with regard to ‘reasonable accommodation’. Under Article 10 (1) of the Directive, such a reversal is required with regard to direct and indirect discrimination, although Member States may also opt to follow this approach with regard to ‘reasonable accommodation’.

²⁰⁷ 29 C.F.R. app.pt. 1630 (1995) paragraph 1630.9.

A further possibility involves requiring that all employers at least consider and discuss the possibility of a reasonable accommodation, even if such an accommodation proves not to be feasible or legally required. A failure to engage in such a process could be classified as an automatic breach of the reasonable accommodation requirement.

Both the individual with a disability and the employer, have various incentives to reach agreement on an appropriate accommodation. Employers should be encouraged to reach agreement because most accommodations bring with them little additional cost, and a failure to reach agreement could result in costly litigation or bad publicity, as well as the loss of a good employee. An individual with a disability may well be aware of difficulties associated with finding or retaining employment, and this will encourage them to reach agreement with an existing or potential employer. The effect of the parties' incentives may be to create a bargaining range. The minimum accommodation the employee is willing to accept is less than the most expensive accommodation the employer is willing to undertake. The high cost to both parties of breaking off the negotiations keeps them at the bargaining table and enables them to reach agreement on an accommodation that falls below the maximum required by the law. Economic logic suggests that the agreement will result in the least costly accommodation which the individual with a disability is willing to accept.

In addition, there may be a role for expert advice, which may take the form of medical advice, but may also consist of advice from technical experts (e.g. on what changes to equipment are physically possible), vocational rehabilitation experts, disability organisations, or public officials.

1. National Approaches

a) Pre-Directive Legislation and Case Law in the European Union

United Kingdom

Case-law in the United Kingdom provides examples of how a failure to engage in this interactive process to discuss possible accommodations could lead to a claim of discrimination. To begin with, it has been held that the duty to make reasonable adjustments requires a balancing of the extent of the duty against the actual or assumed knowledge of the employer both of the disability, and the likelihood of its causing the individual a substantial disadvantage.²⁰⁸ The leading case of *Morse v Wiltshire County Council*,²⁰⁹ established the following guidelines for Employment Tribunals in dealing with 'reasonable adjustment' cases:

- Tribunals must first decide whether any duty is imposed upon the employer to make adjustments, i.e. whether or not employees [actual or potential] are put at a substantial disadvantage by the arrangements made (or not made) by the employer.
- They must then decide whether, if such a duty exists, the employer has taken such steps as were reasonable, in all the circumstances of the case, in order to prevent the relevant arrangements or features, having the *effect* of placing the disabled person concerned at a substantial disadvantage, in comparison with persons who were not disabled.
- Finally, if the Tribunal finds that the employer has failed to comply with such a duty, it must decide if the employer had shown that this failure could be justified. The Tribunal alone decides what is reasonable.

There follows a sample of illustrative cases taken by the Disability Rights Commission:

²⁰⁸ *Ridout v TC Group*, 1998, IRLR 628.

²⁰⁹ 1998, IRLR 352. See also *Stevens v JPM International Ltd*, EAT/910/98.

*Failure to provide reasonable adjustment to assist employee using wheelchair*²¹⁰

The employee's workstation was 2 floors up. It was agreed that this could not be changed. She was obliged to pull herself up 2 flights of stairs with someone following behind her in case she fell. Access to Work assessed her as requiring a wheelchair and a stair lift. Access to Work agreed to pay £9,975 with the employer contributing £2,240. One year later the stair lift still had not been installed. The process of co-operation and negotiation had manifestly failed. The case settled with the employer agreeing to install a stair lift, purchase a power wheelchair and payment of £4000 to the client.

*Failure to make reasonable adjustments to a physically impaired plumber's work duties resulted in his dismissal following sickness absence*²¹¹

For some time the employee had experienced difficulty with his work due to damaged knee cartilage and ligaments, significantly impairing his mobility. He sought assistance from his employer in respect of plumbing duties involving bending and lifting. His employer failed to provide appropriate support (for example, employing an assistant to help him, which could have been funded through the Access to Work scheme) causing his knee to deteriorate further to the extent he had to take four weeks sickness absence. Without consulting the employee, the employer decided to terminate his employment during the period of sickness absence. The employee claimed before the Employment Tribunal that, had adjustments been made to his work duties, he would still be employed. His employer sought to justify the dismissal on the ground that he was losing business due to the employee's absence and he urgently needed to recruit another plumber. The Employment Tribunal concluded at a preliminary hearing that the employee had been unlawfully discriminated against, as there was a failure on the employer's part to make reasonable adjustments. He was awarded £17,361 in damages of which £5000 was for injury to feelings.

Ireland

The Irish Equality Act does not provide for a set procedure; however, two principles emerge from the case law: there must be a discussion with the individual as to what form an accommodation should take, and, as a second stage, expert evidence (invariably medical) will be used to identify the most appropriate accommodation. One can note that the legislation, Equality Officers and the Labour Court refer continuously to *expert evidence*, and this has taken a variety of formats.²¹²

In *A Complainant v. Bus Éireann*,²¹³ the issue in the case was the competence of the complainant, and there was competing medical opinion on the matter of his ability to perform the job safely. In this instance the Equality Officer declined to decide between the evidence and opted for monetary compensation. The Equality Officer also required the respondent to develop objective and verifiable criteria for determining the relevance of any particular medical conditions to employment and to reconsider the complainant's application in light of these developments.

In *Kehoe v. Convertec*,²¹⁴ the Equality Officer held that the company had not reasonably accommodated the complainant. In reaching this decision it was contended that not sending the complainant for a medical examination, as was normal company practice, amounted to a failure to accommodate the complainant.

In the Labour Court decision *A Motor Company v. A Worker*,²¹⁵ the employee needed a special headset for the phone because of his hearing impairment. The company provided an inadequate headset, and

²¹⁰ DRC/01/3858.

²¹¹ DRC/01/1304.

²¹² See particularly the decisions in *A Health and Fitness Club v. a Worker* EED037, 2003 and *Mr. O v. A Named Company*, DEC-E-2003/052.

²¹³ DEC-E2003-004

²¹⁴ DEC-E-2001/034

²¹⁵ ED/01/40

the court accepted that the company had made some steps to deal with the problem, but not the correct ones. It was implicit in this decision that the company had failed to contact the correct experts, namely the National Association for Deaf People, in determining what facilities were necessary.

In *A Computer Component Company v. A Worker*,²¹⁶ reference was made to the use of a medical report to determine what the complainant is capable of doing, and also reference to a safety assessment.

In *A Company v. A Worker*,²¹⁷ it was held that not carrying out an assessment of the complainant (alongside other issues), amounted to a failure to provide reasonable accommodation. In this instance it was not clarified what form of assessment was necessary.

In the case of *An Employee v. a Local Authority*,²¹⁸ the Equality Officer reviewed three initiatives suggested by FÁS, as possibly being of assistance in accommodating the complainant. The three initiatives were as follows:

- That the complainant would undergo an independent vocational assessment to identify his work strengths and weaknesses.
- The hiring of a Job-Coach for the complainant for up to three months.
- The use of the Employment Support Scheme which offers some level of financial support to employers.

It was held in this instance that the appropriate accommodation was the hiring of a job coach. This was clearly not the least costly accommodation, but was according to the Equality Officer probably the most effective in this instance.²¹⁹

It appears from all of these decisions that, in Ireland, considerable weight is given to expert evidence, and from the case law to date it is unclear what status if any is given to individual negotiations on the issue of reasonable accommodation. As the case law suggests that the correct manner to determine whether an employee is competent to undertake the functions of the position is by reference to expert evidence, this burden appears to lie with the employer.

As to the argument of 'economic logic' noted above – as the disabled individual is not making the determination in respect of what is or is not reasonable, the reality is that the accommodation which is regarded as appropriate is that which the experts see as the most appropriate.

Sweden

According to the disability ombudsman and the legislative history to the Prohibition of Discrimination in Working Life of People with Disability Act, the applicant should inform the employer of the disability. In addition, if the employer is uncertain, the employer should contact the disabled job applicant to discuss the matter more closely.

As the duty to provide a reasonable accommodation falls on the employer, the decision as to the exact accommodation, where two or more “equivalent” options exist, also lies with the employer. This is based on the employer’s right to lead and organize the workplace. Nevertheless, there will probably be interactive process between the employee (or prospective employee), the employer and the relevant

²¹⁶ ED/00/08

²¹⁷ ED/01/11

²¹⁸ DEC-E2002-004

²¹⁹ See also *A Motor Company v. A Worker*, above.

trade union in the negotiations regarding a 'reasonable accommodation'. This would in general be required in the course of normal management/union relations.

There is only one case that has really touched on this issue. In a decision of 4 June 2003,²²⁰ noted above under Issue 1, the Labour Court held that direct discrimination had occurred. The Court also pointed out that a person has a right to an individual determination based on their own capacity and circumstances. This can also be interpreted as meaning that the issue of reasonable accommodation should have been dealt with by the employer, even if it could have been concluded that the level of prospective employee's impairment was a problem in relation to the employment at issue.

b) Non-European Legislation and Case Law

The United States

The EEOC's Interpretive Guidance and the ADA committee reports describe a process that covered entities should follow when determining what type of accommodation ought to be provided in a particular situation. The reports of the Senate Labor and Human Resources and House Education and Labor committees declare in identical language that:

The Committee believes that the reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed. The accommodation process focuses on the needs of a particular individual in relation to problems in performance of a particular job because of a physical or mental impairment. A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations that will result in a meaningful equal opportunity for the individual with a disability.²²¹

The starting point of the reasonable accommodation process is either (1) an employee or applicant requesting an accommodation or (2) the employer noticing that an employee or applicant has a physical or mental disability and that the individual's condition is interfering with performance of job tasks, getting to or around the work site, applying for a job on an equal basis, or participating in other terms, conditions, and benefits of employment.

The EEOC suggests that in many instances an appropriate reasonable accommodation may be obvious to the employer and the individual with a disability, such as, for example, where an employee who uses a wheelchair needs to have his or her desk placed on blocks to elevate the desktop above the arms of the wheelchair.²²² If initial discussions between the employer and the employee or applicant do not readily disclose what accommodation is called for, the EEOC recommends that an employer undertake a four-step process:

- (1) Analyse the particular job involved and determine its purpose and essential functions;
- (2) Consult with the individual with disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
- (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

²²⁰ (Dom nr 47/03 – Case number 47/03).

²²¹ S. REP. NO. 116, 101st Cong., 1st Sess. 34 (1989) [hereinafter SENATE REPORT]; H.R. REP. NO. 485, 101st Cong., 2d Sess. pt. 2, at 65 (1990) (Committee on Education and Labor) [hereinafter EDUCATION & LABOR COMMITTEE REPORT].

²²² 29 C.F.R. 414 (app. to pt. 1630) (commentary on § 1630.9) (1993).

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.²²³

The first step, analysing the job, involves examining the actual job duties and determining the true purpose or object of the job – i.e. identifying the essential functions that an accommodation must enable the individual with a disability to perform.²²⁴ The ADA committee reports refer to this step as “identifying and distinguishing between essential and nonessential job tasks and aspects of the work environment of the relevant position(s).”²²⁵ The second step, ascertaining the limitations imposed by the disability and how a reasonable accommodation might overcome them, seeks to identify the precise barrier to the employment opportunity that needs to be addressed by an accommodation.²²⁶

The third step, identifying possible accommodations and assessing their effectiveness, begins with suggestions of accommodations by the individual needing accommodation and may also involve consultations with vocational rehabilitation personnel, the EEOC, or disability NGOs.²²⁷ In addition, the ADA committee reports suggest consultation with such services as the Job Accommodation Network of the President’s Committee on Employment of People with Disabilities as well as other employers.²²⁸ In *Mantolite v. Bolger*,²²⁹ the Ninth Circuit ruled that, under Section 504 of the Rehabilitation Act, “an employer has a duty . . . to gather sufficient information from the applicant and from qualified experts as needed to determine what accommodations are necessary to enable the applicant to perform the job safely.”²³⁰ Assessing the effectiveness of various possible accommodations includes considering the likely success of each potential accommodation in assisting the individual to perform the essential functions of the position, the reliability of the accommodation, and whether it can be provided in a timely manner.²³¹

The fourth step is to select and implement an appropriate accommodation. Where more than one accommodation will enable the individual with a disability to perform the essential functions of the position, his or her preference should be given primary consideration, but the employer retains the ultimate discretion to choose between effective accommodations and may choose the one that is less expensive or easier to provide.²³² In *Carter v. Bennett*,²³³ in which an employee of the U.S. Department of Education who was blind claimed that he had been subjected to discrimination, the court found that the defendants had provided the plaintiff, as a reasonable accommodation, persons to act as readers, special equipment and office space, and a reduced workload, although they had not provided other accommodations desired by the plaintiff, including a full-time reader of his choice, more technologically advanced equipment, and easier access to more office space.²³⁴ In ruling that the Department of Education had not violated the Rehabilitation Act, the court stated that the employer was “not obligated under the statute to provide plaintiff with every accommodation he may request, but only with reasonable accommodation as is necessary to enable him to perform his essential functions.”²³⁵

The courts in the United States have recognized a requirement that employers undertake such give-and-take communication with the individual with a disability before making decisions regarding

²²³ *Id.*

²²⁴ *Id.*

²²⁵ SENATE REPORT at 35; EDUCATION & LABOR COMMITTEE REPORT at 66.

