EU Network of Independent Experts on Disability Discrimination.

Baseline Study

Disability Discrimination Law in the EU Member States

November, 2004.

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Introduction.

Disability has been widely referred to as the latest civil rights movement. For a long time disability law and policy were distorted by gross stereotypes concerning people with disabilities. The legacy has been a level of paternalism and segregation that would scarcely be tolerated on other grounds. The net economic loss to society, the taxpayer and the individual involved has been needlessly huge. The net loss to the quality of our democratic life through the absence of persons with disabilities in public life has also been incalculable. More importantly, the personal impact in terms of lack of self-fulfilment is an affront to our collective European conscience, to our moral sense of right and wrong.

A worldwide law reform movement is now well and truly underway in the disability field – one that tackles the legacy of the past and helps create a more equal society and economy. It is animated by basic human values such as dignity, autonomy, equality and social solidarity and by human rights law. The drafting of a UN convention on the rights of persons with disabilities is but the latest expression of this trend[1].

The European Union is part of that worldwide trend away from paternalism and towards basic rights for all in the disability context. The groundwork for this shift was laid in the early 1990s at European level. As far back as 1994 the European Commission Green Paper on European Social Policy famously asserted that "social segregation *even with adequate income maintenance and special provision* is contrary to human dignity" in the context of disability (italics added)[2]. In other words, money alone is not a sufficient answer unless linked to a rights-based reform agenda. In a landmark Communication of 1996 the European Commission set out a clear vision of the equal opportunities model in the disability field and the need to move toward it in European policy[3]. This shift in thinking was obvious even from the title of that Communication: *Equality of Opportunities for People with Disabilities - A New Community Disability Strategy.*

It did not take long for this paradigm shift at the level of ideas to be reflected in law. The competencies added to the Treaties by Article 13 of the Treaty of Amsterdam of 1997 transformed the capacity of Europe to tackle discrimination on a number of new grounds including disability. European level NGOs had played an active part in making the case for these new competencies. Indeed a famous Report of the European Day of People with Disabilities issued in 1995 detailed the case for treaty changes in the disability context[4]. The succeeding European Day Report set out what a Directive should like in

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1 The drafting process for this convention commenced in 2002 and is ongoing. For the background on the draft United Nations convention see http://www.un.org/esa/socdev/enable/rights/adhoccom.htm. See also the Communication of the European Commission indicating its support for the process: *Towards a United Nations Legally Binding Instrument to promote and protect the rights and dignity of persons with disabilities*, COM (2003) 16, final, 24.1.2003.

2 *Green Paper on European Social Policy – Options for the Union*, COM (93) 551 (1993) at 48.

3 *Communication of the Commission on Equality of Opportunity for People with Disabilities – a New European Community Disability Strategy*, COM (96) 406 FINAL.

4 *Invisible Citizens: Disabled Persons' Status in the European Treaties*, Report of the European

the disability context[5]. On foot of Article 13, A Directive combating racial discrimination was adopted by Council in June 2000[6]. On the basis of a proposal from the European Commission Council unanimously adopted the Framework Employment Directive on Employment in November 2000[7]. It is this latter Directive that now explicitly covers disability in its relevant non-discrimination provisions. There is now a considerable body of literature on the two new anti-discrimination Directives adopted under Article 13[8].

The values of the Framework Employment Directive are further reflected and reinforced by the Charter of Fundamental Rights for the European Union adopted in 2000 which expressly mentions disability in two substantive Articles. Article 21(1) of the Charter deals with the general prohibition against discrimination on several grounds and explicitly includes disability (as well as 'genetic features'). This was perhaps unthinkable a short ten years ago. Article 26 of the Charter deals with the more disability-specific right to integration. Community level action for the benefit of persons with disabilities has continued unabated. In its recently adopted European Action Plan the European Commission rightly gives pride of place to the enactment of the Framework Employment Directive[9].

As a result of the adoption of the Framework Employment Directive the European Union is now an acknowledged world leader in developing appropriate anti-discrimination law on the ground of disability in the employment context. Symbolically – and for the first time in EU law – the Directive situates places disability where it should be; namely, within a high profile civil rights instrument and alongside other prohibited grounds of discrimination. In keeping with trends within international and comparative disability discrimination law it innovates in the disability context by going beyond the familiar proscription against direct and indirect discrimination and requiring the provision of 'reasonable accommodation' to ensure a genuinely equal opportunity for persons with disabilities to apply their true native talents.

The time is right to take stock of the implementation of the Framework Employment Directive on the disability ground in the employment context which is the main purpose of this Baseline Study. It is based on the work done within the European Commission Network of Disability Discrimination Law experts from 2002 to 2004. It is a summary of that research. It reflects first of all on the new values that are quickly becoming established in the disability field throughout the world (Part I). They can be summed up in the re-focusing of disability law and policy from presumptions of incapacity toward an

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Day of Disabled Persons, Brussels, 1995.

5 *Mainstreaming of Equal Opportunities: The Campaign for Article 13 Continues*, Report of the European Day of Disabled Persons, Brussels, 1997.

6 Council Directive 2000/43/EC, *implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, OJ L 180/22.

7 Council Directive 2000/78/2000, OJ L 303/16, 2.12.2000.

8 For a useful summary of this literature see *Critical Review of Academic Literature Relating to the EU Directives to Combat Discrimination*, European Commission, Brussels, 2004.

9 *Equal Opportunities for People with Disabilities: A European Action Plan*, COM (2003) 650 final, 30.10.2003.

expectation of ability and on the means necessary for enabling that ability to be freely expressed.

Part II reflects on the expression of these new values in EU law in the shape of the Framework Employment Directive. It is important to have a clear legal understanding of what the Directive requires – an understanding that is helped by an appreciation of the values it seeks to advance in a disability context. The key components of the Framework Employment Directive will be briefly parsed and analysed for their normative requirements.

Part III contains an analysis of law reform in the pre-enlargement fifteen Member States up to April 2004. It looks at how the Framework Employment Directive is driving the law reform agenda forward. It is divided into two sections. Section I assesses how or whether the relevant domestic constitutional provisions on equality reach the issue of disability. This is important for it gives an insight into the tenuous hold that the civil rights perspective on disability has had in traditional constitutional law. Section II (the bulk) then assesses how the relevant domestic anti-discrimination laws are being adjusted to take account of the provisions of the Framework Employment Directive in the disability context. It does so country by country.

The main object of the analysis contained in Section II of Part III is to evaluate whether and how those norms of the Framework Employment Directive that speak directly to the situation of persons with disabilities are secured under the relevant domestic anti-discrimination laws. It does not look to all the requirements of the Directive but focuses in the main on those elements that add the greatest value on the disability ground in the employment context. Three axes of assessment are used.

> The first relates to the coverage of disability under the relevant anti-discrimination laws (whether targeting direct or indirect discrimination). It also includes a preliminary assessment of how States deal with medical testing which has proven to be a key challenge under comparative law. And it provides information on whether associates of persons with disabilities are brought within the protective coverage of domestic anti-discrimination law.
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> The second axes relates to the key obligation to provide 'reasonable accommodation'. It assesses how this concept is dealt with under domestic anti-discrimination law. This is crucial given the pivotal role played by the notion of 'reasonable accommodation' in the disability context.
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> The third axes relates to the definition of disability under domestic laws. It is true that Framework Employment Directive does not prescribe any particular definition of disability and that States have a wide margin of appreciation in this regard. Yet it is also true that this discretion cannot be unlimited since the emergence of a patchwork quilt of definitions through Europe would undermine the purpose of the Directive which is to effectively tackle discrimination on the ground of disability.

While the analysis provided in Part III is naturally concerned with the inter-relationship between non-discrimination (and 'reasonable accommodation' as a component of the prohibition of non-discrimination) and the more traditional policy response of positive action measures, we do not focus on these measures in any great detail. Suffice it to say that these measures are wide and varied and well documented[10]. A key conceptual point does however emerge in this regard and with respect to the interpretation of the Framework Directive. It is whether all positive action measures are intrinsically compatible with the non-discrimination principle?

Part IV concludes the analysis by setting out the main challenges ahead in implementing the Framework Employment Directive in a manner consistent with its underlying goals and spirit.

[10] A useful summary of such measures in some Council of Europe Member States is contained in the 6th Edition of **Rehabilitation and Integration of People with Disabilities: Policy and Legislation** (Council of Europe, Strasbourg, 2002).

Part 1.

Focus on Ability

New Values in the Disability Field.

Why is the anti-discrimination idea of relevance and use in the disability context? What value does it add to the traditional policy response of social provision? Put simply, the non-discrimination project in the context of disability is primarily concerned with restoring visibility to the person. The purpose of this Part is to state simply the main ideas and values driving the shift to the non-discrimination model in the field of disability.

It is important to draw out a clear contrast between the tradition of paternalism towards persons with disabilities and the strikingly different approach to disability as reflected in the non-discrimination model. This helps not merely to better appreciate the direction and values of non-discrimination law (including the Framework Employment Directive). It also helps to gain a new appreciation of the potentially complementary role of social policy in helping to make freedom and personal choice a reality. In short, the advent of the non-discrimination model is something that should ideally underpin and refresh the European social model.

For the purposes of this Baseline Study one may leave to one side the academic debate about the 'social construct' of difference. There is much to the view that persons are often 'marked apart' or labelled by their supposed group affiliations in order to be 'kept apart'. That is to say, human difference (including the difference of disability) is imagined or created in order to set the terms of entry and participation into the lifeworld (e.g., the world of work and social interaction, etc.) which have the unintended (and sometimes intended) effect of excluding those who are deemed different. However, our primary focus is not so much on the origin of the difference in question but on how those who are different – or who are labelled as different - are in fact treated.

Individuals who belong to – or are assumed to identify with – a particular group or clustering of persons may be treated negatively in part because of the historically low status of that group in society. This can result from (or give rise) to feelings of superiority on the part of one group as against another. In this context one of the main function of anti-discrimination law is to valorise the group and group identity. The paradigm case is race. The general understanding is that this is not the case with disability. And yet increasingly, persons with disabilities, like racial minorities, are beginning to express group pride in their affiliation and are seeking to have this pride valorised by the law. For example, some disability NGOs argued that there should be a right to be disabled inscribed into the draft UN Convention on the Rights of Persons with Disabilities.

Discrimination may be motivated less by feelings of moral superiority of one group over another and more by the use of proxies or stereotypes concerning the assumed

characteristics of group members. These proxies are usually highly inaccurate and diminish the individuality of the individual. Disability is a classic case in point. Here the reduction of personal 'use value' is even implicit in the very word 'dis-ability'. Disability is commonly – and mistakingly - taken as a proxy for inability to perform the routine tasks of life. So the resulting exclusion (which is extremely pronounced in the employment sphere) appears even more 'natural'. Any countervailing ethic of integration is put automatically on the defensive as cost-ineffective since it is simply presumed that persons with disabilities are less productive.