²²⁶ 29 C.F.R. 414 (app. to pt. 1630) (commentary on § 1630.9) (1993).

²²⁷ *Id.*

²²⁸ SENATE REPORT at 35; EDUCATION & LABOR COMMITTEE REPORT at 66.

²²⁹ 767 F.2d 1416 (9th Cir. 1985).

²³⁰ *Id.* at 1423.

²³¹ 29 C.F.R. 414 (app. to pt. 1630) (commentary on § 1630.9) (1993); SENATE REPORT at 35; EDUCATION & LABOR COMMITTEE REPORT at 66.

²³² 29 C.F.R. 414 (app. to pt. 1630) (commentary on § 1630.9) (1993); SENATE REPORT at 35; EDUCATION & LABOR COMMITTEE REPORT at 66–67.

²³³ 651 F. Supp. 1299 (D.D.C. 1987).

²³⁴ *Id.* at 1301.

²³⁵ *Id.*

reasonable accommodations, and commonly refer to it as the "interactive process" for determining reasonable accommodation.²³⁶

Australia

Given the lack of any positive requirement of 'reasonable accommodation' the Australian experience provides limited guidance in addressing this issue. In some cases an employer may need to seek the advice of experts in identifying 'reasonable accommodations'. Australian cases such as *Daghlian*, *McNeill* and *Humphries* highlight the importance of expert opinion in the assessment process to ensure that 'reasonable accommodations' are in fact identified.

2. Examples of Provisions Adopted or Proposed by European Union Member States to Implement Article 5 of the Framework Employment Directive

a) Adopted Legislation

It is noticeable that most implementation legislation does not address this subject. In *Finland* the law and the *travaux préparatoires* are silent on the subject, whilst in *Spain* the implementation statute does not specify a particular process to be followed to identify the particular needs of the employee. In the *Netherlands* the government foresees that the need for, and the kind of, accommodation must be discussed by the employer and the future user.²³⁷ However, an interactive process, involving the employee/ employers and trade unions, is not required by the *WGB h/cz*. In *Germany* the severely disabled employee has a substantive right for accommodation. Following his/her request reasonable accommodations have to be made. The integration office assists the employer (and the employee) in establishing what best suits best the disabled persons' needs.²³⁸ Representatives of severely disabled workers as well as representatives of all workers may be involved in that process too.

b) Proposed Legislation

Available evidence also suggests this topic has not received specific attention in most draft legislation designed to implement the Directive.

Luxembourg

Occupational doctors will have the task of advising the employer whether an accommodation is required or not, and what form of accommodation is needed. However, the decision to accommodate or not will be made by the employer. A public administrative body will decide whether a grant should be provided to cover the cost of the accommodation.

3. Recommendations to Policy Makers and Judiciary

Attention should be paid to the manner in which an appropriate accommodation is negotiated and selected in implementation legislation. It should be recognised that identification and selection of an

²³⁶ See, e.g., *Shapiro v. Township of Lakewood*, 292 F.3d 356, 359 (3d Cir. 2002); *Morton v. United Parcel Service, Inc.*, 272 F.3d 1249, 1256 (9th Cir. 2001); *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 311 (3rd Cir. 1999); *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997); *Templeton v. Neodata Services, Inc.*, 162 F.3d 617, 619 (10th Cir. 1998); *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996); *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 951-54 (8th Cir. 1999); *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002); *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1171-72 (10th Cir. 1999) (*en banc*).]

²³⁷ Explanatory Memorandum, Second Chamber of Parliament 2001-2002, 28 169, nr. 3, p. 26.

²³⁸ § 81 (4) SGB IX: (...) *Bei der Durchführung der Maßnahmen nach den Nummern 1, 4 und 5 unterstützen die Arbeitsämter und die Integrationsämter die Arbeitgeber unter Berücksichtigung der für die Beschäftigung wesentlichen Eigenschaften der schwerbehinderten Menschen.* (...)

appropriate accommodation should be based on negotiation and cooperation between (potential) employee and the employer. Advice from appropriate experts may also have a role to play, but should never result in the exclusion of the disabled individual from the decision-making process. Such expert advice may take the form of medical advice, but could also be technical advice, advice from specialists in vocational rehabilitation, and advice from disability organisations. In addition, the State should play a role in providing information on appropriate accommodations to employers. Such information could be provided by the (main) public body responsible for providing subsidies to meet the cost of adaptations to the workplace made to accommodate disabled individuals. This advice should be available free of charge and be available even to those employers who are not eligible for a subsidy.

Legislators should consider providing for a partial reversal of the burden of proof with regard to establishing the need for an accommodation. This implies that the individual requesting the accommodation should bear the burden of proving that some form of reasonable accommodation is possible. Once an appropriate accommodation has been identified, the employer who declines to make such an accommodation should bear the burden of proving that making that the accommodation would result in a disproportionate burden. Legislators may also provide that an employer who refuses to even consider or discuss a reasonable accommodation should be found to have breached the requirement to make a reasonable accommodation per se. A requirement to engage in such a consideration is required under some national laws.

The employer should not be required to make the most expensive accommodation, or indeed, the precise accommodation requested by the disabled individual. The employer should only be required to make an effective accommodation, that allows a disabled individual to carry out the core tasks of the job in question. However, the preference of the disabled individual should be considered when selecting the most appropriate accommodation.

A formalised approach, such as is applied in the United States, might also be considered. This four step approach involves:

- the identification of the core tasks of the job
- the identification of job-related limitations which need to be accommodated
- the identification of potential accommodations and their effectiveness
- the consideration of the preferences of the disabled individual and the selection of the most appropriate accommodation.

VII. What Limits Exist to the Making a ‘Reasonable Accommodation’?

At first sight it might appear that there are two limitations imposed on the requirement to make an accommodation: firstly, employers are only required to make a “*reasonable* accommodation”; and secondly, a failure to make such a “reasonable accommodation” can only be justified if the accommodation would result in the employer experiencing undue hardship.

The first issue therefore apparently turns on the issue of the “reasonableness” of the accommodation requested or required. To understand this term it is appropriate to consider the (original) meaning of the equivalent term in the Americans with Disabilities Act²³⁹. It is submitted that this US statute directly influenced the drafting of Article 5 of the Framework Employment Directive. Specifically it is submitted that the term ‘reasonable accommodation,’ first used in the US Rehabilitation Act of 1973 and taken up in the Americans with Disabilities Act, was determinant for 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 Americans with Disabilities Act amongst relevant Commission staff, Member States, and disability NGOs. Furthermore, the term ‘reasonable accommodation’ in the Directive was arguably intended to convey the same meaning as it has in the Americans with Disabilities Act, or at least the meaning the term had when the Act was

²³⁹ In Section 101(9).

originally adopted.²⁴⁰ Under the Americans with Disabilities Act a ‘reasonable accommodation’ was originally regarded as any modification or adjustment that was effective in enabling an individual with a disability to perform the ‘essential functions’ of a particular job. The reasonableness of the accommodation did not refer to its limited cost or inconvenience to the employer, but rather to its potential to provide equal opportunity, reliability, and efficiency. The question of reasonableness, as understood in this way, is therefore quite separate from the analysis relating to existence of an undue hardship or disproportionate burden for the employer.²⁴¹ In light of this legislative history, it is submitted that the term “reasonable accommodation” in the Directive should also be interpreted in this way. However, this interpretation does not seem to have been made explicit in the Directive or its Preamble, and this may create confusion at the implementation phase.

Following the wording of the Directive, an accommodation must 'enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training'. As argued above, any accommodation which achieves this goal should be regarded as “reasonable”. As a consequence, if an accommodation is theoretically possible, the Directive only permits a restraint of the duty to accommodate if the making of the accommodation would impose a “*disproportionate burden on the employer*”.

The two limitations outlined above at the beginning of this section should therefore perhaps better be rephrased as: firstly, employers are required to make a reasonable accommodation if such an accommodation exists. This should allow the disabled individual to carry out the work; secondly, where a reasonable accommodation could be made, a failure to make such an accommodation can only be justified if the accommodation would result in the employer experiencing undue hardship.

With regard to the second limitation, based around the concept of “disproportionate burden”, preamble paragraph 21 of the Directive states:

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.

On the basis of this paragraph, Katie Wells has argued that under the Directive the financial cost of the accommodation is the primary factor in determining whether a "disproportionate burden" exists. She argues that the Directive frames the duty to accommodate by weighing two elements: on one side the effectiveness of the accommodation in enabling the disabled person to access employment, and on the other side the financial cost of the accommodation for the employer. Wells regards it as unfortunate that the Directive does not also point to the potential benefits that could accrue to employers from adapting their workplaces to facilitate the employment of disabled people. "This polar opposition of individual gain versus employer cost is not conducive to tackling attitudinal and systemic forms of disability discrimination, and it may reinforce the perception that the principal result of accommodation of disabled people is expense and not benefit."²⁴²

²⁴⁰ The meaning of the term ‘reasonable’ in this context may have changed as the result of a recent Supreme Court decision. In 2002 the US Supreme Court addressed the issue of reasonable accommodation under the Americans with Disabilities Act in *US Airways v Barnett*, 122 S.Ct, 1516 (2002). The majority of the Court gave independent significance to the term ‘reasonable’ regarding it as a modifier to the duty to make an accommodation. The majority opinion of Justice Breyer stated ‘in ordinary English the word “reasonable” does not mean “effective”. It is the word “accommodation”, not the word “reasonable”, that conveys the need for effectiveness’. See also A Meyerson and S Yee, ‘Reasonable Accommodation after Barnett’, Paper for the National Council on Disability, www.ncd.gov. See below under “The United States” for further discussion of the *Barnett* case.

²⁴¹ For further commentary on the original interpretation of the reasonable accommodation provision under the Americans with Disabilities Act, see L Waddington, *Disability, Employment and the European Community* (Blackstone, 1995), 164-167.

²⁴² Katie Wells, The Impact of the Framework Employment Directive on UK Disability Discrimination Law, 32 *Industrial Law Journal* 4, Dec. 2003, 253 at 264.

A 'reasonable accommodation' may pay for itself in the greater productivity of the disabled worker. Alternatively it may have externalities beyond the disabled worker, by, for example, enabling other workers to be more productive, or by attracting customers who would otherwise not have been able or inclined to patronise the firm. 'Reasonable accommodations' in such cases would accord with the model of economic efficiency. However, not all accommodations can be justified by this model. Some accommodations are simply economically inefficient. Furthermore, the justification for the duty of 'reasonable accommodation' is not economic efficiency but equality of opportunity for people with disabilities. This presupposes a comparison with individuals who are not disabled.

Adopting a very different perspective, Kelman argues that the accommodation 'right' is a claim to receive treatment that disregards some (though not all), differential input costs. He regards the accommodation norm as establishing a distributive claim, rather than a right. He argues that those seeking accommodation are making claims on real social resources that compete with all other social resource claimants and that all such claims cannot be met. Thus a particular plaintiff's claim to have his 'right' to accommodation vindicated is subject to claims that his demands are 'unreasonable' in the sense that the resources that would have to be devoted to meeting them could be spent in a better fashion.

He argues that the main reason we distribute the resources needed to accommodate otherwise excluded workers, in kind, in the form of 'inclusionary' services, rather than in cash, is to break down the hierarchical segregation of social groups. If the basic goal of an accommodation requirement is to transfer resources, in kind, to increase social inclusion, there are certain limits on the accommodation requirement. These limits are relevant in determining what accommodations are reasonable and should be covered. According to Kelman people who do not face something resembling social exclusion in the absence of legal intervention should perhaps not be entitled to employer subsidised accommodation.

As a consequence he concludes that the added input the plaintiff seeks is unreasonable if it would benefit (large numbers of?) other potential employees (nearly as much?) as it would benefit the plaintiff. In this sense, the accommodation obligation is limited to those who are thought to be as 'meritorious' as those who can work without the accommodation. Kelman concludes that accommodation arguably takes preference over more conventional re-distributive transfers only in situations in which the transferees would otherwise suffer particular harm associated with being relegated to an outsider status.

A number of other factors may be relevant to establishing the limits of the obligation to accommodate. In some cases, should no accommodation duty exist, the individual with a disability would be unable to find any comparable job (or, in the extreme case, no job at all). The question then arises whether the extreme consequences for the disabled individual, in terms of marginalisation or exclusion from the paid workforce, should be factored into the equation, or whether the individual consequences are irrelevant. In addition, successful employment in a particular line of work or with a particular employer may require an expensive accommodation, whilst an alternative employment or employer may require no accommodation, or only a modest one. In this situation, one can consider what weight should be placed on the career preferences of the individual.

Specific problems are likely to arise where an individual's impairment is general, rather than firm or occupation specific. As a consequence, the jobs the individual can perform without accommodation or with the accommodations employers are willing to offer may be far less lucrative or rewarding than a job that would require a costly accommodation. At the extreme, there may be an all-or-nothing choice. If this particular employer is not required to accommodate, then no employer is, and the entire cost of adjusting to the disability is borne by the individual with the disability; conversely, if the employer is required to accommodate, it bears the entire cost, subject to the availability of public support, solely because of a unilateral choice of the individual to apply for one of its jobs.