It is sometimes said that the doctrine of 'separate but equal' - long and rightly rejected in the area of race – still finds an echo in the field of disability. From this perspective, not only is the exclusion 'natural' but its recipients are sometimes expected to be thankful for State support and largesse. Arguably at play here is the conflation of biological fact (impairment) with social role. The end result can be a crude and pernicious form of social determinism that arbitrarily telescopes the life chances of persons with disabilities. Such social determinism suggests that persons with disabilities have no place in the mainstream and no productive role to play in the labour market. Indeed, according as the labour market does not adjust to allow such persons express their abilities then, through time, this proxy becomes a self-fulfilling prophesy – a vicious circle of exclusion.

An important point of principle needs to be stressed in this context. Even where the relevant proxies may have some basis in fact (e.g., some categories of persons with disabilities have a lower productivity rate) it is still impermissible to use them to cloud rational judgments about individual ability since it is always possible that individuals will not conform to the stereotype. It is fundamentally unfair not to afford everyone an equal chance of proving themselves.

The main problem in the field of disability is not so much that the proxies are accurate but should not be used. Rather, it is that the proxies are highly inaccurate. So one of the main tasks of non-discrimination law in the context of disability is to separate fact from fiction – to place a spotlight on the person behind the disability and, in the employment context, to get employers to focus much more rationally on what the individual has to offer as distinct from what the proxies suggest he has to offer. To a large extent the non-discrimination principle (both direct and indirect) helps to reverse the presumptions of inability accreted through the centuries about persons with disabilities.

Furthermore, and crucially, to respect difference will entail accommodating that difference. This much is plain from the rulings of the European Court of Human Rights (see Part III, Section I). Hence the significance of the concept of 'reasonable accommodation' as a way of moving beyond respecting difference to accommodating it. The obligation of 'reasonable accommodation' is distinct from 'positive action measures' and is intimately tied to non-discrimination. Positive action measures are general and not individualised. The notion of 'reasonable accommodation' is individualised and involves the person with a disability in an interactive dialogue with the employer to discover the right kind of accommodation needed in the overall circumstances of the case. Positive action measures do not generally create subjective rights. That is to say, persons with

disabilities are not generally given any legal standing to challenge how (or whether) these positive action measures are implemented. To the contrary, and precisely because of the intimate link with non-discrimination, the concept of 'reasonable accommodation' creates clear legal standing in the person to challenge the manner by which they are being accommodated. Since one of the drawbacks of positive action measures has been this lack of direct accountability there does not tend to be a close correlation between the measure provided and individual needs. This is redressed by the notion of 'reasonable accommodation'. All of which is not to say that positive action measures are not required. They obviously are. But the notion of 'reasonable accommodation' ensures a more direct link between the accommodation to be provided and the circumstances of the person and it also affords the person the opportunity to challenge accommodations and truly adjust them to his or her realities.

The text of the Framework Employment Directive is alive to the need for positive action measures. Naturally such positive action measures are needed in the disability context. A chief distinguishing feature of the European social model has been its commitment to provide the material underpinning to freedom through social support. The inter-linkage drawn between positive action measures and non-discrimination in the Framework Employment Directive may well provide an opportunity to reflect on how social support might be better directed to achieve the main goal of both non-discrimination and social provision – namely to honour persons and create the conditions for their personal fulfilment and success. Useful pointers are to be found in the recent Conclusions and caselaw of the European Committee of Social Rights of the Council of Europe. This caselaw shows how the non-discrimination ideal can refresh social rights[11].

Part 2
Accommodating Ability through Law
The Legal Expression of New Values in the Framework Employment Directive.

The purpose of this Part is to review and clarify how the various provisions of the Framework Employment Directive advance the anti-discrimination idea in the context of employment and disability[12]. As mentioned earlier, the emphasis is on those parts of the Framework Employment Directive that are specific to disability.

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[11] See Collective Complaint 13, *Autisme Europe v France*, Decision of the European Committee Social Rights, Strasbourg, 2003.

[12] For a review of the situation leading up to the inclusion of Article 13 into the TEU see Gerard Quinn, *The Human Rights of People with Disabilities under EU Law*, in Alston (Ed.), **The EU and Human Rights,** (OUP, 1999) 281. For an overview of the Framework Employment Directive in the Disability context see Richard Whittle, *The Framework Employment Directive for Equal Treatment in Employment and Occupation: an Analysis from A Disability Rights Perspective*, 27 E.L.Rev. (2002) 303.

1. Values of the Directive – Equality as a Democratic Imperative and a Productive Factor.

Of some significance in setting the context for the Directive are recitals 1 and 6 that refer, essentially, to the fact that the Union is primarily a community of shared values with a commitment to the achievement of human rights for all. This backdrop is important since it situates the equal treatment ideal of the Directive squarely in a human rights context.

Recital 8 refers to the Employment Guidelines agreed for 2000 which stress the need to foster a labour market favourable to social integration "by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability". From this may be inferred a broad goal of social integration to be advanced through non-discrimination law and policy. Discrimination based, *inter alia*, on disability, is stated by Recital 11 as undermining the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment. Because of this, Recital 12 states that any direct or indirect discrimination based, *inter alia*, on disability, in the employment field covered by the Directive should be prohibited throughout the Community. Recital 16 states that the provision of measures to accommodate the needs of disabled people in the workplace plays an important role in combating discrimination on the grounds of disability.

In sum, the achievement of equal treatment on all grounds including disability is both a productive factor in the marketplace as well as a civilising factor in democratic society. These two rationales should be seen as mutually supportive.

2. Definition of Disability – Focus on the Phenomenon of Discrimination.

It is noteworthy that there is no definition of disability under the Framework Employment Directive. Naturally this affords Member States considerable latitude in how, or whether, they define disability for the purposes of transposing the Framework Employment Directive. Is his discretion unlimited?

In this regard, it is important to note that Article 1 states that the general purpose of the Directive is to lay down a general framework for combating discrimination on the "grounds of"…disability with a view to putting into effect…the principle of equal treatment. So what is prohibited is discrimination on the ground of disability. This would appear to place the focus of attention on the phenomenon of discrimination as such. To limit the benefits of anti-discrimination law to certain kinds of disability or to disabilities reaching a certain degree would not appear to be consistent with this goal.

It is certainly arguable that people may be discriminated against 'on the ground of disability' who may not themselves have a disability but who are nevertheless treated negatively because of the assumption that they have a disability. An example is someone with a facial disfigurement who is not thereby disabled but who might be treated negatively by others *as if* he were disabled.

Furthermore, those who may be susceptible to disability (revealed for example, through genetic testing) may also be treated negatively 'on the ground of disability' even though they do not themselves currently have a disability. Again, if a consistent focus is maintained on the phenomenon of discrimination on the ground of disability then it makes sense to bring this category within the coverage of the relevant anti-discrimination law.

And there are others who may not have a disability but who work with or associate with those who have a disability (e.g., work in a hospice for those with AIDS) who are likely to be treated negatively 'on the ground of disability'. Likewise, if a consistent focus is maintained on the phenomenon of discrimination 'on the ground of disability' then it also makes sense to bring this category within the coverage of the relevant anti-discrimination law.

In sum, and at a minimum, the national definition chosen (if any) should not unduly detract from the main objective which is to target discriminatory behaviour 'on the ground of disability'.

3. The Prohibition on Direct and Indirect Discrimination on the Ground of Disability (Article 2).

The drafting history of Article 2 is quite important to a proper appreciation of the non-discrimination principle in the disability context and especially with respect to the interaction with Article 5 which particularises the obligation of 'reasonable accommodation'.

In explaining its original proposal for a Directive and with respect to the disability ground the Commission stated:

> Various official estimates suggest that people with disabilities are at least two to three times more likely to be unemployed and to remain unemployed for longer periods than the rest of the working population. A contributory factor to this situation is the prevalence of discrimination based on disability. *Such discrimination* would include inter alia the existence of inadequately adapted workplaces, workstations and work organisation design[13].
>
> [italics added].

The language used above is important for it shows that the Commission clearly saw that inadequately adapted workplaces, etc., was a form of discrimination in the employment context. It is worth emphasizing that the original text of Article 2 (general prohibition on non-discrimination) proposed by the Commission contained four sub-paragraphs[14] - the fourth of which contained the original reference to 'reasonable accommodation' as a way of tackling such inadequately adapted workplaces. As originally proposed, Article 2(4) read:

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13 COM (1999) 656 final, at 3.

14 *Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation,* COM (1999) 565 final.

> In order to guarantee compliance with the principle of equal treatment for persons with disabilities, reasonable accommodation shall be provided, where needed, to enable such persons to have access to, participate in, or advance in employment, unless this requirement creates an undue hardship.

In the ensuing negotiations within Council no delegation objected to the linkage drawn in the above formulation between non-discrimination and 'reasonable accommodation'. However, a decision was taken in principle to move sub-paragraph 4 to a new Article (now Article 5). This was done because it was felt out of place to overburden the general or headline prohibition against discrimination with overly detailed or prescriptive rules dealing with only one ground among the many. It was felt that if any detailed prescriptive rules on particular grounds were needed they should be provided for elsewhere in the text. Article 6 on the age ground creates now elaborates certain justifications for discrimination on that ground. And Article 5 now particularises the obligation of 'reasonable accommodation'. However, and in order to maintain the organic link with the general prohibition against non-discrimination contained in Article 2, the opening line of the original sub-paragraph 4 (above) proposed by the Commission was retained in the opening words to the new Article 5; vis,

> In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided…

Suffice it to say that the original Article 2 contained an explicit reference to the obligation of 'reasonable accommodation' and its displacement for technical drafting reasons from Article 2 to the new Article 5 should not be seen as breaking the link between the general prohibition against non-discrimination of Article 2 and the obligation to provide 'reasonable accommodation.'

The principle of equal treatment is stated in Article 2(1) to mean that there shall be no direct or indirect discrimination on the ground, *inter alia*, of disability.

Direct discrimination is defined under Article 2(2)(a) to occur where "one person is treated less favourably than another is, as been or would be" on the ground, *inter alia*, of disability "in a comparable situation". This encompasses straightforward cases of direct and intentional discrimination against persons with disabilities motivated primarily by prejudice. It is noteworthy that no defence whatsoever is allowable for direct discrimination. If 'reasonable accommodation' can place the individual in a 'comparable situation' then the individual is, by definition, in a comparable situation for the purposes of the Framework Employment Directive.

The notion of direct discrimination under Article 2(2)(a) may reach the issue of 'reasonable accommodation' in an indirect manner. For example, direct or intentional discrimination might arise because the would-be discriminator may fear having to provide 'reasonable accommodation'. In other words, the prospect of having to provide 'reasonable accommodation' may motivate an employer to discriminate directly on the ground of disability.

The added value of indirect discrimination is that it is capable of reaching systemic issues of discrimination not normally covered by the prohibition against direct discrimination. It is defined in Article (2)(2)(b):

> where an apparently neutral provision, criterion or practice would put persons…[with a disability]…at a particular disadvantage compared with other persons.

This prohibition is of inestimable value in the disability context. This is so because much discrimination on the ground of disability arises though through thoughtlessness or the unquestioning acceptance of long established practices. And it is this form of discrimination that impacts most in the context of disability and that has left a legacy of practices that effectively exclude. In other words, indirect discrimination will not generally be motivated by malice or forethought. But it is devastating in its effects and the reach of the indirect discrimination provisions of the Framework Employment Directive to disability are crucial.

Indirect discrimination may on occasion be motivated by prejudice. That is to say, in order to deliberately screen persons with disabilities out of the workplace employers might adjust the qualification standards to have that effect. It is fairly clear that this concept of 'indirect discrimination' in the Framework Employment Directive reaches both disparate impact (unmotivated indirect impact) as well as intentional discrimination through the guise of apparently neutral provisions. That is, it would not appear to be necessary to prove a discriminatory intent. This can also be inferred from existing European case law dealing with indirect discrimination on the ground of sex[15].

Unlike the situation pertaining to direct discrimination, two defences are allowed to a charge of indirect discrimination under the Framework Employment Directive.

The first defence is of general application to all the grounds (including disability) and it allows for an objective justification with a legitimate aim and pursued by necessary and appropriate means: Article 2(2)(b)(i).

The second defence deals more specifically with the concept of indirect discrimination as applied to disability. At the time of the drafting of the Framework Employment Directive the most advanced legislation in Europe on this ground was the British *Disability Discrimination Act* (DDA) of 1995. At that time the DDA did not contain any express prohibition on 'indirect discrimination'. The DDA did, however, provide for an obligation of 'reasonable accommodation' (called 'reasonable adjustments') and deemed a failure to provide such accommodations as discrimination. During negotiations on the Directive within Council it was apparently felt that the provision of 'reasonable accommodation' was a sufficient to answer to a charge of 'indirect discrimination' since many if not all of the obstacles that arise through indirect discrimination can be removed by invoking such an obligation. For this reason a specific reference was retained to 'reasonable accommodation under Article 2(2)(b)(ii) notwithstanding the removal of the

[15] See, e.g., Case 170/84 *Bilka-Kaufhaus GmbH v Weber vonHarzt* [1986] ECR 1607.

substance of the obligation to Article 5. The end result is that the disability-specific defence to 'indirect discrimination under Article 2(2)(b)(ii) now reads:

> As regards a person with a particular disability, the employer or any other person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

A few points may be noted with respect to Article 2(2)(b)(ii). First of all, it assumes that national legislation actually provides for the obligation to engage in 'reasonable accommodation' and that such legislation accords with the requirements of the Framework Employment Directive. Secondly, it assumes that such legislation has actually been complied with. Thirdly, it implicitly assumes that 'indirect discrimination' will arise unless effectively responded to with 'reasonable accommodation'. Fourthly, it assumes that the only available response or cure to 'indirect discrimination' where it is proven to occur on the ground of disability is the provision of 'reasonable accommodation'. Certainly the provision of 'reasonable accommodation' will answer a charge of indirect discrimination in many instances. This leaves open the theoretical possibility of indirect discrimination arising on the ground of disability for which the provision of 'reasonable accommodation' is no answer or solution. In such cases the general defence to indirect discrimination (objective justification with a legitimate aim pursued proportionately) would need to be relied upon to defend an allegation of discrimination on the ground of disability.

When 'reasonable accommodation' is an answer to indirect discrimination and where it is not possible due to the defence of 'disproportionate burden' provided for by Article 5 then presumably the charge of indirect discrimination has been fully answered. So the notion of 'reasonable accommodation' can operate as the 'cure' to indirect discrimination and also as a defence against a charge of indirect discrimination when it is shown not to be possible to achieve in practice.

4. From Formal Rights to Effective Rights: The Key Obligation of 'Reasonable Accommodation' (Articles 5 and 2).

As previously mentioned, the substance of sub-paragraph 4 of Article 2 contained in the original Commission proposal which dealt with 'reasonable accommodation' was removed to the new Article 5 even though Article 2(2)(b)(ii) retains a reference to the notion as a specific justification for indirect discrimination on the ground of disability.

Article 5 is in many respects the lynchpin of the Framework Employment Directive on the ground of disability[16]. It reads as follows:

> 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

[16] See generally, Lisa Waddington and Aart Hendricks, *'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination'*, 18 International Journal of Comparative Labour Law and Industrial Relations, (2002) 403.

> 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.

The conceptual linkage between non-discrimination and 'reasonable accommodation' was explained by the Commission in its original proposal. The Commission explained:

> The principle of equal treatment under Article 2 as applied in the context of disability entails an identification and removal of barriers in the way of people with disabilities who, with reasonable accommodation, are able to perform the essential functions of a job. *The concept has become central in the construction of modern legislation combating disability-based discrimination* [citing the British DDA which specifically deems a failure to provide 'reasonable accommodation' or its equivalent as discrimination] and is also recognised at an international level[17].
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> [italics added].

The Commission continued:

> Essentially the concept stems from a realization that the achievement of equal treatment can only become a reality where some reasonable allowance is made for disability in order to enable the abilities of the individual concerned to be put to work. It does not create an obligation with respect to individuals who, even with reasonable accommodation, cannot perform the essential functions of any given job[18].

Under Article 5, 'reasonable accommodation' in the form of "appropriate measures" shall be taken "where needed in a particular case". This rightly assumes that such accommodation will not be required in all cases. Of importance is Recital 17 which asserts that the Directive only covers those who can perform the 'essential functions' of a job whether with or without 'reasonable accommodation'.

The reference to 'essential functions' in Recital 17 is important at a number of levels. First of all, it serves to underscore the point that the quest for a particular 'reasonable accommodation' should be an interactive one between the employer and individual. The employer will need to carefully identify the truly 'essential functions' of a given job and to distinguish them from marginal functions. Obviously, if an employer over-conflates the 'essential functions' of a job in order to deliberately screen a person with a disability out or (if such over-conflation has that result) then the employer is guilty of at least indirect discrimination. Adjudicatory bodies including courts must obviously retain jurisdiction to review how the 'essential functions' of any particular job are defined and should not automatically defer to the employer's own judgments. Otherwise the prohibition on discrimination will have little effect. Secondly, the reference to 'essential functions' is also relevant to the kind of 'reasonable accommodation' that an employer might be required to engage in. For example, if the marginal or non-essential functions of a job could be transferred to another employer in order to enable an employee with a

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17 COM (1999) 565 final at 8, 9.

18 Id at 9.

disability to perform the 'essential functions' of the job then such 'reasonable accommodation' might be required.

Article 5 does not itself provide an exhaustive or even an indicative list of 'appropriate measures' of accommodation. But the object of such accommodation is stated to be to "enable a person to have access to, participate in, or advance in employment or to undergo training." Recital 20 does, however, refer to some illustrative examples including:

> adapting premises, and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

Given the potential range of accommodations (e.g., reassignment of non-essential or marginal functions to other employees) and the amount of variables at play, it follows that the process of identifying any particular 'reasonable accommodation' must, *perforce*, be interactive and individualised to the needs of the person in question.

A defence of 'disproportionate burden' is provided for by Article 5. Any assessment of when an otherwise 'reasonable accommodation' reaches the threshold of 'disproportionate burden' involves a complex balancing of the circumstances of the employer with the rights and interests of the employee or prospective employee. Recital 21 asserts that within this calculus account should be taken of:

> financial and other costs involved, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

This defence is a key element to Article 5. A wide variety of factors will no doubt be relevant in the determination of whether the threshold of a 'disproportionate burden' has been exceeded. Among other things, it brings the intersection between general social provision and non-discrimination law into sharp focus in the disability context. Many employers are in fact directly or indirectly assisted in several Member States to employ persons with disabilities. This assistance takes many forms including capital grants, technical advice and assistance, tax credits and other tax breaks. If such aid is taken into account then there will be a reduced opportunity to plead 'disproportionate burden' in many instances. However, if this State assistance were not to be factored into the equation then there would have been many more opportunities for employers to avail of the defence. The drafters of the Directive were keenly aware of the problem and Article 5 now specifically provides that the burden shall not be considered disproportionate when it:

> is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

So the availability of State aid and assistance to employers is relevant to the identification of the thresholds. Indeed, the fact that the State itself may be the employer is highly relevant on the assumption that it can bear a higher threshold. Other relevant factors will include the financial capacity of the enterprise (which brings the link between parent and subsidiary companies into focus) and its overall capacity to concede the accommodation

required. All of which must be balanced against the overall objective of the Framework Employment Directive which is to lay down a 'level playing field' for all in the employment context (Recital 37).

It is not an exaggeration to say that the way in which the obligation of 'reasonable accommodation' is handled will probably determine whether national legislation will be effective in combating discrimination on the ground of disability.

It is worthy of note that the European Social Charter – which is a legally binding treaty covering economic, social and cultural rights adopted under the aegis of the Council of Europe- is now interpreted to require anti-discrimination law on the ground of disability in the employment and that such law should expressly require an obligation of 'reasonable accommodation[19].' As well as monitoring periodic State reports, the relevant treaty monitoring body set up under that treaty –the European Committee of Social Rights – also has the capacity under certain conditions to entertain and adjudicate upon collective complaints. One such collective complaint dealing with the interaction of the relevant non-discrimination principle (Article E of the Revised European Social Charter) with other substantive social rights in a disability context has already been decided[20]. These parallel developments in the Council of Europe - which rest squarely on a human rights perspective on disability - may have some bearing on how the relevant issues should be approached by the European Court of Justice.

5. The Space provided for 'Positive Action' (Article 7).

Positive action measures have traditionally proliferated in the field of disability. Article 7 of the Framework Employment Directive is drafted with care in order to carve out a protected space for such measures on all grounds including disability. It is to the effect that the Framework Employment Directive shall not prevent Member States from "maintaining or adopting specific measures to prevent or compensate for disadvantages" linked to the grounds of prohibited discrimination (including disability). Nor, of course, can the Directive be used to require such positive action measures where they do not already exist.

An important point of principle arises. Does Article 7 (1) immunise all forms of positive action from scrutiny under the prohibition against discrimination under the Framework Employment Directive? After all, Article 7 (1) is geared to ensure "full equality of treatment in practice". It might plausibly be argued that a positive action measure that makes it less likely that the public (and employers) will be sensitised to the need for a rational appraisal of the abilities of persons with disabilities is open to question. Since quotas were widely used throughout Europe at the time of the negotiations leading up to the adoption of the Framework Employment Directive it is unlikely that Article 7(1)

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[19] See European Committee of Social Rights Conclusions XVI-2, Vol 1 & 2 (covering Article 15 of the Charter).

[20] Collective Complaint no. 13, *Autisme Europe v France*, Decision of the European Committee of Social Rights, 2003. Available at: http://www.coe.int/T/E/Human_Rights/Esc/

(whether taken alone or when read in conjunction with Article 2) was meant to subvert them. This issue would not therefore appear to arise with respect to quota systems. Rather, it would appear to arise in the context of legislative measures or practices that reserve certain categories of low status jobs for certain categories of workers with disabilities (e.g., to persons with certain impairments of a certain degree). It is too early to say how the European Court of Justice might react to this issue if squarely put.

Article 7(2) is even more specific with respect to positive action measures in the context of disability. In this specific context it goes on to carve out an exception for the protection of health and safety at work. It reads:

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

The drafting history of this provision reveals that its intention was positive and not negative. Clearly the Commission saw health and safety measures as an added way of creating space in the workplace for persons with disabilities. It is noteworthy that in its original proposal the Commission justified the notion of 'reasonable accommodation' in part on the basis that:

> …it would supplement and reinforce the employer's obligation to adapt the workplace to disabled workers, as provided by Framework Employment Directive 89/391/EEC[21] [Health & Safety Directive].