On the other hand one could argue that the disproportionate burden test should allow no further room for such considerations. Employers should be expected to do all that is possible to accommodate disabled individuals in each and every case, and the disproportionate burden defence, which should only successfully be relied upon in cases of genuine and severe hardship, should not be further weakened even in such extreme situations. The reasonable accommodation requirement should already factor in the extreme scenarios described above, and the disproportionate burden defence, which should not be easily met, should always be the absolute limit of the employer's obligation.

Collective bargaining agreements

In some jurisdictions collective bargaining agreements can restrict the possibility to make certain 'reasonable accommodation's. However, in light of the wording of Article 16 (b) of the Framework Employment Directive, this possibility seems to have been closed off.

Article 16 reads:

Any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.

1. National Approaches

a) Pre-Directive Legislation and Case Law in the European Union

United Kingdom

The DDA provides a specific defence of 'justification,' which can apply to any failure to make a reasonable adjustment:²⁴³

A failure to make a reasonable adjustment, where an employer is under a duty to do so, can be justified if the reasons for the failure are both material to the circumstances of the particular case, and substantial.

However, as noted above, the Directive does not allow for such defences, and the United Kingdom Government is to introduce Regulations that will limit the defence quite severely.

Whilst the term 'disproportionate burden' is not used in the DDA 1995, the concept is nevertheless implicit in the section which states:²⁴⁴

In determining whether a step [reasonable adjustment] is reasonable, regard is to be had to:

- a) The effectiveness and practicability of taking a step;
- b) The financial and other costs that would be incurred;
- c) The extent to which the employer's activities would be disrupted;
- d) The extent of the employer's financial and other resources, including the availability of financial or other assistance.

²⁴³ DDA s 5 (3) (4).

²⁴⁴ DDA s 6 (4)

This approach seems to merge the two questions of whether an effective accommodation exists and whether making such an accommodation would amount to a disproportionate burden.

Furthermore, in the case of *Kenny v Hampshire Constabulary*,²⁴⁵ it was stressed that the duty to make reasonable adjustments is restricted to 'job-related matters'.²⁴⁶

The case of *Bradley v Greater Manchester Fire and Civil Defence Authority*,²⁴⁷ sought to clarify how the justification defence interacts with the duty to make reasonable adjustments. In this case, the applicant had arthritis of the spine and wrists and could not sit for normal periods. Her manual dexterity was also affected. She was dismissed and recommended for ill-health retirement, following a period of sickness absence. There had been a last minute failure in communication between the occupational health physician and the applicant's manager. As a consequence, although adjustments had initially been considered by the employer, they had not been considered immediately prior to the dismissal. The Tribunal and Appeal Tribunal held however that as no reasonable adjustments could have been made in any event the case, the dismissal was justified.

Ireland

As the term disproportionate burden is not used in the Irish legislation it is difficult to assess this issue by reference to Irish Cases. The reality is that the Irish legislation limits the obligation in respect of reasonable accommodation by reference to the term 'nominal costs.' This is a result of the history of the legislation. In *An Employee v. a Local Authority*,²⁴⁸ the term nominal cost was analysed and the following principles were enunciated:

- The size of the enterprise is relevant when determining whether an accommodation gives rise to a nominal cost or not.
- The status of the enterprise, public or private is relevant when determining whether an accommodation gives rise to a nominal cost or not.
- All employers are not to be treated in an identical manner when determining whether an accommodation gives rise to a nominal cost or not.

Sweden

Basically there is no case law on this issue. Presumably the general statements referred to in the legislative materials can provide some guidance in regard to the manner in which the courts will eventually deal with the issue. In addition, the scope of the duty is based on a reasonable balancing of interests.

An employer's economic circumstances and right to organise the work as he or she sees fit must be taken into account. The reasonableness of requiring measures to be undertaken can vary depending on the employer. This determination must be made on a case to case basis.

The following, among others, are factors that should be considered:

- the company's ability to bear the costs,
- the expected effects of the measure on the disabled person's ability to carry out the work,
- the problems caused for the employer in connection with the measures (for example, decreased efficiency, how quickly the measures can be undertaken, how quickly the employer needs to have the applicant performing the job), and

²⁴⁵ 1999, IRLR 76.

²⁴⁶ In this case a complainant with cerebral palsy had requested assistance with toileting.

²⁴⁷ EAT 253/00.

²⁴⁸ DEC-E2002-004

- the expected length of the employment (a shorter employment period or a short term project can result in lesser requirements in relation to the accommodation measures to be undertaken).

In the case of a large employer with substantial resources the duty to provide a ‘reasonable accommodation’ will presumably go substantially beyond accommodating the essential functions of the job.

The possibility of receiving public subsidies to cover the cost of the accommodation are not to be taken into account in determining the issue of reasonableness. However, if it becomes apparent during the recruitment process that the subsidy will be received, the subsidy should be taken into account.²⁴⁹

Rather obliquely the Government has stated that, even if it is possible to eliminate or reduce the limits on the capacity to carry out the work tasks caused by the disability through support and adaptation measures, the failure to provide those measures will constitute direct discrimination only if they can reasonably be required of the employer.

b) Non-European Experiences

The United States

The ADA does not limit the accommodation requirement through the disproportionate burden requirement, but rather utilises the (related) concept of “undue hardship”. Like ‘reasonable accommodation’, undue hardship must be determined on the facts of each case.

Regulations under Sections 501, 503, and 504 of the Rehabilitation Act and the statutory language of the ADA provide that a covered entity is not required to implement any job accommodation that the entity can demonstrate would impose an “undue hardship” on the operation of its business.²⁵⁰ The Section 501 and 504 regulations did not define the term “undue hardship,” but they did provide that, in determining whether a particular accommodation would impose such a hardship, the following factors should be considered:

- (1) The overall size of the agency’s program with respect to the number of employees, number and type of facilities, and size of budget; (2) the type of agency operation, including the composition and structure of the agency’s workforce; and (3) the nature and cost of the accommodation.²⁵¹

The ADA defines “undue hardship” as “an action requiring significant difficulty or expense,” when considered in light of a similar but expanded list of factors.²⁵²

- (i) the nature and cost of the accommodation needed under this Act;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

²⁴⁹ Government bill 1997/98:179, p 54.

²⁵⁰ 29 C.F.R. §§ 1614.102(a)(8), 1614.203(c)(1) (1993); 41 C.F.R. § 60-741.6(d) (1993); 45 C.F.R. § 84.12(a) (1993); 42 U.S.C. § 12112(b)(5)(A).

²⁵¹ 29 C.F.R. § 1614.203(c)(3) (1993); 45 C.F.R. § 84.12(c) (1993). Section 503 regulations likewise did not define “undue hardship;” they provided only that, “[i]n determining the extent of a contractor’s accommodation obligations, the following factors among others may be considered: (1) Business necessity and (2) financial cost and expenses.” 41 C.F.R. § 60-741.6(d) (1993).

²⁵² 42 U.S.C. § 12111(10)(A).

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.²⁵³

Pursuant to the Rehabilitation Act Amendments of 1992, the more elaborate list of factors to be considered in determining undue hardship as established in the ADA applies under the Rehabilitation Act as well.²⁵⁴

The committee reports and the EEOC's ADA Interpretive Guidance elaborate somewhat more on the definition of "undue hardship" by explaining that "an action requiring significant difficulty or expense" means "an action that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program."²⁵⁵ The choice of the word "significant" to describe the degree of difficulty or expense that constitutes an undue hardship may have originated from a 1979 report of the Senate Labor and Human Resources Committee, in which the committee sought to substitute the phrase "significant hardship" for "undue hardship" to clearly distinguish the limits on reasonable accommodation in the disability context from those of religious accommodation.²⁵⁶ The committee explained that a hardship should excuse making an accommodation if it is one that is "exceeding or violating propriety or fitness; excessive, immoderate, unwarranted."²⁵⁷ In arriving at final statutory and report language regarding the meaning of "undue hardship," Congress rejected the notion of any *per se* level of difficulty or expense that would constitute undue hardship²⁵⁸ and voted down an amendment that would have created a presumption that a suggested accommodation would involve undue hardship if it exceeded 10 percent of the annual salary for the position in question.²⁵⁹ Representative Donald Payne declared his opposition to the measure because "it unfairly switches the focus away from the resources of the employer and onto the annual salary of the employee."²⁶⁰

In rejecting the notion of a fixed, across-the-board standard of undue hardship and providing instead the statutory list of factors to be considered, Congress aligned itself with regulations and judicial precedents under the Rehabilitation Act that interpret undue hardship as varying according to the impact of a particular proposed accommodation on a particular business, with more accommodation being required of larger entities with more resources. The analysis of the final regulation that accompanied the original HEW Section 504 regulations described this relative approach: the weight given to each of these factors in determining whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care centre might not be required to spend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aid to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it

²⁵³ *Id.* § 12111(10)(B).

²⁵⁴ Pub. L. No. 102-569, §§ 503(b)(g), 505(c)(d), and 506(d), 106 Stat. 4424, 4427, 4428 (1992) (codified at 29 U.S.C. §§ 791(g) (§ 501), 793(d) (§ 503), and 794(d) (§ 504)).

²⁵⁵ SENATE REPORT at 35; HOUSE EDUCATION & LABOR COMMITTEE REPORT at 67; *see also* HOUSE JUDICIARY COMMITTEE REPORT at 41; 29 C.F.R. 408 (app. to pt. 1630) (commentary on § 1630.2(o)) (1993).

²⁵⁶ S. REP. NO. 316, 96th Cong., 1st Sess. 8 n. 5 (1979).

²⁵⁷ *Id.*

²⁵⁸ HOUSE JUDICIARY COMMITTEE REPORT at 41.

²⁵⁹ 136 CONG. REC. H2470, H2475 (daily ed. May 17, 1990). Opponents of the amendment successfully argued that a 10% cap would severely disadvantage lower-wage workers who needed accommodations. *Id.* at H2473 (remarks of Rep. Schroeder); *id.* at H2474 (remarks of Rep. Payne).

²⁶⁰ *Id.* at H2474 (remarks of Rep. Payne).

could constitute an undue hardship to impose that requirement on a provider of foster home care services.²⁶¹

Assessing whether a proposed accommodation would result in an undue hardship involves a highly fact-specific, individualized inquiry regarding the practicability to the enterprise involved of making the necessary accommodation.²⁶²

In the *U.S. Airways, Inc. v. Barnett*,²⁶³ the Supreme Court of the United States appears to have contemplated a reasonableness standard for reasonable accommodations separate from undue hardship analysis, and therefore broke away from the original meaning of the term. Prior to the *Barnett* decision, the EEOC and most courts and commentators had believed that, to claim the right to a reasonable accommodation, a person with a disability merely had to show that a requested accommodation worked, in the sense that it would enable the worker with a disability to perform the essential functions of the job. The limits on its "reasonableness" were established by the ADA definition of "undue hardship" as explored in the introduction to this section. An "unreasonable accommodation," then, was one that resulted in undue hardship. The majority opinion in *Barnett*, however, recognized an assessment of reasonableness of accommodations apart from undue hardship.

The Court reasoned that the ADA does not "demand action beyond the realm of the reasonable."²⁶⁴ It rejected Mr. Barnett's argument that the word "reasonable" in "reasonable accommodation" only means "effective," and held that it is the word "accommodation," not the word "reasonable," that conveys the need for effectiveness. The Court declared that "an accommodation could be unreasonable in its impact even though it might be effective in facilitating performance of essential job functions."²⁶⁵ In permitting employers and courts to conduct an assessment of the "reasonableness" of accommodations, apart from their financial and administrative hardship on the employer's operation, the *Barnett* opinion opened up a troublesome can of worms. It invites employers to interject their own possibly eccentric and prejudiced views about what is reasonable, and allows courts to second-guess otherwise workable and not unduly burdensome accommodations. Accordingly, the Court's position undercuts a sensitive compromise - reflected in the "undue hardship" standard - between requiring employers to do nothing or very little to accommodate their workplaces to the needs of individual workers with disabilities or requiring them to take extreme actions to accommodate particular workers that would unduly harm the employers' businesses.

The "interactive process," discussed above, for determining reasonable accommodation did not contemplate that an employer could say that although a particular accommodation would be effective and was not unduly costly or difficult the employer was still rejecting it because it does not view the accommodation as reasonable. Nor that courts could interpose their own opinions about whether an effective, not unduly burdensome accommodation is somehow nonetheless unreasonable.

In its origins in regulations implementing the Rehabilitation Act, in its usage in the ADA, and in regulatory interpretations of the EEOC, the focus of the "reasonable accommodation" concept has always been on meeting the accommodation needs of the worker. Under the EEOC's regulations implementing the ADA, "reasonable accommodation" is defined to mean various kinds of "modifications or adjustments" to the application and work environment that either: "enable a qualified applicant with a disability to be considered for the position such qualified applicant desires," "enable a qualified individual with a disability to perform the essential functions of [the] position [held

²⁶¹ Analysis of Final Regulation, 42 Fed. Reg. 22,688, No. 16 (1977) (codified as reissued at 45 C.F.R. 375 (app. A to pt. 84) (commentary on § 84.12(c)) (1993)).

²⁶² *Hall v. United States Postal Serv.*, 857 F.2d 1073, 1080 (6th Cir. 1988) (citing *Arline v. School Bd. of Nassau County*, 772 F.2d 759, 765 (11th Cir. 1985), *aff'd*, 480 U.S. 273 (1987)). See generally Chai R. Feldblum, "Employment Protections," in *The Americans with Disabilities Act: From Policy to Practice* 94-95 (Jane West ed., 1991) (describing congressional decision to adopt flexible, case-by-case approach to undue hardship).

²⁶³ 122 S.Ct. 1516 (2002).

²⁶⁴ 122 S.Ct. at 1523.

²⁶⁵ *Id.* at 1522.

or desired], or "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."²⁶⁶ The definition is concerned exclusively with enabling the employee or applicant to participate on an equal footing.

The phrase "undue hardship," on the other hand, has, since its origins in Rehabilitation Act regulations, been viewed as the limit on an employer's obligation to provide accommodations. The ADA's definition of undue hardship²⁶⁷ states in considerable detail the kinds of financial, administrative and structural factors that courts should consider when deciding whether an accommodation will place an undue hardship on employers.

During congressional consideration of the ADA, discussions and debates about how an employer could defend itself against a claim for a requested accommodation centred on the "undue hardship" definition. "Undue hardship" was the topic of considerable debate.²⁶⁸ "The word "reasonable" was not viewed by Congress or the drafters of the legislation as an independent modifier that would exclude particular accommodations that employers were otherwise legally obligated to provide under the ADA, and the Court's opinion in *Barnett* makes a dramatic and unfortunate break with the ADA's legislative history and implementing regulations in suggesting that the statute imposes an independent standard of reasonableness of accommodations.

Australia

Under Australian law two potential limits exist to the making of a 'reasonable accommodation'. First, the accommodation should enable the person with a disability to carry out the essential requirements of the particular employment. This limitation exists under Australian law with respect to the limited requirement of accommodation under the DDA and has been discussed above. Secondly, the duty to accommodate should only exist up to the point where it imposes an 'unjustifiable hardship' on the employer. In Australian law all the relevant circumstances of the particular case are taken into account in determining what constitutes unjustifiable hardship. Relevant factors include, but are not limited to, the nature of the benefit or detriment to all persons who are concerned with the case; the effect of the disability of a person concerned with the case; the financial circumstances of the person claiming unjustifiable hardship and the estimated cost of the accommodation.²⁶⁹ In effect, there is a balancing act assessing the costs of the accommodation to the employer and the benefits to the person with a disability and taking account of the impact on others in the workplace. In assessing potential benefits, social benefits as well as economic benefits are taken into account.²⁷⁰

Case examples of 'unjustifiable hardship'

In *Woodhouse v Wood Coffill Funerals Pty Ltd* [1998] HREOCA 12 a pallbearer could not carry coffins safely because of prosthetic foot. As a consequence he was dismissed from his employment. The Human Rights and Equal Opportunity Commission found that had he been given a small amount of training he would have been able to carry out the inherent requirements of the job and that the provision of such training would not have been an unjustifiable hardship on his employer.

Similarly, in *Daghlian* the provision of a stool to accommodate the postal worker would not have amounted to an unjustifiable hardship on the employer.

²⁶⁶ 29 C.F.R. § 1630.2(o).

²⁶⁷ 42 U.S.C. § 12111(10).

²⁶⁸ See, e.g., 135 Cong. Rec. S10735, S10736 (daily ed. Sept. 7, 1989) (Statements of Sens. Hatch and Harkin); 135 Cong. Rec. S10773 (daily ed. Sept. 7, 1989) (Statement of Sens. Helms and Harkin); 136 Cong. Rec. H2429 (daily ed. May 17, 1990) (Statement of Rep. Bartlett); and 136 Cong. Rec. H2471-H2475 (daily ed. May 17, 1990) (debate on Rep. Olin amendment to put a cap on undue hardship).

²⁶⁹ DDA s 11

²⁷⁰ This is discussed at length in the Productivity Commission's *Review of the Disability Discrimination Act 1992* (Cth): *Draft Report* Chapter 10

In another case, the provision of dictating software to enable a public servant to use a computer and thus to carry out the functions of her job was held not to amount to unjustifiable hardship: *Rees v Australian Agency for International Development* [1999] HREOCA 12

2. Examples of Provisions Adopted or Proposed by European Union Member States to Implement Article 5 of the Framework Employment Directive

a) Adopted Legislation

Finland

According to the Equality Act, in determining whether an accommodation is reasonable, one must take into account especially the costs arising thereof, the financial situation of the employer or education provider, and the availability of public funding or other resources for such purposes. According to the pertinent government proposal (HE 44/2003 vp) one may also take into consideration the size of the organisation or business enterprise. Also a situation may be considered unreasonable where the taking of “reasonable measures” would alter the operation of the work place “too much” and would at the same time endanger occupational safety and health (idem).

The Netherlands

From the Explanatory Memorandum, it follows that the question whether an accommodation is 'effective', calls for a two-staged test. It must first be established, that the accommodation is appropriate (- i.e. does the accommodation enable the disabled person to do the job?) and necessary. It must in a second, subsequent step be established, whether the accommodation would result in a disproportionate burden on the employer. The balancing of the parties' interests, must be done in the light of 'open' norms of civil law, such as the duty of a good employer ['goed werkgeversschap']. If financial compensation exists for the realisation of an effective accommodation, the accommodation cannot be regarded as a 'disproportionate burden' on the employer. The government has indicated, that the duration of the employment contract, might be a weighty factor in determining as to whether or not it is deemed 'reasonable' to realise the accommodation. The government has also explicitly referred to Consideration 21 of the Preamble to the Directive.²⁷¹

Belgium

The Belgian federal implementation statute²⁷² provides in Article 2(3):

The denial of a reasonable accommodation for a person with a disability is discrimination in the sense of this statute.

A reasonable accommodation is an accommodation that does not create a disproportionate burden, or where the burden is sufficiently compensated for by existing measures.²⁷³

One can see from the second part of Article 2(3), that an accommodation is judged to be reasonable if it does not create a disproportionate burden for the employer. This interpretation conflicts with the aforementioned US inspired understanding of the notion of reasonable accommodation which regards an employment related accommodation as reasonable if it is effective in allowing an individual to carry out a specific job. The preparatory texts relating to the Belgian statute in fact make it clear that

²⁷¹ Explanatory Memorandum, Second Chamber of Parliament 2001-2002, 28 169, nr, 3, p. 29.

²⁷² Act to Combat Discrimination and to Amend the Act of 15 February 1993 to Establish a Centre for Equal Opportunity and to Combat Racism.

²⁷³ Article 2(3): 'Het ontbreken van redelijke aanpassingen voor de persoon met een handicap vormt een discriminatie in de zin van deze wet.

Als een redelijke aanpassing wordt beschouwd de aanpassing die geen onevenredige belasting betekent, of waarvan de belasting in voldoende mate gecompenseerd wordt door bestaande maatregelen.'

when determining whether any accommodation amounts to a disproportionate burden (i.e. is reasonable in the terms of the Belgian Act), three criteria have to be considered:

- are any accommodations possible which would allow a specific person with a disability to effectively participate in an equal way in a specific activity?
- do these accommodations amount to a disproportionate burden for the person who must make them?
- do there exist any measures that significantly reduce the burden on the person who is under the duty to accommodation?²⁷⁴

In fact though, only the last two criteria have been explicitly included in the Statute, and Belgian law.

Spain

In order to determine if a burden is disproportionate, according to art. 37 bis Law 13/1982, the following items must be considered: a) If the public subsidies sufficiently compensate the cost of the measures; b) the costs of the measures, including the financial ones; c) the size of the organization or the company.

Germany

The law (*Section 81 (4) SGB IX*) provides three exemptions from the duty to accommodate. First the employee has no right to accommodation if this would place an undue burden on the employer in general. Second making a reasonable accommodation would be a disproportionate burden if it involves unreasonable costs to the employer. Third the employee has no right to reasonable accommodation if occupational health and safety regulations or if civil service law would be breached.²⁷⁵

b) Proposed Legislation

Austria

Although “reasonableness” (of adjustment) is certainly not a clear-cut concept, case law offers some important elements: the employers’ duty to care (*Fürsorgepflicht*) is activated only when employees can be expected (if necessary: after re-training) to be able to fulfil the new terms of their contract.²⁷⁶ The greater the number of employees, the stricter the employer’s duty to make reasonable adjustments.²⁷⁷ Dismissal must never be pronounced solely on account of an employee’s disability.²⁷⁸ If (suitable) other positions are in principle available the employer must even consider assigning a post that entitles the worker to an increased rate of pay.²⁷⁹ Allowances and grants available under the *BEinstG 1969*²⁸⁰ are to be taken into account when the “reasonableness” of adjustments is to be judged.²⁸¹ However, the employer is not obliged to create a “new” post in the company, specifically tailored to meet the needs of the employee.²⁸² Furthermore, if dismissal seems necessary to prevent the

²⁷⁴ *Parl. St.* 2001-2002, no 1578/008, 30-31. See Van den Langenbergh, above fn 57, 604-605.

²⁷⁵ Section 81 (4) sentence 3 *SGB IX*:

Ein Anspruch nach Satz 1 besteht nicht, soweit seine Erfüllung für den Arbeitgeber nicht zumutbar oder mit unverhältnismässigen Aufwendungen verbunden wäre oder soweit die staatlichen oder berufsgenossenschaftlichen Arbeitsschutzvorschriften oder beamtenrechtliche Vorschriften entgegen stehen.

²⁷⁶ *OGH* 29/04/1992, 9 ObA 18/92.

²⁷⁷ *OGH* 29/04/1992, 9 ObA 18/92.

²⁷⁸ *VwGH* 22/02/1990, 89/09/0147.

²⁷⁹ *OGH* 29/04/1992, 9 ObA 18/92.

²⁸⁰ See above Chap. 3.3.2.2.

²⁸¹ *VwGH* 14/12/1999, 99/11/0246.

²⁸² *OGH* 11/01/2001, 8 ObA 188/00f: Der Arbeitgeber ist nicht verpflichtet, “auf Dauer einen der Arbeitsfähigkeit des Arbeitnehmers entsprechenden neuen Posten zu schaffen”.

company's bankruptcy or other grave disturbances, the employee's interests are usually outweighed by the interests of the employer.²⁸³

To enhance foreseeability and publicity, parliament decided in 1998 to convert some of the courts' principles into statutory law. Since January 1999, the *BEinstG 1969* explicitly demands that support available under Sec. 6(2) *BEinstG 1969* (grants and loans) is to be taken into account when the employers' and the employees' interests are to be balanced.²⁸⁴ The *BEinstG 1969* also provides that an employer cannot reasonably be expected to continue employment if:

- the work formerly allotted under contract becomes redundant and assigning a new position involved a heavy burden (*erheblicher Schaden*);
- the disabled person is no longer able to fulfil the contract and assigning a new position involved a heavy burden;
- the disabled person persistently breaches the terms of the contract and continuing employment undermined work discipline.²⁸⁵

France

There is no other definition of either reasonable accommodation or disproportionate burden in the proposed legislation. Definitions might be elaborated in the regulations which will be adopted to implement the law or, more probably, judges will be called upon to decide what amounts to a reasonable accommodation and a disproportionate burden, taking public subsidies into account. These subsidies will be provided by the fund for professional integration of disabled people (to which all employers who do not employ 6% of disabled workers contribute).

Luxembourg

The maximum amount which an employer can be required to spend on an accommodation will be 40-60% of the disabled employee's annual salary over three years. This equates to 120-180% of the employee's annual salary. This may encourage the recruitment of disabled people who can easily and cheaply be accommodated, and leave more severely disabled people without protection. In other respects the proposed bill is vague concerning how a disproportionate burden will be established.

3. Recommendations to Policy Makers and Judiciary

Legislation and case law should recognise only two limitations to the requirement to make a reasonable accommodation:

1. Employers are not required to make a reasonable accommodation if no accommodation exists which would allow the disabled individual to carry out the work. If such an accommodation does exist it should be deemed "reasonable". However, this does not necessarily mean that an employer will be obliged to provide the accommodation, as:
2. Where a reasonable accommodation could be made, a failure to make such an accommodation can be justified if the accommodation would result in the employer experiencing a disproportionate burden.

Legislation should promote such a two stage test, which should also clearly be followed by the judiciary. In order to promote clarity and avoid confusion, legislators might opt to utilise the term "effective" accommodation in implementation legislation, in preference to "reasonable accommodation". Where the term "reasonable accommodation" is nevertheless used, courts should stress that an accommodation is reasonable if it is effective, in the sense that it allows a disabled individual to carry out the employment related tasks.

²⁸³ See, e.g., *VwGH 22/02/1990*, 89/09/0147; *VwGH 11/06/2000*, 2000/11/0096; *VwGH 04/10/2001*, 97/08/0469.

²⁸⁴ Sec. 8(3) *BEinstG 1969*.

²⁸⁵ Sec. 8(4) *BEinstG 1969*.