The Commission's original proposal did not contain an equivalent to Article 7(2). Apparently it was added during negotiations in Council and in a positive spirit. It is noteworthy that it was put into the Article dealing with 'Positive Action' and not in any Article dealing with (or entitled) 'exemptions'.

It is therefore plain that the Framework Employment Directive does not contemplate health and safety law and policy as an obstacle to the achievement of a non-discriminatory and integrated work environment. Rather, it sees the non-discrimination principle as being complemented by health and safety law and especially by the latter's focus on adapting the workplace to suit the employee. On occasions, however, employers might plead health and safety concerns in order either to exclude persons with disabilities from the workplace or to segregate them from the main workforce. Given the drafting history of the Directive and in particular the emphasis placed on the potential synergy between both sets of laws (anti-discrimination laws on the one hand and health & safety laws on the other), it follows that such a negative invocation of health and safety issues should be strictly scrutinised and placed firmly on the defensive.

[21] Council Directive 89/391 of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L183 29.06.1989, p.1.

6. Exemptions: ' Genuine and Determining Occupational Requirement'.

If the defences available under Article 2 are not proven then discrimination will ordinarily be deemed to arise in a suitable case. Other parts of the Framework Employment Directive carve out exemptions to the operation of the non-discrimination principle.

Article 4 (1) of the Framework Employment Directive is careful to carve our space for employers to make distinctions which are "based on a characteristic related to any of the [prohibited] grounds" where:

> by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement.

The original proposal of the Commission dealing with this exemption stated that the "justification in these cases relate to the nature of the job concerned and the context in which it is carried out[22]." Great care will be needed to successfully police the invocation of this defence in the disability context. Otherwise a segregationist ethic could too easily masquerade as a genuine and determining occupational requirement.

With respect to the 'nature of the job' a key concern on the disability ground will again be the accurate identification of the 'essential functions' of any given job. Is it, for example, really essential that a delivery van driver should be able-bodied when vehicles can easily be adjusted to enable a person with a disability to drive?

With respect to the 'context' in which the job is to be carried out it is surely of relevance whether or not 'reasonable accommodation' is provided. The 'context' of the job will include many things. One thing it should not include would be the potential reaction (or predictions about these reactions on the part of employers) of customers, consumers or indeed fellow-workers to the presence of a persons with a disability on the job. Even if these negative reactions occur (and even where predictions of their occurrence are accurate) it would undermine the purpose of the Framework Directive if employers were permitted to use it in order exempt their behavior from examination.

7. Permission for Armed Forces Exemption: Article 3(4).

Recital 18 of the Framework Employment Directive is to the effect that the armed forces and police are not required to maintain in employment:

> persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.

The reference to 'required capacity' is probably meant to embrace the actual capacity (occupational and otherwise) of an individual to perform a job. Logically this concept

[22] Com (1999) 565, at 10,

relates to the ‘essential functions’ of the job. And presumably, the phrase ‘required capacity’ includes the possibility of ‘reasonable accommodation.’

Article 3(4) of the Directive proceeds to grant States a discretion not to apply the provisions of the Framework Employment Directive to all or part of their armed forces on the grounds of age and disability. Recital 19 rationalises this discretion on the basis of the need to safeguard the combat effectiveness of the armed forces of the Member States. It probably follows that any derogations that go beyond what is objectively needed to safeguard the combat readiness of the armed forces go beyond the scope of the permission created under Article 3(4). Recital 19 also requires that the scope of any derogation on this ground must be defined.

Part 3.

Review of the Current Law

New Values Driving European Law Reform

The purpose of this Part is to survey the main features of anti-discrimination law in the Member States as it relates to the disability ground. It is divided into two sections.

Section I deals with the underlying receptiveness of domestic constitutional norms dealing with equality towards the non-discrimination perspective on disability. A brief examination of the relevant constitutional provisions is useful if only to try to establish the underlying disposition of the various domestic orders to the kinds of changes required by the Framework Employment Directive.

Section II deals with existing anti-discrimination legislation in the fifteen Member States prior to enlargement. It focuses on those aspects of the Framework Employment Directive that are specific to the ground of disability. That is, it focuses on

(1) the reach of the relevant non-discrimination norms to disability,
(2) the status of the key obligation of 'reasonable accommodation under non-discrimination law and
(3) the definition of disability.

1. Current Constitutional Law – Receptiveness of Fundamental Law to the New Values.

Our analysis of the constitutional provisions reveals the following.

(a) Disability is Not Generally Expressly Included in Equality Provisions.

All written constitutions (with the exception of Denmark) contain explicit equality/non-discrimination clauses and are generally phrased in terms of 'equality before the law'. Even in the Danish case the concept of equality underpins much of the philosophy of the Constitution and the incorporation of the European Convention of Human Rights into Danish domestic law has had positive practical effects. The unwritten UK constitution has also recently been supplemented by legislative measures incorporating the European Convention on Human Rights (*Human Right Act* (1998) and a number of cases on the disability ground have already been heard by the British courts under this measure.

Only three European Constitutions specifically mention disability in the relevant equality/non-discrimination clauses. Article 3(3) of the German *Grundgesetz* (Basic Law or Constitution) states since 1994, *inter alia*, that "no person shall be disfavoured because of disability". When considering Article 3(3) the Federal Constitutional Court first determines whether 'unfavourable treatment' arises on the facts of a case and, if so, then reaches the issue of whether a 'legitimate compelling justification' exists. Ten German

Lander Constitutions contain some mention of disability in the relevant anti-discrimination provisions. In the employment context, these provisions bind the Lander as in their capacity as public employers. Some of these provisions also include mention of position action.

Since 1997, Article 7(1) of the Austrian Constitution states, *inter alia,* that "no one must be placed at a disadvantage because of his or her disability". This does not appear to confer a subjective right. And since 1997 Article 6(2) of the Finnish Constitution states that no one "shall be, without an acceptable reason, be treated differently from other persons on the ground of…disability". A reason is considered 'acceptable' if it serves an objectively justifiable end, if it serves the objectives of the fundamental rights system and if the means used are proportionate to the end.

The inclusion of disability in the relevant equality provisions was recent in all three countries. These provisions do not mandate positive action but create at least some implicit space for the same. When read together, Articles 6 and 18 and 22 of the Finnish Constitution contemplate positive action.

The inclusion of disability into the relevant equality provisions sends a strong signal within the domestic legal order about the relevance and strength of equality perspective on disability. As such, it underpins the overall trend toward the equal opportunity model in the disability context. But its practical effects can be limited due to a variety of factors. Procedural hurdles can effectively limit the usefulness of the equality norm under constitutional law. In any event, debates continue concerning the reach of such norms into purely private relations (*drittwirkung* or third party effect) where they are needed most in the employment context. In any event, such constitutional prohibitions on discrimination can never, on their own, be detailed enough to provide the kind of clear guidance needed to make generalities relevant in specific cases. Only legislation can do this.

Most Constitutional courts interpret general equality norms in an Aristotelian sense – i.e., to treat equals equally and unequals unequally. Typical of this approach is that of the Luxembourg Constitutional Court which has held that:

> the legislature may, without infringing the constitutional principle of equality, subject certain categories of people to different legal regimes on condition that the difference in treatment arises from objective disparities, which are rationally justified, adequate and proportionate to the objective[23].

This reflects the 2000 decision of the European Court of Human Rights in *Thlimmenos* v *Greece.* In that case the Court emphasised that:

> The right not to be discriminated against…is also violated when States without any objective and reasonable justification fail to treat differently persons whose situations are significantly different.[24]

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23 Case 9/00 of 5.5.2000.

24 In its *Thlimmenos* judgment of 6 April, 2000, *t*he European Court of Human Rights stated:

The President of the Court, Judge Wildhaber, has written that one of the chief beneficiaries of this approach should be persons with disabilities.[25]

Some constitutional courts interpret the general equality/non-discrimination clauses as covering people with disability even thought they are not specifically mentioned in the relevant provisions; Italy[26], Spain[27], Ireland[28]. However, not all constitutional courts have been confronted with the question. It is likely that most or all courts would include disability within the protective ambit of equality protections by broadly interpreting general phrases within those protections which include 'any other status'.

In 1996 a high level Constitution Review Group recommended that the relevant equality provision in the Irish Constitution should be extended to include an explicit mention of disability[29]. It was prompted to do so by a lengthy submission from the Commission on the Status of People with Disabilities. However, no proposal to amend the Constitution has yet been put to the people as a result of this recommendation.

In 2001 a motion was moved in the Dutch Parliament to include a reference to 'disability' and 'chronic disease' in the list of prohibited grounds of discrimination under Article 1 of the Constitution. The matter was deferred at the time by the Dutch Government.

(b) Disability is Included in Many General Provisions Dealing with Social Provision and Positive Action.

Despite the paucity of mention of disability in the relevant equality/non-discrimination provisions, it does receive more prominence in general clauses dealing with social policy. For example, the Austrian Constitution contains an explicit saver for positive action measures within the relevant equality/non-discrimination clauses (Article 7(3)(4)).

Similarly, the Italian Constitution places a duty on the State to remove all economic and social obstacles which prevent the full development of the individual, etc. (Article 3(2)). Article 21(6) of the Greek Constitution states that people with disabilities are entitled to benefit from measure ensuring their self-sufficiency, professional integration and participation in the social, economic and political life of the country". Article 22 of the

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> the right not to be discriminated against…is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different…
>
> para 44.

25 Jude Luzius Wildhaber, '*Protection against Discrimination under the European Conventio non Human Rights –a Second Class Guarantee*', speech delivered in Riga on 8 March, 2001.

26 Sent.n. 55 July, July 5th 1961.

27 Constitutional Court of Spain, sentence Num 269/1994 (first court), 13 October, 1994.

28 It is commonly assumed that Article 40.1 on equality inures to the benefit of persons with disabilities. The problem is that Article 40.1. seems captive to other countervailing provisions in the Constitution and especially Article 43 on the right to private property.

29 Report of the **Constitution Review Group**, (1996) at 230.

Finnish Constitution is interpreted to support positive action measures although it does not explicitly mention any particular group. Article 19(3) of the Finnish Constitution provides for the general right to adequate social, health and medical services as well as the well-being and personal development of children.

Several Constitutions mention disability in what might loosely be called promotional measures (including prevention and treatment) for citizens with disabilities; Spain, (Article 49), Portugal (Article 71), Ireland (Article 45). It is unclear to what extent, if any, these social obligations give rise to enforceable subjective rights. Such measures can be conceptually tied to equality/non-discrimination – but the connection is not drawn out so clearly under existing constitutional law.

Article 71 of the Portuguese Constitution states:

> (1) Citizens who are physically or mentally disabled enjoy all the rights and are subject to all the duties embodied in the Constitution, except for the exercise or performance of those for which their disablement renders them unfit.

It is unclear which specific rights are denied to disabled citizens on account of their unfitness. Article 71 continues:

> (2) The State carries out a national policy for prevention and the treatment, rehabilitation, and integration of handicapped persons, develops a form of education to make society aware of its duties of respect for them and solidarity with them, and ensures that they enjoy their rights fully, without prejudice to the rights and duties of their parents and guardians.

The Greek Constitution provides that "disabled war and peacetime veterans" as "well as persons suffering from incurable bodily or mental ailments" are entitled to the special care of the State (Art. 21(2)). Article 21(3) goes on to pledge the Greek State to "care for the health of citizens…and…adopt special measures for the protection of…disability". Furthermore Article 21(6) goes on to state that "[P]eople with disabilities are entitled to benefit from measures ensuring their self-sufficiency, professional integration and participation in the social, economic, and political life of the Country". Article 116(2) of the Greek Constitution asserts that positive measures to promote equality between men and women does not constitute discrimination. It is confined to gender.

Section 2 of Article 3 of the Italian Constitution is to the effect that it is the duty of the State to remove all economic and social obstacles which, by limiting the freedom and equality of citizens, prevents the full development of the individual and the participation of all workers in the political, economic and social organization of the country. Article 22 of the Dutch Constitution places a duty on Government to bring about the right conditions for social and cultural development and recreation. Article 19(3) of the Finnish Constitution provides for the general right to adequate social, health and medical services as well as the well-being and personal development of children. In 1999 a Commission for the Institutions and Institutional Reform in Luxembourg proposed the insertion of the following into the Constitution: "The law provides for the social integration of citizens with a disability". This proposal, which was not adopted, was not

so much intended to confer new rights in the disability field but was rather intended to enhance legislative competence in the area.

(c) Disability is Included in Many Specific Provisions Dealing with Work, Health, Education, etc.

Interestingly, there is a wealth of comparative European constitutional provisions dealing with disability within highly particular provisions dealing, for example, with health, welfare and education. Perhaps this is reflective of the general view in the past that disability was not so much an equality issue as a social policy issue.

For example, various Constitutions mention disability under the relevant social security/welfare provisions; Italy (Article 38(2)), Portugal (Article 63(4)), Finland (Article 19(2)). The thrust of these provisions is to provide for a general guarantee to basic subsistence, adequate insurance and the means of subsistence with respect to the contingency of disability or where the capacity to work is lost or reduced.

Two Constitutions specifically refer to disability under the general right to work; Italy (Article 35), Portugal (Article 58(2)). Interestingly the Portuguese Constitution asserts:

> [that the]…duty to work is inseparable from the right to work, *except for those persons whose capacities have been diminished by age, sickness, or disability*" (Art. 58(2)).
>
> [italics added].

Read one way this would appear to assume that disability amounts to an automatic *inability* to work which, if so, does not sit well with the underlying values of the Framework Employment Directive. In Sweden and with respect to employment in the public sector there is a constitutional requirement that decisions regarding an offer of employment shall be based solely on objective grounds such as skills and merit[30]. It is therefore never justifiable to treat any job applicant unfavourably on the basis of irrelevant factors. This is presumed to apply in the context of disability. However, laws may only be declared unconstitutional in Sweden on the basis of a 'manifest violation'. This serves to diminish the practical utility of the provision.

Several constitutions refer explicitly to disability in the context of the right to education. Disability is explicitly mentioned in the context of education in the Portuguese Constitution (indirectly in Article 71(2) with reference to the need to educate society to the needs of persons with disabilities and more directly in Article 74(g) which covers the promotion and support of special education). Disability is also mentioned under the right to education in the Italian Constitution (Article 38(3) – entitlement to vocational education and training) and in the Finnish Constitution (Article 16(2) - which refers to equal education opportunities, *inter alia*, for those with 'special needs'). The Greek Constitution mentions that the State shall provide financial assistance "…to students in need of assistance or special protection" (Article 16(4)). The Luxembourg Constitution

[30] Regeringsformen 1 kap, 9: Instrument of Government, Chapter 1, Article 9.

does not mention disability in the context of education but does mention the 'exceptionally gifted' (Article 23(3)). None of the provisions mentioned above deal explicitly with the core right at stake namely the right to integrated education. The degree to which such education should be provided in an integrated setting is left to judicial interpretation of the interaction of the right to education and with the relevant equality norms.

Language rights (sign language) in the context of disability is explicitly covered under only two Constitutions; Finland (Article 17 (3)) and Portugal (Article 74). The relevant Finnish provisions covers not merely the rights of persons with disabilities to use sign language but also the rights of persons to interpretation or translation assistance. Article 74 of the Portuguese Constitution was amended in 1997 to include a "duty to protect and develop Portuguese sign language, as a cultural expression and instrument of access to education and equality of opportunities".

Article 72(5) of the Constitution of Denmark states that "[A]ny person unable to support himself or his dependents shall, where no other person is responsible for his or their maintenance, be entitled to receive public assistance…". The Greek Constitution affords a right to protection of health and genetic identity (Article 5(5)).

(d) There is Very Little Caselaw on Disability in Constitutional law.
While there is, as can be expected, a wealth of caselaw dealing with mental health law and specifically the process of civil commitment throughout Europe, there is very little constitutional caselaw on the broader equality or non-discrimination issues in the disability field.

In terms of significant constitutional caselaw, perhaps the most interesting case involving disability with respect to equality/non-discrimination is that of *Re: Article 26 and the Employment Equality Bill*, (1998)[31] in Ireland. There, in part at least because of the relative weakness of the equality provisions in the Irish Constitution, the Irish Supreme Court decided that the obligation placed on employers in the draft Bill to engage in 'reasonable accommodation' towards employees with disabilities violated the employer's right to private property and was thus void[32]. This was the reason why 'reasonable accommodation' was capped with a ceiling of 'nominal cost' in the revived Bill which eventually became law in 1999 *(Employment Equality Act, 1999)*. This cap was in fact

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31 [1997] 2 I.R. 321.

32 The Supreme Court reasoned:

> the difficulty with the section now under discussion is that it attempts to transfer the cost of solving one of society's problems on to a particular group. The difficulty the Court finds with the section is not that it requires an employer to employ disabled people, but that it requires hum to bear the costs of all special treatment or facilities which the disabled persons may require to carry out the work unless the cost of the provision of such treatment or facilities would give rise to an 'undue hardship' to the employer.
>
> Id. at 367.

removed in the *Equality Act* of 2004 which was introduced to transpose the Framework Employment Directive (see below).

There are three major constitutional law decisions in Germany relating to persons with disabilities covering education, inheritance law and tenancy law. In the context of the right to education the Federal Constitutional Court placed segregated education on the defensive. On the facts of the case it did not find that 'unfavourable treatment' had arisen and did not therefore feel the need to explore whether a compelling legitimate justification existed[33]. It is nevertheless a significant advance in the sense that the judgment requires a strong justification for 'unfavourable treatment.'

The Danish Supreme Court has held that no violation of the general principle of equality occurred in a case where the public authorities refused to allow a blind student to take her 'student wage' with her while studying abroad[34] (non-exportability of social benefits)..

(e). Tentative Conclusions – Disability is Not Generally Anchored as an Equality Issue on European Constitutional Law.

What this synthesis of constitutional provisions reveals is the following.

First, although there is a trend in favour of broadening the personal scope of the relevant equality/non-discrimination provisions to include people with disabilities, the majority of Constitutions still do not cover disability explicitly. It is true that many courts interpret the generality of equality/non-discrimination provisions to implicitly include disability. But the general point is that people with disabilities are largely absent in headline constitutional provisions on equality. This fact does not, of course, have any direct bearing on the domestic application of the Framework Employment Directive. But it does serve to bring out the extent to which European constitutional orders have not traditionally viewed disability as an equality or non-discrimination issue. Which in turn serves highlight the significance of the changes required by the Framework Employment Directive.

Secondly, the absence of disability in the relevant equality/non-discrimination provisions does not mean that disability was entirely neglected. To the contrary. There is a wealth of provisions dealing with disability under the broad 'social policy' heading. This is intrinsically positive particularly where the relevant provisions are directly linked to a strategy of using social supports to expand personal choice and self-determination. Harnessing such social support to a serve a broader equality/non-discrimination agenda remains a major challenge. This goal of creatively linking positive action with non-discrimination is not helped by the fact that the relevant equality/non-discrimination provisions under comparative European constitutional are largely silent on disability.

Thirdly, there is an underlying temptation for courts to accept a philosophy of 'separate but equal'. This seems more pronounced in the disability field. This may be partly due

33 BverfGE 96, 288.

34 UFR.2001.1258H.

to the novelty of the difference of disability from a judicial point of view. It may also have to do with the accumulated weight of social provision from the past. Whatever its source, this temptation appears to bump up against the philosophy of the Framework Employment Directive and indeed modern human rights law.

2. Review of Current Anti-Discrimination Law.

The purpose of this section is to review the current state of domestic anti-discrimination law up to April 2004. A county analysis follows under three general headings:

(a) General Coverage of Disability under the relevant statute law,
(b) The Status of the Obligation of 'Reasonable Accommodation,'
(c) The definition of disability.

- Austria.

(a) General Coverage of Disability in Austrian Anti-Discrimination Law.

Currently, the Behinderteneinstellung (*BEinstG)* of 1969 imposes a duty on employers to employ disabled persons under a quota system. Persons with disabilities have to be assessed to be at least 50% disabled before they can benefit. The statute also confers protection against dismissal on grounds of disability (effectively a work retention measure) and provides a legislative basis for a range of grants and loans. It applies to both the private and public sectors. Apart from the dismissal provisions, it does, not, however, confer subjective or individually enforceable legal rights. Individuals cannot, for example, compel the adjustment of a workplace under it. The *BEinstG* 1969 does not contain any explicit prohibition against discrimination on the ground of disability.

During debates concerning the 1997 amendment to the equality clause in the Austrian Constitution (outlined in the previous section) many members of Parliament stressed the need to go further than the *BEinstG.* Since the Autumn of 1997 two Parliamentary motions calling on the Government to pass anti-discrimination legislation were defeated. A Bill on *Equal Treatment of People with Disabilities* (sponsored by the Liberal Party) was rejected during its Second Reading in July 1999. The Bill was reintroduced into Parliament (sponsored by the Green Party) in November 1999 without any changes. The Bill covered a wide range of fields (e.g., education, public transport, etc). The chapter on occupation did not include employment. Instead, it dealt with the requirements of taking up an occupation as a self-employed person.

During 2002 a variety of disability organisations formed a platform which started to campaign for a comprehensive disability discrimination statute. Such an act was promised by the Government that was returned after the November 2002 General Election. After a public debate in late 2003 the Secretary of State for Social Security published a draft Bill early in 2004 on equal treatment of persons with disabilities.

The 2004 draft Bill – which includes employment but also sweeps beyond it - would amend the *BEinstG 1969* by providing for an explicit prohibition against discrimination on the ground of disability. This draft was prepared and released by the Ministry for Social Affairs. To date it has not yet been brought before Parliament. Section 7(a) of the draft Bill sets out its material scope which covers the conditions of access to employment, pay, *ex gratia* fringe benefits, access to vocational training, advanced training or retraining, promotion, other working conditions, dismissal, and membership or involvement in an organisation of workers or employers. If enacted, the principal legislation will remain the *BEinstG* 1969 as amended.