The disproportionate burden test should be regarded as a difficult test to satisfy. Each employer should be assessed on an individualised basis to establish if making a particular accommodation would result in a disproportionate burden. The factors elaborated in the ADA might be considered in determining whether a particular accommodation would result in a disproportionate burden.²⁸⁶

- (i) the nature and cost of the accommodation;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.²⁸⁷

In addition, specific account should be taken of any external benefit resulting to the employer, such as enhanced access for disabled customers. More should be expected of larger or wealthier employers than smaller employers or employers whose firm has a low turn-over.

In line with the Directive, collective bargaining rules should be re-examined to ensure they do not hamper the provision of reasonable accommodations, e.g. by restricting certain positions or benefits to workers based on seniority or work history, and therefore excluding disabled workers who do not meet these criteria.

VIII. What Should be the Role of the Public Sector as an Employer and a Provider of ‘Reasonable Accommodations’? What is the relevance of the public subsidies?

As Employer

In addition to different requirements being placed on different individual employers with regard to the making of ‘reasonable accommodation’, different sectors may also face differing levels of obligation. This is certainly true if the quota obligation which some Member States recognise. In particular, in some countries only the public sector is subject to the obligation to employ a set quota of disabled people, or is obliged to employ a higher quota than private sector employers. With regard to reasonable accommodation, these differing public / private sector obligations and differing sectoral obligations are at least partially reflected in the disproportionate burden defence – namely, if an employer in a particular sector is experiencing economic difficulty, and therefore able to argue that the expenditure on a ‘reasonable accommodation’ would amount to a disproportionate burden, other employers in the same sector may well also be experiencing similar economic difficulties and be able to make a similar case. However, it is submitted that, on occasions, these sectoral differences will not reflect (only) the economic strength of specific sectors, but also other characteristics particular to specific sectors. In particular, the argument can be made that the public sector should serve as a model employer providing more extensive accommodations than those which can be required in the private sector. This is because the public sector can provide a source for the technological and managerial experience and innovations necessary to accommodate people with disabilities. As these innovations

²⁸⁶ 42 U.S.C. § 12111(10)(A).

²⁸⁷ *Id.* § 12111(10)(B).

spread to the private sector, both the cost of any one accommodation and the unfairness of imposing it upon any single employer are likely to diminish. It is worth noting that the Directive specifically covers both the public and the private sector.

The Interface between 'Reasonable Accommodation' and State Provision

The Directive specifies that the making of a 'reasonable accommodation' will not amount to a disproportionate burden where the burden is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.'

Member States provide differing levels of protection and support in this respect. This is likely to continue to be the case as the regulation of social security systems is a competence which is jealously guarded by the Member States, and clearly outside of the scope of Community law. Consequently there will be differing levels of support for employers when making 'reasonable accommodations'. As a result, the extent to which (similarly placed) employers in differing Member States are obliged to make (similar) 'reasonable accommodations' will vary. In effect, this will lead to a patchwork quilt of differing levels of protection with regard to the making of 'reasonable accommodations. This is because the availability of public support will heavily influence the assessment of whether the making of any particular accommodation amounts to a disproportionate burden, and therefore whether such an accommodation is required or not. From the point of view of Community law, the existence of different standards is in fact quite logical. In essence the differing levels of protection result from different social security standards, and it is quite clear that the Community does not have the competence to take binding action to co-ordinate this area. In addition, the need to respect the subsidiarity principle, and the political sensitivities of the Member States in this area, imposes severe restrictions on the Community's room for manoeuvre.

1. National Approaches

a) Pre-Directive Legislation and Case Law in the European Union

The United Kingdom

The UK Disability Discrimination Act provides in s6 (4)

In determining whether it is reasonable for an employer to have to take a particular step in order to comply with subsection (1) (above), regard shall be had in particular to:

- a) the extent to which taking the step would prevent the effect in question
- b) the extent to which it is practicable for the employer to take the step
- c) the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking the step would disrupt any of his activities
- d) the extent of the employer's financial and other resources
- e) the availability to the employer of financial or other assistance with respect to taking the step.

Ireland

The determination of whether an accommodation gives rise to a disproportionate burden based on a number of factors including the possibility of obtaining public funding or other assistance. Case-law on the existing provisions also requires an employer to check out what assistance is available and the 'nominal cost' issue is determined on the basis of the availability of grants.

Sweden

As noted above, the possibility of receiving public subsidies to cover the cost of the accommodation are not to be taken into account in determining the issue of reasonableness. However, if it becomes apparent during the recruitment process that the subsidy will be received, the subsidy should be taken into account.²⁸⁸

Beyond this though the public sector plays a substantial role as a stimulus to creating a work environment that is inclusive. There are a number of laws that are important in this regard. One example is the employer's responsibility to provide for an inclusive working environment. The Government considers it desirable that the 'reasonable accommodation' requirements are coordinated with other rules related to accessible working conditions. This covers various statutes such as the Work Environment Act²⁸⁹ and the related rules issued by the Swedish Work Environment Authority, the Employment Protection Act²⁹⁰ and the Act on public insurance.²⁹¹ The Government is thus continuing preparation of this issue and is planning to develop a proposal as to the regulations that should apply concerning an employer's duties in relation to an ongoing employment situation.²⁹²

In addition, in some cases, for example, wage subsidies are available. These wage subsidies are regulated in the Decree on special measures for persons with a work disability.²⁹³ An individual may also have a right to certain support measures in order to regain or retain his/her work capacity. These measures are regulated in the Act on General Social Insurance.²⁹⁴ Rather than being classified as positive action measures, these would probably come under the heading of social security measures.

It should be pointed out that the wage subsidies related to workers with disabilities may in some ways be in conflict with the purpose of the non-discrimination laws, since there seems to be no coordination between the laws. There is at least a risk that persons with disabilities may refrain from competing for "non-subsidised" jobs due to a lack of awareness concerning the laws against discrimination, and employers may have developed a tendency to expect the subsidies in regard to disabled workers, even if they are doing a job for which they are fully qualified.

b) Non-European Experiences

The United States

Title II of the ADA prohibits all forms of discrimination, including employment discrimination, on the part of a "public entity."²⁹⁵ A "public entity" is defined as including "(A) any State or local government; and (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government."²⁹⁶

Title II of the ADA thus prohibits employment discrimination, including the failure to make reasonable accommodation, by any state, city or local government, or agency or department within the government. The Department of Justice, which issued implementing regulations for Title II of the AD in 1991,²⁹⁷ noted that Title II coverage applies to "Executive agencies" within state and local

²⁸⁸ Government bill 1997/98:179, p 54.

²⁸⁹ SFS 1977:1160 as well as amendments up to and including SFS 2000:764. The Work Environment Act and the Work Environment Decree (Arbetsmiljöförordningen (1977:1166)) require employers to maintain a good working environment, which covers not only the physical aspects but the psycho-social as well. This also means that certain types of accommodations should be made in regard to employees with disabilities. This can also relate to the physical accessibility of the workplace.

²⁹⁰ SFS 1982:80.

²⁹¹ 1962:381 as well as amendments up to and including SFS 2004:476.

²⁹² Regeringens proposition 2002/03:65, p 195 Ett utvidgat skydd mot diskriminering (Government Bill 2002/03:65, Extended protection against discrimination, p 195).

²⁹³ Förordningen (2000:630) om särskilda insatser för personer med arbetshandikapp).

²⁹⁴ Lagen (1962:381) om allmän försäkring).

²⁹⁵ *Id.* § 12132.

²⁹⁶ *Id.* § 12131(1) (also covers "the National Railroad Passenger Corporation [Amtrak], and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act)").

²⁹⁷ 28 C.F.R. pt. 35 (1993).

governments as well as to “activities of the legislative and judicial branches of State and local governments.”²⁹⁸ All governmental activities of public entities are covered, including those carried out by contractors.²⁹⁹

The ADA defines the term “State” to include “each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.”³⁰⁰

As to the application to public entities of ADA requirements related to employment, the Justice Department’s Title II regulations provide that the requirements established in the EEOC’s Title I regulations are the standards for Title II agencies that are also subject to Title I.³⁰¹ Accordingly, such public agencies are subject to the requirement that they make reasonable accommodation for limitations of workers and applicants with disabilities.

The EEOC’s Interpretive Guidance and the ADA committee reports state that whether a particular accommodation imposes an undue financial hardship must be determined by considering the availability of external resources, such as funds from a state vocational rehabilitation agency; federal, state, or local tax deductions; or the willingness of the individual with a disability to pay all or part of the cost — *i.e.*, only the final net cost to the covered entity should be considered.³⁰²

In the context of public employment, the most influential decision addressing the question of cost and undue hardship is *Nelson v. Thornburgh*.³⁰³ In that case, the court ruled that various accommodations (including the use of readers, braille forms, and a computer that stores and retrieves information in braille) needed by employees with visual impairments would not impose an undue hardship even though their costs would be substantial, because the additional dollar burden of the accommodations would represent only a small fraction of the \$300 million administrative budget of a state agency.³⁰⁴ In its ADA report, the House Judiciary Committee cited *Nelson* with approval as illustrating how the process of weighing the various factors to determine whether undue hardship exists would work.³⁰⁵

Australia

The significant resources at the disposal of public sector employers make it much harder to argue that providing ‘reasonable accommodation’ to a person with a disability will impose an unjustifiable hardship on the employer. Further, where equality is the goal of particular measures, as it is in the imposition of a duty to provide ‘reasonable accommodation’ for people with disabilities, the public sector has a leadership role to play as a model employer.

Government also has a potential role to play in sharing the burden of providing ‘reasonable accommodation. The Australian Government plays a limited role in providing supports for people with disabilities in employment under the *Commonwealth/States Disability Agreement*. The Productivity Commission is considering other ways in which government could provide assistance, for example through an inclusive procurement policy.³⁰⁶

²⁹⁸ 28 C.F.R. 441 (App. to pt. 35) (commentary on § 35.102) (1993).

²⁹⁹ *Id.*

³⁰⁰ 42 U.S.C. § 12102(3).

³⁰¹ 28 C.F.R. § 35.140(b)(1).

³⁰² 29 C.F.R. 408 (app. to pt. 1630) (commentary on § 1630.2(p)) (1993); SENATE REPORT at 36; EDUCATION & LABOR COMMITTEE REPORT at 69.

³⁰³ 567 F. Supp. 369 (E.D.Pa. 1983).

³⁰⁴ *Id.* at 382.

³⁰⁵ HOUSE JUDICIARY COMMITTEE REPORT at 41.

³⁰⁶ Chapter 14

2. Examples of Provision Adopted or Proposed by European Union Member States to Implement Article 5 of the Framework Employment Directive

a) Adopted Legislation

Finland

The availability of public subsidies is one factor to be taken into account when assessing whether particular RA measures are reasonable. An employer may receive a refund for costs that result from work and training experimentations, medical examinations, and consultations aiming to support the opportunities of a disabled person to gain or keep her/his work.³⁰⁷ The employer may also receive compensation for such accommodation measures (with regard to changes to machines or other physical environment or e.g. the rearrangement of the method of work) that it has taken in order to enhance the opportunity of a disabled person to gain or keep his/her work.³⁰⁸ To be compensated for these kinds of accommodation measures, they must be *necessary* in order to eliminate or decrease disadvantage resulting from a disability or an illness.³⁰⁹ The maximum compensation for such measures is 1 681,88 € per person. An employer may also receive compensation in a situation in which a fellow employee provides help to a disabled employee in order to enhance his/her ability to perform his/her work properly. The maximum compensation in this case is 168,19 € per month for a maximum period of one year.

We might also note that the Act on Services and Assistance for the Disabled provides for transportation services, interpretation services, service housing, personal assistance, reimbursement of costs relating to home alterations, rehabilitation counselling and adaptation training.

The Netherlands

Under the Act on the Reintegration of Disabled People in Employment (Wet op de (Re)integratie Arbeidsgehandicapten [REA])³¹⁰ employers are entitled to claim subsidies to cover the cost of accommodations in certain circumstances and under certain conditions.

Spain

The Law 51/2003, 2 of December (BOE 3/12/03), of equal opportunities, non-discrimination and universal accessibility for disabled people, provides in Article 7 provide that the public administration can establish a system of public support to contribute to the cost of the necessary measures to make a reasonable accommodation.

Germany

The public sector as an employer should serve as a role model for private employers. Public entities have to report vacant jobs early and have a duty to interview qualified severely disabled persons (*Section 82 SGB IX*). According to German public employment directives (*Schwerbehindertenrichtlinien der Bundesministerien und der Bundesländer*), qualified severely disabled job applicants have to be hired on a preferential basis.

³⁰⁷ Employment Services Act, section 12.

³⁰⁸ Decree on Employment Service Benefits [asetus työvoimapolveluihin liittyvistä etuuksista 17.12.1993/1253], section 14.

³⁰⁹ *Idem*.

³¹⁰ Wet op de (Re)integratie Arbeidsgehandicapten, wet van 23 April 1998, Stb. 290, meest recentelijk gewijzigd bij de wet van 15 december 1999, Stb. 564 [Act on the Reintegration of Disabled People in Employment, Act of 23 April 1998, law gazette 290, most recently amended by the Act of 15 December 1999, law gazette, 564].