The 2004 Bill repeats the text of Article 2 of the Framework Employment Directive almost *verbatim*. As well as a prohibition on direct and indirect discrimination it includes a prohibition against harassment (Section 7(b)) as well as against instructions to discriminate (Section 7(c)). It explicitly allows for positive action measures. The Bill envisages the addition of the following to *BEinstG 1969:*

> Specific measures with a view to promoting full equality in employment or occupation, such as measures to prevent or compensate for disadvantage linked to disability, shall not constitute discrimination.

Curiously, the explanatory memorandum accompanying the Bill states that the above language will enable employers to remain free to select persons with a particular disability (e.g., an impairment to the senses) or whose particular disability reaches a certain degree. This interpretation of positive action measures vividly illustrates a broader question concerning the compatibility of positive action measures with the anti-discrimination norm.

The 2004 Bill proposes to introduce two tiers of enforcement. Victims of alleged discrimination are supposed to apply first to an arbitration committee established within the Department of Social Security. Using methods of mediation, the arbitration committee must first try to reach a friendly settlement. If such a settlement cannot be found the committee shall pursue an investigation of the case with a view to making a declaration as to whether or not discrimination contrary to the law has occurred. The committee may also impose sanctions. The applicant may then apply to the employment tribunal (if alleging employment discrimination) or to the civil courts (dealing with discrimination outside employment). As soon as the matter is referred to the employment tribunal the declaration of the arbitration committee ceases to have effect. The law envisages a role for organisations of workers and employers in bringing forward claims of discrimination. It is unclear whether the permission of the victim has to be first obtained.

Medical testing is not explicitly regulated within the sphere of non-discrimination law. But neither is medical testing required. Employers are specifically required to pay particular attention to the health conditions of their employees and to employ people according to their aptitude and skills.

(b) The Status of the Obligation of Reasonable Accommodation.

The obligation to engage in 'reasonable accommodation is not, as such, yet covered under existing anti-discrimination legislation in Austria.

The January 2004 Bill does not explicitly call for 'reasonable accommodation' on the part of the employer. It seems that the drafters envisaged that such an obligation would fall more naturally under the concept of 'indirect discrimination' the definition of which in the Bill will include a reference to 'characteristics of built environment'. However, while the notion of 'reasonable accommodation' reaches the built environment it also encompasses many more things. Moreover, the remedies and sanctions provided by the Bill seem confined to damages (which may include damages for injury to feelings). There would not, therefore, appear to be a mechanism envisaged whereby the employee or job seeker could compel the provision of 'reasonable accommodation' on the part of the employer.

Section 7a(4) of the draft Bill relates to the employer's duty to adjust the working environment and sets out the limits of this duty. Discrimination will not be deemed to occur if adjustments cannot be expected because they would be unreasonable (e.g., because the burden for the employer is unduly high). It reads:

> A disadvantage within the meaning of paragraph 2 [defining indirect discrimination] shall not constitute discrimination if the elimination of the causes of the disadvantage imposes a disproportionate burden. When assessing the burden, the expenditure 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.

Section 7a(5) of the draft clarifies the limits of the employer's duty set out in paragraph 4. It is to the effect that even if accommodation is to deemed unreasonable, discrimination will still be deemed to occur if the employer fails to make all the efforts that can nevertheless be reasonably be expected from it (efforts with a view to accommodate the needs of disabled people to the greatest possible extent). Paragraph 5 strengthens the duty of the employer under paragraph 4. It is to the effect that if a particular measure is considered unreasonable under paragraph 4 then the employer might still be obliged to engage in other measures under paragraph 5 provided that the other measure ameliorates the situation for people with disabilities. Section 7a(5) of the January 2004 Bill reads:

> 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 account.

Litigation will no doubt be required to clarify these provisions.

(c) The Definition of Disability.

Section 3 of the *BEinstG* 1969 currently defines disability as follows:

> Disability is the result of a deficiency of functions that is not just temporary and based on an abnormal physiological, mental or psychological condition. A condition is not deemed temporary if it will presumably last for more than six months.

It seems that there no plans to amend this definition in the draft 2004 Bill in the employment context. Outside the employment context two draft definitions have been proposed. Both of these would explicitly extend the protective coverage of the non-discrimination norm to family members of a person with a disability.

- Belgium.

(a) The General Coverage of Disability under Belgian Anti-Discrimination Legislation.
Legal competencies in the disability field are divided among the Federal State, Regions, and Communities. The overlaps in competencies are complex and as many as six different legislatures are involved depending on their respective competencies: namely, the Federal State, the Flanders Region, the Walloon Region, the Region de Bruxelles-capitale, the Flemish-speaking Community, the French-speaking Community, and the German-speaking Community.

The *section de legislation* of the *Conseil d'Etat/Raad van Staat* had previously pronounced that human or civil rights are transversal values that cut across the full spread of government competencies. That is, rights do not in themselves give rise to legal competencies where none formerly existed under positive constitutional law but affect the full spread of competencies no matter what they are and no matter where they lie (i.e, no matter which legislative body has competence). Civil rights as such is a matter for the Federal Belgian State. However, vocational training and disability policy (including employment) are competencies for the Regions in the Belgian system and are therefore impacted by civil rights. So the transposition of the Directive arises at all levels within the Belgian system.

At the level of the Belgian Federal State a Collective Agreement (no.38) was adopted in 1983 (and given the force of law by Royal Decree) in the field of recruitment and selection of workers. It was originally drafted to give effect to the *United Nations Convention for the Elimination of all Forms of Racial Discrimination* (CERD) in Belgian law. It was subsequently modified and broadened in 1994 and 1999 respectively. The latest set of amendments (1999) led to the insertion into the Agreement of two new grounds of prohibited discrimination covering sexual orientation and disability. The Belgian social partners believed that Article 13 EC could, and should, be directly implemented in Belgian law without waiting for any implementing Directive to be adopted. The relevant part of Article 2bis of the Collective Agreement now reads:

> The employer may not treat the candidates in a discriminatory fashion.

> During the procedure [recruitment and selection], the employer must treat all the candidates equally. The employer may not make distinctions on the basis of personal characteristics, when such characteristics are unrelated to the function or the nature of the undertaking, unless this is either authorised or required by law. Thus, the employer may in principle make *no distinction* on the basis of age, sex, civil status, medical history, race, colour, ascendancy or national or ethnic origin, political or philosophical beliefs, membership of a trade union or of another organisation, sexual orientation or *disability*.
>
> [italics added].

Article 11 of the Collective agreement protects the private life of the worker against not merely employers but also against others such as psychologists or physicians who act for the employer. This is interpreted to mean that an employee does not have to disclose a disability.

Anti-discrimination law has recently been strengthened at the federal level. The *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* (Federal Anti-Discrimination Act) has been adopted by both houses of the Parliament (the last vote was in the Senate on 12 December 2002). It was promulgated into law on 25 February 2003 (based on a Bill originally proposed by Senator Mahoux). This new legislation offers protection against direct and indirect discrimination on the ground of disability and provides for civil remedies as well as criminal sanctions. It is divided into six chapters. Chapter I identifies its legal basis under the Belgian Constitution; Chapter II defines the scope of the law and the various forms of discrimination it seeks to prohibit. Chapter III provides for criminal sanctions; Chapter IV contains the civil provisions and remedies; Chapter VI deals with the right of organizations to file suit.

The grounds of discrimination now include 'the actual or future medical condition, or disability or a physical characteristic' (Article 2(1)). The law goes beyond the field of employment into areas such as the supply of goods and services. It even reaches "access to, and participation in, all economic, social, cultural or political activities which are normally accessible to the public" (Article 2 (4)).

The civil provisions contained in Chapter IV of the new Federal legislation seem readily applicable in the employment context. The Law of February 2003 provides for the invalidity of any contractual clauses which run counter to its provisions (Article 18). The law takes priority over any such agreements. It gives the judge the power to issue mandatory injunctions (Article 19). It enables the judge to issue an order to cease and desist under pain of a fine (Article 20).

Direct discrimination is defined by the 2003 Federal Law as a 'difference of treatment which lacks an objective and reasonable justification' (Article 2 § 1). This definition seems overly wide when compared to Article 2 (a) of the Framework Employment Directive. The law does state, however, that a differential treatment will only be justified in employment "where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the

objective is limited and the requirement is proportionate". In other words, the available defence ('objective and reasonable justification') might be confined to a 'genuine and determining occupational requirement' and thus saved under the Framework Employment Directive.

Indirect discrimination is defined under the 2003 Federal Law as arising where an apparently neutral provision, criterion or practice, would put persons defined by one of the prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is (a) based on an objective and reasonable justification or (b) is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This formula seems to impose a somewhat lesser hurdle to surmount in order to justify indirect discrimination as contrasted with the Directive which additionally also requires that the provision, etc., should be 'necessary' – Article 2(2)b).

Chapter II of the 2003 Federal Law sets out a number of criminal offences related to the general notion of discrimination (both direct and indirect). These offences concern those (a) who publicly incite discrimination, who incite hatred or violence against the person, and those (b) who give publicity to their intention to commit discrimination as well as (c) public servants who commit discrimination in the exercise of their public functions. These offences may occasionally arise in an employment context. If certain acts such as harassment are found to have been motivated by hate or hostility against a persons on one or more of the prohibited grounds then the relevant fine may be aggravated.

An instruction to discriminate is also considered to be a form of prohibited discrimination under the Federal Law. Interestingly, obeying superior orders is no defence on the part of a public servant who complies with such an instruction (Article 6.(2) of the Federal Law).

It does not appear that the protective sweep of the Federal Law was intended to reach persons who are associated with those who have a disability. The Federal Law also faithfully reproduces the language of the Framework Employment Directive on harassment.

Both the Flemish and Walloon regions are also actively engaged in law reform in this field within their respective spheres of competence. In Flanders a *Decree on Equitable Participationt in the Employment Market* (*evenredige participatie op de arbeidsmarkt*) was promulgated on 8 May 2002. The Decree seeks to transpose the Framework Employment Directive and the Race Directive with respect to the relevant competences of the Flemish Region and Community. It is also inspired by Dutch law (*Promotion of Labour Participation of Ethnic Minorities: SAMEN*) and Canadian equality law (*Employment Equity Act*, 1995). The Decree seeks to improve the level of representation of certain 'target groups' in the labour market. The latter term is left open-ended and will be further particularised through regulation by the Flemish Government together with the Flemish Social and Economic Council. It seems certain to include the disabled.

The Flemish Decree is premised on two key principles: (1) the 'representative participation' which refers to the representation in the workforce of target groups in numbers proportionate to their representation in the broader community and (2) 'equal treatment' which refers to the elimination of all forms of direct and indirect discrimination. The prohibition of discrimination relates to on a number of limited grounds which expressly include 'disability or physical characteristic'. Discrimination is defined as 'less favourable treatment'. No justification is envisaged for direct discrimination. Since it is enacted within the sphere of competence of the Flemish Region, it primarily imposes obligations on the Flemish public authorities defined as:

(1) persons or organisations who act as intermediaries in the labour market by giving information on employment opportunities, offer vocation guidance and vocational training,
(2) on the public authorities of the Flemish Region/Community including the field of education (e.g., teachers in public schools),
(3) other employers with respect to vocational training end employment.

Chapter II of the Flemish Decree sets out a long list of prohibited forms of discrimination on the grounds listed including disability. It is, for example, unlawful to refer to any of the prohibited grounds (including disability) in the description of conditions or criteria in employment intermediation, to present certain employment opportunities as better suited to persons belong to one of the protected groups, to deny or discourage access to employment, to deny access to vocational guidance, to impose conditions on the receipt of titles such as degrees, to use techniques or tests which, in vocational guidance, vocational training, career guidance or employment intermediaries, may lead to direct or indirect discrimination.

Chapter III of the Flemish decree refers to regular reporting obligations on the part of employers which is modeled on Canadian employment equity legislation. Chapter IV deals with supervision of the implementation of the Decree. Harassment is prohibited under the Decree but is not specifically tied to discrimination.

The Walloon Government adopted an important Executive Decree (Arrêté) on 5 November 1998 on the promotion of equality of opportunities for persons with disabilities in the employment sphere. This decree has itself been progressively modified in 2001 and twice in 2002. The Decree has 10 Titles. Titles 1-9 set out a number of means though which the decree encourages the integration of persons with disabilities into the labour market under the supervision of a new agency (*Agence walloone pur l'integration des personnes handicappe: AWIPH).* It does not set out any non-discrimination rules. An adapted version of this Decree was adopted by the Region of Bruxelles-Capitale on 4 March, 1999.

On 27 May 2004 the Walloon Region adopted a *Decree on Equal Treatment in Employment and Professional Training.* Its scope is limited to the competencies of the Walloon Region including those attributed to it under law. It applies therefore to vocational guidance, socio-professional integration, the placement of workers, the allocation of aids for the promotion of employment and vocational training in both the public and private sectors.

The Region of Bruxelles-capitale adopted an ordinance on the mixed management of the employment market on 26 June 2003. The ordinance essentially defines which entities, and under which conditions, may act as intermediaries in the employment market. Whether public or private, these entities are obliged to respect the general prohibition against discrimination. Article 4(2) of the ordinance specifically prohibits covered entities from discriminating against job-seekers on the grounds of disability.

On 26 April 2004 the Council of the German-speaking Community discussed a draft Decree proposed for the implementation, with respect to its competencies, of the Framework Employment Directive (in addition to other Directives). It awaits formal publication in the official journal. The Decree applies to the administration of the Community, to the personnel of the educational system of the Community, and to employers with respect to the provision of 'reasonable accommodation'. Harassment is deemed a form of direct discrimination in the decree.

The vicarious liability of an employer is governed under the Belgian Civil Code.

Under the Federal Law of February 2003 the *Centre pour l'égalite des chances et la lutte contre le racisme* as well as certain other bodies concerned with human rights will have the power to file suit in the Industrial Tribunal on behalf of an aggrieved individual provided that the individual consents. Likewise, the Flemish Decree confers power to file suit on certain organisations and enables them to assist the complainant in pursuing a case. The Federal Law allows for the burden of proof to be reversed once sufficient evidence (including statistical data) has been adduced giving rise to a presumption of discrimination. The Flemish Decree likewise allows for the reversal of the burden of proof. Victimisation is also covered in both the Federal and Flemish legislation. Remedies include injunctions as well as damages and publicity.

The *Reglement general sur la protection du travail et le bien-etre* (RGPT) was initially adopted by two decrees in 1946-1947. It governs the field of medical testing. The objective of testing is to create the conditions to make it possible for the *medecin du travail* to suggest adaptations of the working conditions, or the adoption of individual or general measures of protection. Such an examination is compulsory with respect to workers hired under the Belgian quota system. It is conceivable that a refusal by an employer to put into effect the recommendations of a *medecin du travail* could be considered discrimination in as much as the employer fails to 'reasonably accommodate' persons with disabilities.

(b) The Status of the Obligation of 'Reasonable Accommodation'.

As proposed the 2003 Belgian Federal Law did not at first include an obligation to engage in 'reasonable accommodation. The justification offered was that specific legislation would be needed for this purpose which, it was felt, fell more within the competence of the Regions and Communities and would, in any event, have to be

discussed first among the social partners. However, in May 2002, the Government set aside its initial hesitation and proposed an appropriate Government amendment.

Article 2 (3) of the Federal Law of 2003 now deems a failure to provide 'reasonable accommodation' as amounting to discrimination. The defence of 'disproportionate burden' is provided for. Yet in any calculation of whether the burden is in fact disproportionate, due account has to be taken of whether the measures are sufficiently compensated for by the State. Illustrative examples of 'reasonable accommodation' are given in the explanatory documentation for the draft proposal.

The Flemish Decree also requires 'reasonable accommodation'. However, a failure to provide 'reasonable accommodation' is not explicitly tied to the concept of discrimination (whether direct or indirect). That is, it has the status of a general requirement but is not tied either to direct or indirect discrimination. Interestingly, the obligation is not confined to disability and applies across all grounds (i.e., it also applies to age and religion, sexual-orientation). It is therefore entirely possible that cases dealing with the obligation of 'reasonable accommodation' on the ground of age will arise before they do on disability. The defence of 'disproportionate burden' applies. The burden is not to be considered disproportionate when it is sufficiently remedied by existing measures.

The relevant decrees of the Walloon Region and of the Region of Bruxelles-Capitale use the concept of 'reasonable accommodation' not as corollary of the general prohibition against discrimination but simply to describe the changes the employer may bring to the working post with the financial support of the Region. Thus, to provide "reasonable accommodation" is not considered under these decrees to be an obligation of the employer; it is essentially a privilege. The employer may – or may not – choose to adapt the working post to the needs of the disabled employee.

Article 8 of the 2004 Walloon Decree requires 'reasonable accommodation' but seems to suggest that the obligation is confined to the education or training context. However, it is possible to read the obligation more expansively under the Walloon Decree since the material scope of the Decree read as a whole reaches beyond education. Case law will be needed to clarify this point. The German Community Decree requires 'reasonable accommodation' and deems failure to provide it as discrimination.

(c) The Definition of Disability.

The Federal Law does not define the notion of 'disabled person'. It concentrates on prohibiting any kind of discrimination, either direct or indirect, on the basis of "current or future state of health, a disability or a physical characteristic". This may cover those who have a genetic pre-disposition to a disability. The same is true of the Flemish Decree of 8 May 2002. The Walloon Decree does not qualify the degree of severity of the impairment but simply states that the impairment must be important enough to require the intervention of the collectivity. None of the definitions used seem to capture 'perceived disability'.

Denmark.

(a) The General Coverage of Disability under Danish Anti-Discrimination Law

By Act of Parliament no. 459 of 12 June 1996 Denmark enacted its first statute banning discrimination in the labour market. This act was introduced to give effect to International Labour Organisation (ILO) Convention 111 *Discrimination (Employment and Occupation)* of 1958 and the *International Convention for the Elimination of all Forms of Racial Discrimination* (CERD). Disability was not specifically covered by the relevant anti-discrimination provisions.

In 2001 a Commission appointed by the Danish Government recommended that a range of human rights convention should be incorporated into Danish law. Since a referendum would be needed with at least a 40% majority vote in favour, such a move may be some time away. In any event, it is not immediately apparent that incorporation would directly benefit persons with disabilities especially in the absence of detailed legislation tailored to disability with associated case law.

Denmark has an elaborate and generally effective tradition of social support for persons with disabilities.[35] Such support does not, however, generate subjective or enforceable individual rights. The recipients of such support were traditionally seen as clients and not as rights holders. However, this view has undergone a significant shift in the last decade. The Danish Parliamentary Ombudsman and Supreme Court have both been instrumental in the field of disability in recent years. Indeed, the incorporation of the European Convention on Human Rights into Danish law in 1992 has further fuelled the shift away from passive welfare towards an active rights policy.

By tradition, such matters as are covered by the Framework Employment Directive are left to voluntary negotiations between the social partners and are then reflected in collective agreements in Denmark. Negotiations between the social partners with respect to the transposition of the Framework Employment Directive have in fact been going on for more than two years. Denmark has notified the European Commission that it requires an additional year to transpose the Framework Employment Directive into its laws. The legislation needed to transpose the Framework Employment Directive is being prepared by a commission within the Danish Ministry of Employment. The Danish Government intends to table a Bill before Parliament in September 2004. To that end it has asked the social partners to conclude their negotiations by May 2004.

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[35] See generally, **Danish Disability Policy – Equal Opportunities through Dialogue**', Danish Disability Council (2002) available at http://www.clh.dk/pjecer/danskhandicappolitik/disabilitypolicy.doc.

The Danish courts insist on a strong principle of equality under the rubric of general principles of administrative law. Such principles attach to official acts (e.g., the exercise of official discretion) or acts done under colour of State law. Though laudable, this does not reach or regulate purely private acts of discrimination in the open labour market. Likewise the opinions of the Ombudsman – through not legally binding – have great effect in the public and semi-public sector.

In Denmark a disabled job seeker is obliged to inform his employer if he has a disability which might substantially inhibit his capacity for the work in question. Failure to do so could be considered by the employer as fraudulent with implications for the validity of the contract. In general, employers have no right to insist on a medical examination except in certain sectors such as the food industry or if the individual applies for pension insurance.

(b) The Status of the Obligation of 'Reasonable Accommodation'.

The obligation of 'reasonable accommodation', is not, as such, covered under Danish anti-discrimination law. A variety of programmes does much of the job of 'reasonable accommodation' but are not directly related to anti-discrimination law and does not confer 'subjective' rights on individuals. They cannot by themselves meet the requirements of the Framework Employment Directive. The Danish courts have a long tradition of balancing competing rights and interests and so should be in a position to appropriately interpret the obligation of 'reasonable accommodation' once it is properly transposed into Danish law.

The *Law on Compensation to Disabled Persons in Employment* (1998) creates a statutory preference for "*persons who because of disability have difficulties in getting employment on the ordinary labour market*". It does not factor in the possibility of 'reasonable accommodation' as understood under the Framework Employment Directive.

(c) The Definition of Disability.

There is no legal definition of disability in Denmark. Imputed disability is not generally considered to be a disability in Denmark.

Finland.

(a) The General Coverage of Disability in Finnish Anti-Discrimination law.

Like most European countries, only gender-based discrimination was traditionally covered by civil non-discrimination law in Finland: *Act on Equality between Women and Men* (609/1986).

A Working Group (Project) was set up by the Finnish Ministry of Labour with the task of overseeing the transposition of the Framework Employment Directive. A parallel Working Group worked on the transposition of the Race Directive. Their separate proposals were integrated into one proposal and then submitted to Parliament as a single Government Proposal on Equal Treatment on 20 December 2002. The time allocated for considering the proposal was short. Because of Parliamentary elections to be held in Mach 2003 the Parliament was dissolved in mid-February 2003. Before being dissolved the Parliament rejected the proposal. Such legislation was finally adopted at the end of 2003 (*Equality Act*, 2003).