Public subsidies are given to employers according to *Section 81 (4) Sentence 2 SGB IX* by administrative agencies, notably the integration office. The offices provide financial means as well as technical advice and information for the employers. If these financial aids are not provided, the accommodation requirement is seen as an undue burden for the employer.³¹¹ These grants or loans are provided according to administrative regulations³¹² and on a case-by-case-basis. Usually they are given rather generously, although the employer is expected to cover smaller adjustment costs.³¹³

b) Proposed Legislation

Austria

Under the *BEinstG 1969*, employers (or disabled people) may apply for grants or loans compensating for special costs related to the employment of people with disabilities (technical appliances, personal assistance, training, creation of suitable jobs, wage). Nevertheless, the *BEinstG 1969* does not confer “rights” or “titles”, upon employers or disabled people. Whether or not grants, loans, or wage subsidies are eventually accorded, lies in the unfettered discretion of the *Ausgleichstaxfonds* administered by the Secretary of State for Social Security.

Allowances and grants which are provided under the *BEinstG 1969* are to be taken into account in determining the “reasonableness” of adjustments.³¹⁴ To enhance foreseeability and publicity, parliament decided in 1998 to convert some of the courts’ principles into statutory law. Since January 1999, the *BEinstG 1969* explicitly demands that support available under Sec. 6(2) *BEinstG 1969* (grants, loans) is to be taken into account when the employers’ and the employees’ interests are to be balanced.³¹⁵

France

To facilitate participation of disabled people in all aspects of social life, the third part of the bill deals with accessibility (*Titre III Accessibilité*) especially in education, employment and surroundings (transports, buildings, new technologies). Chapter II, *Emploi, travail adapté et travail protégé* begins with Section I *Principe de non-discrimination*. Its first article is Art. 9, which adds a paragraph to the discrimination section of the Labour Code (instead of the disabled workers section as in the draft text). It takes up the words of Art. 5 of directive 2000/78/EC. It specifies that, to guarantee the respect of the principle of equality, all employers, including the State and public employers must provide reasonable accommodation for disabled workers.³¹⁶

Courts will have to decide what amounts to a reasonable accommodation or a disproportionate burden, taking public subsidies into account. These subsidies will be provided by the fund for professional integration of disabled people (to which all employers who do not employ 6% of disabled workers contribute).

Luxembourg

The public sector will not be covered by Article 11 of the loi portant transposition de la directive 2000/78/CE du Conseil. The government intends to propose a different provision which will result in the public sector being required to make accommodations. The public sector is covered by a quota obligation and provides subsidies to private employers to meet the costs of accommodations.

³¹¹ Düwell in LPK-SGB IX Section 81 Rdnr. 32.

³¹² Schwerbehindertenausgleichsabgabenverordnung vom 28. März 1988, BGBl. I, 484 in der Fassung vom 13. September 2001, BGBl. I, S. 2376.

³¹³ For instance in south Germany in the region Unterfranken, employers are expected to carry the costs up to €260,00. (www.regierung.unterfranken.bayern.de/for_all/soziales/sg_610/Vordr610/merkblat.doc)

³¹⁴ VwGH 14/12/1999, 99/11/0246.

³¹⁵ Sec. 8(3) *BEinstG 1969*.

³¹⁶ See under Issue 1 of this paper.

3. Recommendations to Policy Makers and Judiciary

Policy makers should ensure that a variety of public subsidies exist to meet the cost of accommodations and promote awareness of such subsidies. Employers who are claiming that the making of an accommodation would amount to a disproportionate burden should demonstrate that they have investigated the possibility of obtaining public subsidies to (partially) cover the related costs. The judiciary should take into account the availability of any public subsidies, whether these have actually been claimed or not, in determining whether making any particular accommodation would amount to a disproportionate burden.

IX. How does a Duty to Accommodate fit into the Non-Discrimination Framework?

This issue turns on the relationship between a failure to provide a 'reasonable accommodation' and the Article 2 norm of non-discrimination (both direct and indirect)? The Framework Employment Directive, along with other EC equality directives, makes a clear distinction between direct and indirect discrimination. The Directive (along with the Race Directive and the recently amended Equal Treatment Directive) defines direct discrimination as a situation 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation' on a ground covered by the relevant legislation.³¹⁷ The Directives also defines indirect discrimination. Article 2 (2) (b) of the Framework Employment Directive reads:

Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless:

that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that they are appropriate and necessary.

How does the concept of 'reasonable accommodation' fit into this established framework? Can the unjustified refusal to make a 'reasonable accommodation' be regarded as a form of discrimination, and, if so, should it be regarded as direct or indirect discrimination, an aspect of both concepts or, alternatively, as a third and different form of discrimination? A brief analysis of the concepts of direct and indirect discrimination, and their links to the reasonable accommodation requirement, will throw some light on this question.

Direct discrimination generally involves *intent* on the part of the discriminator, or at least the intention to make a distinction on a specific ground. In the case of the alleged failure to provide a 'reasonable accommodation', one could argue that such intent can be established where the employer has been made aware of the need for a job adaptation to assist a specific individual, which can be made without excessive effort or cost, and has refused to make that adaptation. Such an approach could be fitted into the European Community framework by explicitly providing for the 'disproportionate burden' defence with regard to a directly discriminatory act involving a denial of a 'reasonable accommodation' (this is not done at present).

However, in order to bring the failure to make a 'reasonable accommodation' within the definition of direct discrimination as laid down in the Framework Employment Directive, one must establish that an individual requiring an accommodation is in a comparable situation to those who do not require such

³¹⁷ Article 2 (2) (a) in both Directives.

an accommodation.³¹⁸ The latter is often difficult to demonstrate, given that an accommodation typically seeks to take away a barrier which impedes an individual from placing him/herself in ‘a comparable situation’. Unless one is willing to extend the meaning of direct discrimination to include the failure to create equal employment opportunities, the notion of direct discrimination can only rarely be invoked to redress a failure to make a ‘reasonable accommodation’. Swedish law nevertheless adopts this approach with respect to disability,³¹⁹ and notably, EC laws regards pregnancy discrimination in this light.³²⁰

The European Court of Justice has therefore held that in determining whether a refusal of employment on the grounds of pregnancy could be regarded as direct sex discrimination:

The answer depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex.³²¹

Applying this test, the Court found that discrimination on the grounds of pregnancy was a form of direct sex discrimination, since only women could be refused employment for this reason. Whether the Court would be willing to apply a similar test with respect to disability has to be seen. It cannot be denied that disability is a more complex concept than pregnancy, not only with respect to the type of accommodations needed but also with respect to the nature and duration of an impairment. At the same time, the exclusion mechanisms are highly similar and, from an equal rights perspective, equally problematic.

With regard to indirect discrimination, no such intention to differentiate between protected groups is commonly required. The Framework Employment Directive contains a definition of indirect discrimination, which focuses on a comparison between persons with a particular named characteristic and other persons, to identify if the former have been placed at a particular disadvantage. Seen in this way, the physical organisation of the work or workplace could, for example, disadvantage certain groups, e.g. people with mobility impairments, and therefore be regarded as indirectly discriminatory. The Framework Employment Directive thus allows for a comparison of one individual with ‘other persons’, suggesting that the appropriate comparator depends on the given situation. But does this imply that the plaintiff is free to compare him/herself with any real or imaginary group of persons? This question is particularly relevant for people with disabilities in need of a job adaptation. The exclusionary effect of seemingly neutral job qualification requirements – e.g. fluency in foreign languages – and the availability of effective job accommodations is highly individualistic and dependent on environmental circumstances. In such cases, the assignment of an appropriate comparator may be particularly difficult and give rise to specific legal questions. It remains to be seen how national courts and, eventually, the European courts will interpret and apply the indirect discrimination test in the Framework Employment Directive, and to what extent the – implicit or explicit – refusal of job accommodations can be covered by this test.

In this context, Joll³²² has noted that under the guise of the prohibition of indirect discrimination, employers have been required to provide accommodations to pregnant workers, workers who have recently given birth, and African American workers under Title VII of the Civil Rights Act. However, she notes that the accommodation requirement is far broader under the ADA than under Title VII and justification is easier to establish for indirect discrimination.

³¹⁸ An alternative would be to make a comparison between two individuals who both require a (similar) accommodation, where one has received the accommodation and another has not. However, such a restrictive interpretation would limit the relevance of the direct discrimination test.

³¹⁹ Article 6 Law (1999:132) prohibiting discrimination in working life of disabled persons.

³²⁰ Cf. Case C-177/88 *Dekker* [1990] ECR I-3941.

³²¹ Case C-177/88 *Dekker* at para. 10.

³²² Christine Joll, *Accommodation Mandates*, unpublished paper.

It is also worth noting that the Directive provides that a provision, criterion or practice will not amount to indirect discrimination, if an employer is obliged to make a 'reasonable accommodation' to eliminate the disadvantages which would otherwise be experienced by "persons with particular disabilities" as a result of the provision, criterion or practice. (Article 2 (2) (b) (ii)). What does this imply for the interaction between the obligation to make a 'reasonable accommodation' and the concept of discrimination? Does this suggest a failure to make a 'reasonable accommodation' is a form of indirect discrimination? Or does it imply that an employer can continue to apply provisions which indirectly discriminatory against people with a disability as a group, as long as the employer accommodates individuals with a disability who request an accommodation? Furthermore, does the accommodation requirement imply that all disadvantages associated with the provision in question must be removed, or that only a certain level of disadvantage has to be removed?

'Reasonable accommodation' discrimination is arguably different from direct and indirect discrimination, given that a disadvantage is not necessarily experienced by all or most members of a particular group, but is, as noted above, experienced on the individual level, depending on both individual and environmental factors. 'reasonable accommodation' discrimination may therefore require a different approach to do justice to the particularities of an individual in a given situation – or, as was held by the Canadian Supreme Court:

Accommodation ensures that each person is assessed according to his or her own personal abilities rather than presumed group characteristics.³²³

In the light of the above and given the prevailing notions about direct and indirect discrimination, Hendriks and Waddington have argued that it seems indispensable to (also) perceive 'reasonable accommodation' discrimination as a form of discrimination *sui generis*.³²⁴ Different from direct and indirect discrimination, 'reasonable accommodation' discrimination typically emerges in response to the failure to make an adaptation to ensure equal opportunities, and commonly does not follow from differentiation on a forbidden or seemingly neutral ground – a distinction which is sometimes difficult to apply with respect to groups in need of adaptations.³²⁵

On the other hand, Joll argues that an economic analysis of accommodation mandates, e.g. 'reasonable accommodation', and anti-discrimination law, reveals that the two forms of legal intervention are similar rather than distinct. Workers are likely to respond in the same way to anti-discrimination legislation as to accommodation mandates – by being more willing to supply their labour at any given wage (increase in supply). Employers are also likely to respond in the same way – employers regard both anti-discrimination legislation and accommodations as imposing costs (real or perceived), and their demand for labour will fall. The degree to which these requirements are binding will affect the impact on labour demand, and specifically whether only disadvantaged workers are effected (non-binding rules) or whether the effect will be averaged out across all workers (binding rules). She concludes that the spreading across all workers of the costs reflected in anti-discrimination law or accommodation mandates will result in an upward shift in the labour demand for disadvantaged workers.

Some authors adopt an opposing position. Kelman³²⁶ argues that non-discrimination and accommodation are fundamentally different concepts. He regards the accommodation 'right' as a claim to receive treatment from a defendant that disregards some (though not all) differential input

³²³ *Grismer v. The British Columbia Council of Human Rights*, [1999] 3 S.C.R. 868.

³²⁴ Lisa Waddington and Aart Hendriks, 'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to 'reasonable accommodation' Discrimination', *The International Journal of Comparative Labour Law and Industrial Relations*, Volume 18, Issue 4, 2002, 403.

³²⁵ E.g. excluding dogs, thus using the criterion 'having a dog', can both be considered to constitute direct discrimination (having a service dog is inherent to some blind persons) and indirect discrimination (disproportionately affecting blind persons).

³²⁶ Mark Kelman, 'Market Discrimination and Groups, Stanford Law School', *Stanford Public Law and Legal Theory Working Paper Series*, Working Paper No. 8, February, 2000.

costs. The accommodation norm therefore establishes a distributive claim, rather than a right. Kelman rejects the argument that the obligation to make a ‘reasonable accommodation’ should be framed in terms of a right to non-discrimination.

1. National Approaches

a) Pre-Directive Legislation and Case Law in the European Union

Ireland

It would appear that the case law in Ireland suggests two possible approaches to this issue. In most instances there appears to be a blurring of distinctions between reasonable accommodation and direct discrimination. It should be noted that neither the Equality Tribunal, nor the Labour Court have stated the two concepts are interrelated, however, it is clear from their decisions that the two are being interpreted together. On the other hand it has been held in a few instances that a failure to provide reasonable accommodation is discrimination in itself. In *A Motor Company v. A Worker*,³²⁷ the Labour Court held that a failure to provide reasonable accommodation amounted to direct discrimination under section 6 of the Act. In *A Company v. A Worker*,³²⁸ the Labour Court held that there was a constructive dismissal because of the failure to provide reasonable accommodation. Direct discrimination was not referred to in the ultimate decision. In *A Computer Component Company v. A Worker*,³²⁹ the Labour Court held that a Computer Company could not rely on the provisions relating to a person being incapable of doing the job, which is an element of the section dealing with reasonable accommodation, and then went on to hold that there was direct discrimination as a result. In *Harrington v. East Coast Area Health Board*,³³⁰ the Equality Officer found that the complainant had been directly discriminated and that the potential employer had failed to reasonably accommodate. From the decision there appears to be two separate issues, that of direct discrimination and that of reasonable accommodation. In *Kehoe v. Convertec Ltd*,³³¹ the Equality Officer noted the failure to provide reasonable accommodation, then held that there was direct discrimination under section 6 (2) (g) of the Employment Equality Act. In *An Employee v. a Local Authority*,³³² the Equality Tribunal reviewed whether the complainant had been directly discriminated against, and also whether reasonable accommodation had been provided – both issues were treated separately.

Sweden

A failure to accommodate is a form of direct discrimination according to § 6 of the Prohibition of Discrimination in Working Life of People with Disability Act.

b) Non-European Experiences

The United States

It is interesting to note that this issue, which seems to be so vexing in the European context, is of far less significance within the framework of US non-discrimination law. The distinction between “direct” and “indirect” discrimination is largely irrelevant under US law, unless it is recast as “intentional” (disparate treatment) versus “effects” (disparate impact) discrimination. Burgdorf³³³ argues that since the federal disability non-discrimination laws require reasonable accommodation and the Supreme Court has recognised the rationale for it, in fact it is not necessary to spend much time debating whether the requirement is part of eliminating intentional discrimination or of eliminating effects

³²⁷ ED/01/40

³²⁸ ED/01/11

³²⁹ ED/00/08

³³⁰ DEC-E/2001/001

³³¹ DEC-E-2001/034-004

³³² DEC-E2002-004

³³³ In correspondence with the author.

discrimination. What is necessary is that accommodations be required to address the impact of inaccessible facilities and discriminatory policies, practices, and procedures, and that the failure to do so should be regarded as unlawful discrimination. He argues that, in the context of US law, as long as this is achieved, it is of no significance how the unlawful action is classified. He furthermore states, in his conclusion to the paper presented at the closing conference of the EU disability non-discrimination law expert group in Louvain-la-Neuve:

... an enlightened view of the reasonable accommodation requirement in American disability non-discrimination statutes is that this requirement is an essential component of not discriminating on the basis of disability, and should not be characterised as “affirmative action” or “positive action” – concepts that address obligations over and above the duty of employers not to engage in discrimination.

Australia

The provisions of the Disability Discrimination Act which are relevant to disability discrimination in employment include sections 5, 6, 11 and 15. Section 5 contains the general prohibition on direct discrimination on the ground of disability. Direct discrimination occurs when a person with a disability is treated less favourably than a person without the disability in circumstances that are the same or are not materially different:

s 5 (1) For the purposes of this Act, a person (*discriminator*) discriminates against another person (*aggrieved person*) on the ground of a disability of the aggrieved person if, because of the aggrieved person’s disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability

Section 5(2) sheds light on when circumstances will be considered to be ‘the same or not materially different’:

s 5 (2) For the purposes of subsection (1) circumstances in which a person treats or would treat another person with a disability are not materially different because of the fact that different accommodation or services may be required by the person with a disability.

The Statute therefore defines a disabled person who requires an accommodation as not being in “materially different” position to a person who does not require such an accommodation and specifies that less favourable treatment in this situation amounts to a form of direct discrimination.

The provisions relating to direct (and indirect) discrimination in the DDA are therefore much broader in scope than the equivalent provisions in the Framework Employment Directive.

The inclusion of section 5(2) in the DDA ensures that difference is accommodated when assessing the issue of direct discrimination and illustrates one way in which a general duty to accommodate could be fitted into a non-discriminatory framework. Similarly, the focus on the ‘reason’³³⁴ for discrimination in Australian case law, rather than subjective motive or intention provides a further illustration of how the duty to accommodate can fit into the non-discriminatory framework.

Indirect discrimination under the DDA is not limited in the way that Article 2(2)(b) of the Framework Employment Directive is limited. The focus under section 6 is on the impact of the ‘requirement or condition’ on the person with a disability. An employer cannot avoid liability by showing that the ‘requirement or condition’ is justified by a legitimate aim. What must be established under the DDA is that a substantially higher proportion of non-disabled people will be able to meet the requirement while the person with a disability is unable to do so. The provision of an accommodation to enable the

³³⁴ DDA s 10

person with a disability to meet the ‘requirement or condition’ would obviate any claim of indirect discrimination, thus providing another illustration of how the duty to accommodate could fit into a non-discriminatory framework.

2. Examples of Provisions Adopted or Proposed by European Union Member States to Implement Article 5 of the Framework Employment Directive

a) Adopted Legislation

Finland

A failure to provide reasonable accommodation may amount to discrimination, but this is not automatically the case. The law or the *travaux* are not explicit on the subject, but Timo Makkonen argues in his report for the Expert Group that the failure to hire a disabled person, who, after the taking into account of obligatory reasonable accommodation measures, was the best candidate, would amount to discrimination on the basis of disability (it would seem to constitute direct discrimination).

The Netherlands

Dutch implementation legislation, the WGB h/cz, is ambiguous in this respect. Two possible interpretations exist. Firstly, a strict text base interpretation leads to the conclusion that “reasonable accommodation differentiation” (i.e. an unjustified failure to make a reasonable accommodation) is a form of direct or indirect differentiation (i.e. discrimination). In its advise to the government the Dutch Equal Treatment Commission argued that “reasonable accommodation differentiation” should be explicitly provided for in Article 1 of the Act, which defines the terms differentiation, direct differentiation and indirect differentiation.³³⁵ The Commission argued that the goal of clarity would be served if “reasonable accommodation differentiation” formed part of the central norm embodied in Article 1.³³⁶ The Commission also advised that the “unreasonable burden” justification should be provided for explicitly in Article 3 of the Act, which also contains the justifications for actions that would otherwise be direct or indirect differentiation.³³⁷

In its advise to the government the Equal Treatment Commission also emphasized that the reasonable accommodation obligation was not a new phenomenon, and that the pre-existing General Equal Treatment Act (AWGB) established the principle that unequal cases must be treated unequally in proportion to the relevant difference. The Commission argues that this interpretation may require specific measures in order to achieve “real” equality. The Commission also approves and welcomes the fact that the government has made the positive duties approach explicit in the WGB h/cz.³³⁸ The Commission therefore emphasised the existence of the positive duty approach also under the AWGB. Since the AWGB is built exclusively around the concepts of direct and indirect differentiation, this seems to imply that an unjustified failure to make a reasonable accommodation is a form of direct or indirect differentiation.

An alternative view is based on a reading of the text in conjunction with a purposive interpretation. On the basis of this approach one could conclude that “reasonable accommodation differentiation” is a sui generis form of discrimination. This interpretation is based on the fact that both the requirement to make a reasonable accommodation and the justification for failing to make such an accommodation are clearly separated from Article 1 (definition of differentiation) and Article 3 (justifications). The advice of the Equal Treatment Commission to incorporate the reasonable accommodation obligation and the justification for failing to make an accommodation in Articles 1 and 3 respectively was not

³³⁵ See commentary of the Equal Treatment Commission on the Bill on Equal Treatment on the Ground of Disability and Chronic Disease, 26 April 2001, CGB Advies 2001/02.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

followed. According to the Government "the structure of the Act implies that the prohibition to make a differentiation is contained in Articles 1,2, and 3".³³⁹ Marianne Gijzen concludes³⁴⁰ that, since the reasonable accommodation provisions have not been integrated into these key Articles, the requirement has a distinct and *sui generis* nature under Dutch law.

Spain

Luis Rodriguez Vega in his report for the expert group argues that a failure to make a reasonable accommodation is a specific type of indirect discrimination. This is based on an analysis of art. 37.3 of the Law 13/1982, that refers to reasonable accommodation as a way to avoid indirect discrimination.

Germany

The issue has not been discussed in German legal literature yet. As the right to reasonable accommodation existed before the anti-discrimination provision was adopted it might be said that a failure to provide reasonable accommodation is not regarded discrimination. There is consensus however, that a such a failure can result in the duty to pay damages to the employee.³⁴¹

b) Proposed Legislation

Austria

Thus far the courts have not referred to discrimination when deciding upon the validity of a dismissal. The January 2004 draft takes a clear stance: a failure to provide reasonable accommodation is a form of indirect discrimination.

According to draft Sec. 7a(2) *BEinstG 1969*, indirect discrimination will not only relate to (neutral) "provisions", "criteria", or "practices", but also to "characteristics of built environment" (*Merkmale gestalteter Lebensbereiche*). The term "accommodation" within the meaning of Article 5 of the Directive clearly encompasses adjustments of the physical features of the working environment, such as staircases, machines, or toilets. When an employer fails to adapt the physical working environment according to the needs of a disabled employee (or an applicant for a job vacancy), the employer will violate the prohibition of (indirect) discrimination on account of disability.

In accordance with the "negative" approach to "reasonable accommodation", the January 2004 draft proposes to insert a new Sec. 7a(4) into the *BEinstG 1969*, reading:

"(4) A disadvantage within the meaning of para. 2 shall not constitute discrimination if the elimination of the causes of the disadvantage imposes a disproportionate burden. When assessing the burden, the expenditures necessary to eliminate the disadvantage and the financial strength of the employer or organisation have to be taken into account. When assessing the reasonableness of the burden, the availability of grants or allowances administered by a public agency have to be taken into consideration."³⁴²

Draft Sec. 7a(4) *BEinstG 1969* is clearly supposed to incorporate a part of Article 5 of the Directive into Austrian law. The January 2004 draft also clarifies one important aspect of the employers'

³³⁹ Explanatory Memorandum, Second Chamber of Parliament 2001-2002, 28 169, nr. 3, p.25.

³⁴⁰ In discussions with author.

³⁴¹ Düwell in LPK-SGB IX Section 81 Rdnr. 34.

³⁴² In German, the proposed Sec. 7a(4) *BEinstG 1969* reads: "Eine Benachteiligung im Sinne von Abs. 2 stellt dann keine Diskriminierung dar, wenn die Beseitigung der die Benachteiligung begründenden Bedingungen zu unverhältnismäßigen Belastungen führen würde. Bei der Prüfung, ob Belastungen unverhältnismäßig sind, sind insbesondere der damit verbundene Aufwand und die wirtschaftliche Leistungsfähigkeit des Arbeitgebers oder der Organisation . . . zu berücksichtigen. Besteht die Möglichkeit, für die entsprechenden Maßnahmen Förderungen aus öffentlichen Mitteln in Anspruch zu nehmen, ist dies bei der Beurteilung der Zumutbarkeit in Betracht zu ziehen."

responsibilities with regard to reasonable accommodation. The draft proposes to insert into the *BEinstG 1969* the following Sec. 7a(5):

“(5) When the elimination of the causes of the disadvantage, especially of barriers in the built environment, proves disproportionate, discrimination is, nevertheless, to be taken to occur where the employer or the organisation failed to provide for reasonable measures substantially improving the situation of persons with disabilities and, thus, realising equal treatment to the greatest possible extent. When assessing the reasonableness of the measures, the availability of grants or allowances administered by a public agency have to be taken into consideration.”

The draft of Sec. 7a(5) of the *BEinstG 1969* might tighten up the employers' duty to remove what could cause an indirect discrimination of disabled people. When enacted, statutory law will prescribe that employers discriminate against disabled people when they do not make an effort to ensure at least approximately equal treatment. It would not be left to the law enforcing agencies to say so when ruling on the reasonableness of certain measures demanded by a disabled employee.

Nevertheless, it is submitted that draft Sec. 7a(4)-(5) of the *BEinstG 1969* does not fully grasp what is envisioned by Article 5 of the Framework Employment Directive. Firstly, the employers' duty under Article 5 of the Directive is a “positive” duty rather than a “negative” one hidden in the notion of indirect discrimination. The concept underlying Article 5 of the Directive implies that, at some point, disabled people may demand their right that employers comply with the duty to provide reasonable accommodation. According to the January 2004 draft, people with disabilities are not supposed to have an effective remedy in that respect. The sanctions proposed by the draft basically comprise payments to the victims of discrimination. People with disabilities may bring in a claim in tort, alleging that their right not to be discriminated against has been violated by an employer. If the complaint is well-founded, law enforcement agencies will be entitled to order the respondent to pay compensation to the complainant. Law enforcement agencies, however, will not be entitled to order the respondent to take the measures he or she failed to provide in the first place. Secondly, the failure of an employer to comply with the duty under Article 5 of the Directive is partially, but not completely absorbed by the notion of indirect discrimination under the Austrian draft. According to the draft, indirect discrimination will certainly take place when an employer refrains from adjusting the premises, from altering the procedures for determining to whom employment should be given, or from modifying working equipment. But the employers' duty under Article 5 of the Directive goes further than this. Under Article 5 of the Directive, an employer might also be obliged to shift some of the disabled employee's duties to another employee, to assign the disabled employee to a different work place, to change working hours, to allow the employee to be absent during working hours for treatment or rehabilitation, or to arrange for training or re-training. It is submitted that failures in these respects do not necessarily constitute indirect discrimination. The failures nevertheless violate the employers' duty under Article 5 of the Directive.

France

The Assemblée nationale wishes to insert the duty to accommodate in the part of the Labour Code which addresses discrimination and has stated that a refusal to accommodate would constitute indirect discrimination. The Labour code defines discrimination in Art. L. 122-45 which specifies that it can be direct or indirect.

The Penal code prohibits discrimination in Art. 225-1 and 225-2 without explicitly using the words direct or indirect.

Luxembourg

In Luxembourg the question of discrimination must be considered within the framework of criminal law. Since 1997 the Penal Code has provided for the offence of disability discrimination with regard to employment. The relevant provisions are:

Chapitre VI du Code pénal- « Du racisme, du révisionnisme et d'autres discriminations. »
(L. 19 juillet 1997)

Art. 454. (L. 19 juillet 1997) Constitue une discrimination toute distinction opérée entre les personnes physiques à raison de leur origine, de leur couleur de peau, de leur sexe, de leur orientation sexuelle, de leur situation de famille, de leur état de santé, de leur handicap, de leurs mœurs, de leurs opinions politiques ou philosophiques, de leurs activités syndicales, de leur appartenance ou de leur non appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée.

Constitue également une discrimination toute distinction opérée entre les personnes morales, les groupes ou communautés de personnes, à raison de l'origine, de la couleur de peau, du sexe, de l'orientation sexuelle, de la situation de famille, de l'état de santé, du handicap, des mœurs, des opinions politiques ou philosophiques, des activités syndicales, de l'appartenance ou de la nonappartenance, vraie ou supposée, à une ethnie, une nation, une race, ou une religion déterminée, des membres ou de certains membres de ces personnes morales, groupes ou communautés.

Art. 455. (L. 19 juillet 1997) Une discrimination visée à l'article 454, commise à l'égard d'une personne physique ou morale, d'un groupe ou d'une communauté de personnes, est punie d'un emprisonnement de huit jours à deux ans et d'une amende de 251 euros à 25.000 euros ou de l'une de ces peines seulement, lorsqu'elle consiste:

- 1) à refuser la fourniture ou la jouissance d'un bien;
- 2) à refuser la fourniture d'un service;
- 3) à subordonner la fourniture d'un bien ou d'un service à une condition fondée sur l'un des éléments visés à l'article 454 ou à faire toute autre discrimination lors de cette fourniture, en se fondant sur l'un des éléments visés à l'article 454;
- 4) à indiquer dans une publicité l'intention de refuser un bien ou un service ou de pratiquer une discrimination lors de la fourniture d'un bien ou d'un service, en se fondant sur l'un des éléments visés à l'article 454;
- 5) à entraver l'exercice normal d'une activité économique quelconque,
- 6) à refuser d'embaucher, à sanctionner ou à licencier une personne;
- 7) à subordonner une offre d'emploi à une condition fondée sur l'un des éléments visés à l'article 454.

Art. 456. (L. 19 juillet 1997) Une discrimination visée à l'article 454, commise à l'égard d'une personne physique ou morale, d'un groupe ou d'une communauté de personnes par une personne dépositaire de l'autorité publique ou chargée d'une mission de service public, dans l'exercice ou à l'occasion de l'exercice de ses fonctions ou de sa mission, est punie d'un emprisonnement d'un mois à trois ans et d'une amende de 251 euros à 37.500 euros ou de l'une de ces peines seulement, lorsqu'elle consiste:

- 1) à refuser le bénéfice d'un droit accordé par la loi;
- 2) à entraver l'exercice normal d'une activité économique quelconque.

Art. 457. (L. 19 juillet 1997) Les dispositions des articles 455 et 456 ne sont pas applicables:

- 1) aux discriminations fondées sur l'état de santé, lorsqu'elles consistent en des opérations ayant pour objet la prévention et la couverture du risque décès, des risques portant atteinte à l'intégrité physique de la personne ou des risques d'incapacité de travail ou d'invalidité;
- 2) aux discriminations fondées sur l'état de santé ou le handicap, lorsqu'elles consistent en un refus d'embauche ou un licenciement fondé sur l'incapacité médicalement constatée de l'intéressé;
- 3) aux discriminations fondées, en matière d'embauche, sur la nationalité, lorsque l'appartenance à une nationalité déterminée constitue, conformément aux dispositions statutaires relatives à la fonction publique, aux réglementations relatives à l'exercice de certaines professions et aux dispositions en matière de droit du travail, la condition déterminante de l'exercice d'un emploi ou d'une activité professionnelle;
- 4) aux discriminations fondées, en matière d'entrée, de séjour et de droit de vote au pays, sur la nationalité, lorsque l'appartenance à une nationalité déterminée constitue, conformément aux

dispositions légales et réglementaires relatives à l'entrée, au séjour et au droit de vote au pays, la condition déterminante de l'entrée, du séjour et de l'exercice du droit de vote au pays;

5) aux différenciations de traitement prévues par ou découlant d'une autre disposition légale.

Art. 457-1. (L. 19 juillet 1997) Est puni d'un emprisonnement de huit jours à deux ans et d'une amende de 251 euros à 25.000 euros ou de l'une de ces peines seulement:

1) quiconque, soit par des discours, cris ou menaces proférés dans des lieux ou réunions publics, soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics, soit par des placards ou des affiches exposés au regard du public, soit par tout moyen de communication audiovisuelle, incite aux actes prévus à l'article 455, à la haine ou à la violence à l'égard d'une personne, physique ou morale, d'un groupe ou d'une communauté en se fondant sur l'un des éléments visés à l'article 454;

2) quiconque appartient à une organisation dont les objectifs ou les activités consistent à commettre l'un des actes prévus au paragraphe 1) du présent article;

3) quiconque imprime ou fait imprimer, fabrique, détient, transporte, importe, exporte, fait fabriquer, importer, exporter ou transporter, met en circulation sur le territoire luxembourgeois, envoie à partir du territoire luxembourgeois, remet à la poste ou à un autre professionnel chargé de la distribution du courrier sur le territoire luxembourgeois, fait transiter par le territoire luxembourgeois, des écrits, imprimés, dessins, gravures, peintures, affiches, photographies, films cinématographiques, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image, de nature à inciter aux actes prévus à l'article 455, à la haine ou à la violence à l'égard d'une personne, physique ou morale, d'un groupe ou d'une communauté, en se fondant sur l'un des éléments visés à l'article 454.

La confiscation des objets énumérés ci-avant sera prononcée dans tous les cas.

Art. 457-2. (L. 19 juillet 1997) Lorsque les infractions définies à l'article 453 ont été commises à raison de l'appartenance ou de la non-appartenance, vraie ou supposée, des personnes décédées à une ethnie, une nation, une race ou une religion déterminées, les peines sont de six mois à trois ans et d'une amende de 251 euros à 37.500 euros ou de l'une de ces peines seulement.

Art. 457-3. (L. 19 juillet 1997) Est puni d'un emprisonnement de huit jours à six mois et d'une amende de 251 euros à 25.000 euros ou de l'une de ces peines seulement celui qui, soit par des discours, cris ou menaces proférés dans des lieux ou réunions publics, soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics, soit par des placards ou des affiches exposés au regard du public, soit par tout moyen de communication audiovisuelle, a contesté, minimisé, justifié ou nié l'existence d'un ou de plusieurs crimes contre l'humanité ou crimes de guerre tels qu'ils sont définis par l'article 6 du statut du tribunal militaire international annexé à l'accord de Londres du 8 août 1945 et qui ont été commis soit par les membres d'une organisation déclarée criminelle en application de l'article 9 dudit statut, soit par une personne reconnue coupable de tels crimes par une juridiction luxembourgeoise, étrangère ou internationale.

Est puni des mêmes peines ou de l'une de ces peines seulement celui qui, par un des moyens énoncés au paragraphe précédent, a contesté, minimisé, justifié ou nié l'existence d'un ou de plusieurs génocides tels qu'ils sont définis par la loi du 8 août 1985 portant répression du génocide et reconnus par une juridiction ou autorité luxembourgeoise ou internationale.

Art. 457-4. (L. 19 juillet 1997) Dans les cas prévus aux articles 455, 456, 457-1, 457-2 et 457-3, les coupables pourront de plus être condamnés à l'interdiction des droits conformément à l'article 24.

Remarque importante:

L. 19 juillet 1997, Article VI

Toute association, d'importance nationale, dotée de la personnalité morale et agréée par le ministre de la Justice peut exercer les droits reconnus à la partie civile en ce qui concerne les faits constituant une infraction au sens des articles 444 (2), 453, 454, 455, 456, 457, 457-1, 457-2, 457-3 et 457-4 du code

pénal et portant un préjudice direct ou indirect aux intérêts collectifs qu'elles ont pour objet de défendre, même si elles ne justifient pas d'un intérêt matériel ou moral et même si l'intérêt collectif dans lequel elles agissent se couvre entièrement avec l'intérêt social dont la défense est assurée par le ministère public.

Toutefois quand l'infraction aura été commise envers des personnes considérées individuellement, l'association ne pourra exercer par voie principale les droits reconnus à la partie civile qu'à la condition que ces personnes déclarent expressément et par écrit ne pas s'y opposer.

Nicole Delpérée concludes that, following the adoption of the new bill, the unjustified refusal to make an accommodation can amount to direct discrimination if the failure to make the accommodation results in the disabled individual being unable to exercise normal economic activities. The obligation to make an accommodation only exists if a number of criteria are met:

- an accommodation must be possible and the requirement must be reasonable. This will be determined taking into account the fact that there is low public awareness of the (criminal) law obligation in this area. This suggests that in many instances criminal sanctions will not be applied.
- the employer must have intentionally failed to accommodate or been gravely negligent in this respect. In order to establish this one must show that the accommodation could easily have been made and was affordable, and was wrongly refused.
- The disabled individual must have a disability of at least 30%; the occupational doctor must have advised the employer that an accommodation was needed; and the cost of the accommodation must have been within the maximum set by law.

3. Recommendations to Policy Makers and the Judiciary

An unjustified failure to make a reasonable accommodation should be clearly classified as a form of discrimination, and be subject to the same sanctions provided for other forms of discriminatory acts. The question then arises whether such a failure should be classified as a form of direct or indirect discrimination or as a *sui generis* form of discrimination. Examples of all three approaches can be found in the legislation of the EU Member States. Classifying a failure to make an accommodation as a form of indirect discrimination seems to be the weakest approach. Moreover, such a classification would not fit easily with the current understanding of indirect discrimination found in EC law.

The most appropriate responses seem to be either a classification of an unjustified to make an accommodation as a form of direct discrimination or as a *sui generis* form of discrimination. The labelling of such actions as direct discrimination would emphasize the unacceptable nature of such discrimination and associate such acts with the most serious form of discrimination and related sanctions. However, it would imply the recognition of a new justification for direct discrimination not currently provided for in EU law – namely the existence of a disproportionate burden. This may bring risks with it, not least the possible opening of the door to financial arguments to justify other forms of direct discrimination. The alternative approach involves the recognition of reasonable accommodation as a third, *sui generis* form of discrimination. This has the advantage that it would allow for the peculiarities associated with this form of discrimination. Reasonable accommodation is arguably distinct from direct and indirect discrimination given that a disadvantage is not necessarily experienced by all or most members of a particular group, but at the individual level. However, the *sui generis* approach risks establishing a separate and special category of “disability” discrimination that, at least while the reasonable accommodation obligation under the Directive only covers disabled people. Ultimately the decision as to which method to adopt remains with Member States, and national factors, including the existing framework of non-discrimination law, may influence this decision.

X. Conclusion

Article 5 of the Framework Employment Directive, containing the obligation to make a reasonable accommodation, is proving to be one of the more challenging and complicated provisions for Member

States to transpose. Whilst this paper does not claim to present a comprehensive picture of implementation measures, even within the EU-15, it does reveal that Member States are adopting different approaches in response to the requirements set out in Article 5. As legislation and case law on this matter becomes more developed throughout the European Union it is to be hoped that a transfer of knowledge and awareness will promote best practice, and ensure an effective guarantee of the rights of disabled people, whilst respecting the rights of employers. A move towards common European standards and a legal approach may occur. Lessons can undoubtedly also be learnt from the experiences of non-European jurisdictions; however, as always, one should be cautious about simply transferring legislative approaches and rules between different legal systems.

Clearly the European Court of Justice, when called upon to interpret Article 5 of the Directive, will benefit from such a (cross EU) comparison; however, national legislators, judges and legal practitioners could equally gain insight through examining the experience of their European neighbours. It is hoped that this paper, and the work of the work of the European Expert Group on Disability Discrimination, will have made a first contribution to such a cross European approach. Our goal has to been to present current practices and developments, and to attempt to identify key tools and approaches which could promote the effectiveness of the reasonable accommodation obligation. In spite of the fact that the date for the implementation of the Directive passed some time ago, this advise nevertheless seems relevant – not all Member States have transposed Article 5 and, more importantly, courts, employers and legal practitioners will gradually be called upon to interpret and apply the new obligation. As case law and guidance emerges, further research will be required, to continue to inform the debate.