Three sets of laws currently govern disability discrimination.

First, the Finnish Penal Code contains two provisions on discrimination; one of a general nature (Section 11(9)) and one specifically targeting discrimination in the field of employment (Section 47(3)). The prohibition on employment discrimination deals with employers who in the recruitment process or in the employment context place a person in a disadvantageous position without a 'weighty or acceptable reason'. Neither the general nor the employment specific provisions directly cover disability. Both provisions do however cover discrimination on the ground of 'health status' and there is little doubt that disability is covered even though many persons with a disability do not in fact have any health concern. This raises the possibility that persons with disabilities whose disabilities are not a health concern are not covered. The relevant provisions of the Penal Code do not distinguish between direct and indirect discrimination. Instructions to discriminate are also penalised. As punishment for discrimination the Penal Code prescribes fines or imprisonment for a maximum of six months.

Secondly, the *Employment Contracts Law*, which came into force in 2001, contains a specific non-discrimination provision with regard to working life. The core provision of Chapter 2, (Section 1) is entitled '*Prohibition of Discrimination and Equal Treatment*'. It prohibits 'differential treatment' on a number of grounds "or any other comparable circumstance" without "acceptable reason". Disability is one such ground and would no doubt be covered under the term '"any other comparable circumstance" in any event. Under the Act an employer has the obligation to "strive to further the employee's opportunities to develop themselves according to their abilities"

Should an employment contract contain a provision that is found to be discriminatory either in itself or in its effects, such a provision can be adjusted or rendered null and void. Discriminatory acts on the part of employers may also constitute grounds for the giving of notice by an employee for the termination of the employment contract in question.

Thirdly, the *Equality Act* (2003) was specifically adopted in December 2003 in order to transpose both Directives into Finnish law. It entered into force in February 2004. Its definition of discrimination is modelled on the provisions of the Directives and explicitly includes both direct and indirect discrimination. It covers all the grounds of the Framework Employment Directive. The listing of grounds is in fact open-ended. No justification is permitted for direct discrimination under the Act. It prohibits discrimination with respect to conditions for self-employment and occupation,

recruitment criteria, employment and working conditions, promotion, training of staff, education and membership and involvement in organisations of workers or employers.

A victim of discrimination on the ground of disability can claim 'just satisfaction' under the Act from the perpetrator up to the maximum amount of €15,000 which may be exceeded if the act of discrimination is considered to be particularly serious. It appears that interested organisations may not commence criminal or civil proceedings on behalf of, or in support of, the victims of discrimination. The *Equality Act* provides for a shift in the burden of proof in accordance with the Framework Employment Directive.

Finnish workers who acquire a disability during their working life are afforded added protection under Finnish law. In Finland as elsewhere in Europe there exists a web of laws that aim at enhancing the employability of persons with disabilities. They do not make reference to the principle of equality even though they are obviously animated by a broad philosophy of equality. There is a large volume of caselaw regarding the proper implementation of these laws. However, the notion of non-discrimination does not form part of the *ratio decidendi* of these cases.

The *Occupational Health Care Act* of 2001 (1383/2001) regulates the use of medical examinations in relation to employment including recruitment. In accordance with Article 12 of the Act an employer has the duty to provide:

> (2) investigation, assessment and monitoring of work-related health risks and problems, employee's health, working capacity and functional capacity, including any special risk of illness caused by the work or working environment, and any medical examinations as a result of the aforementioned points…
> …
> (5) monitoring and supporting the ability of a disabled employee to cope at work, having regard to the health requirements of the employee…

An employer has a duty to ensure that the health status of a disabled worker does not deteriorate due to his working conditions. The measures to be taken to support the disabled worker may relate to a re-organisation of the workplace or workstation. This is 'reasonable accommodation' in another guise – although not linked to the concept of non-discrimination. An employee may not, without just cause, refuse to attend a medical examination under the Act if it is necessary to investigate his working or functional capacity for the purposes of the health requirements associated with the job.

Under the *Act on the Protection of Privacy in Working Life* (477/2001) an employer is also required to obtain medical data from the employee directly. In order to obtain information from other sources the employer must first get the permission of the employee. The object is to assess the employees' capacity to perform the work or the need for training or other occupational development. The information so derived is considered 'sensitive data' for the purposes of the *Personal Data Act* (523/1999).

(b) The Status of the Obligation of Reasonable Accommodation.

As already mentioned, under the *Employment Contracts Act* (2001) an employer is obliged to "strive to further the employees" opportunities to develop themselves

according to their abilities so that they can advance in their careers. It might be argued that this, when taken with the prohibition on 'differential treatment', requires 'reasonable accommodation'. However, such an expansive interpretation has yet to be tested in the courts.

Section 5 of the *Equality Act* (2003) states:

> In order to promote equal treatment in accordance with section 2(1) 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.

This is a disability-specific provision. It refers to 'reasonable measures' and not 'reasonable accommodation' although both terms are probably coterminous. This obligation is separate from the concept of 'positive action' which is dealt with separately under Section 7 of the Act. Neither the law nor the *traveaux preparatoires* are clear on the question whether failure to provide 'reasonable accommodation' without just cause amounts to discrimination. If so, it would give rise to a claim for 'just satisfaction' under the Act.

Finnish employers are entitled to apply for financial compensation to help defray the costs associated with the provision of accommodation measures under a Decree on *Employment Service Benefits* up to a maximum amount (currently €.1,681.88 per person).

(c) The Definition of Disability.

Finnish anti-discrimination law does not define disability or a person with a disability. Other statutory provisions do contain definitions but they are not adopted directly nor incorporated by reference into the relevant anti-discrimination laws.

France.

(a) The General Coverage of Disability in French Anti-Discrimination Law.

On 14 July 2002 the French President announced that one of his three priority projects for his five year term of office would be to improve the general status of persons with disabilities.

Until recently the main legislative provisions relating to disability outside the non-discrimination field were gathered under four statutes (1) the *Disabled Persons Outline Act* (no. 75-535 of 1975); (2) the *Disabled Persons Employment Act* (no. 87-157 of 1987 – effectively a quota statute); (3) the *Anti-Discrimination Act* (no. 2001-1066 of 2001) and (4) the *Social Modernisation Act* (no. 2002-73 of 2002).

The French Penal Code prohibits discrimination based, *inter alia*, on disability (both real and assumed) in many spheres including employment (Section 225-1). Section 235-2 imposes heavy fines (up to €45,000) and terms of imprisonment (up to three years) for discrimination in the field of employment, the supply of goods and services and any other business, with the possibility of increased penalties if the discrimination is committed in a place where the public is entitled to be present. The defences are rather broad. No allowance seems to be made for the possibility of 'reasonable accommodation'. A defence is permitted on a general health ground.

The French Labour Code was amended to prohibit discrimination on several grounds including 'appearance' (Article L.122-45). The scope of this Article is broad and encompasses recruitment, the provision of courses and training, dismissal and sanctions. Such discrimination is excused if 'inaptitude' is found by a physician owing to the individual's state of health or disability. The possibility of 'reasonable accommodation' is not taken into account. Caselaw on disability is almost non-existent under this section of the Labour Code. More recently, the Labour Code was amended by *Act 2001-1066* to more explicitly bring 'indirect discrimination' within its protective reach.

Discrimination with respect to the hiring of a new employee in public posts is prohibited by Article L. 243-3 of the Social Action and Family Code (the provisions of which will henceforth be incorporated into the 2004 Bill – see below). A defence grounded on the proven 'inability' of the prospective employee is provided for. The notion of 'reasonable accommodation' does not appear to play a direct role in determining 'inability' to perform a job.

Disabled workers enjoy special protection under French law in the event of dismissal and benefit from an extension of the normal period of notice. Early retirement is also available to persons with disabilities on more advantageous terms.

A Bill designed to promote equal rights and opportunities, participation and citizenship for persons with disabilities was passed by the Senate on 1 March 2004. It originated in a proposal presented by the Senate in May 2003 which the Government used as a basis for its draft Bill. The Senate retained carriage of the Bill in light of its expertise in the field. The Bill was examined by the Council of Ministers in December 2003. It was formally adopted by the Senate on 1 March 2004. It was adopted by the National Assembly on 15 June 2004 and returned to the Senate for a second reading. It may be modified slightly before its final adoption and promulgation. It should come into force by January 2005.

The 2004 Bill was adopted against the backdrop of broad consensus and widespread interest. A series of meetings took place in Departments which culminated in a major forum in the UNESCO building in Paris in December 2003. Over 400 amendments were tabled in the Senate. A variety of bodies made substantive inputs to the relevant debates including the trade unions, the National Consultative Commission on Human Rights, and the National Consultative Council for Disabled Persons.

The main objectives of the Bill are to compensate for the consequences of disability, to promote participation in social life as a whole (especially by guaranteeing the accessibility of buildings and access to employment) and to replace the ethic of administrative convenience with that of person-centred service.

In French law medical tests in the employment context play an important role. It is the works doctor who, at the time of recruitment has the task of assessing the capacity of the disabled person to carry out the tasks of the job. If the doctor determines the 'inaptitude' of the person then a failure to hire will not be regarded as discrimination on the ground of disability[36].

The Court of Cassation decided in May 2003 that disabled workers are not obliged to disclose their disability to their employer and reasoned that French law was designed for their protection[37].

(b) The Status of the Obligation of Reasonable Accommodation.

According to Sections R232-1-8 and 232-2-6 of the Labour Code, an employer must adapt the workplace, including canteen and toilets, to accommodate disabled persons. This must not, however, involve disproportionate costs. Grants towards these modifications are available. The physician attached to the enterprise may also recommend adaptations.

Chapter II of Book III of the 2004 Bill entitled 'Employment, Adapted Work and Sheltered Work' (Part I of which is entitled 'Non-Discrimination) begins with a section based on Article 5 of the Framework Employment Directive. The exact wording has been modified several times and is still not final. Article 11 of the Government's preliminary engrafted much of the language of the Framework Employment Directive:

> …In order to guarantee compliance with the principle of equal treatment with regard to handicapped people, employers, in particular the State, pubic State establishments, local communities and their establishments…shall make reasonable adjustments to enable them to access, carry out or obtain or develop in employment or obtain training. The costs related to these adaptations must not be excessive. Financial assistance may compensate for all or some of the expenses incurred in this context by the employer.

After discussing and voting on the various proposed amendments the Senate adopted the following version:

> Employers, in particular the State, local communities and their public establishments, shall take appropriate steps according to the requirements in a specific situation, to enable handicapped workers benefiting from the employment obligation…to access employment or maintain a position corresponding to their qualifications, carry out or develop in employment or obtain training provided that the costs relating to the implementation of these measures are not excessive, particularly in view of the financial assistance which may compensate for all or some of the expenses incurred by the employer in this context.

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36 Labour Code, Article L.122-45.

37 CCass. Soc. No. 1083, 6 May 2003, *Revue de jurisprudence sociale* 8-9/03 p. 733.

The phrase 'reasonable adjustments' was replaced with the phrase 'appropriate steps' at the request of the Council of State as this latter term was deemed both clearer and stricter. Changes or flexibility in working hours are contemplated as an aspect of 'appropriate steps'. The National Assembly added the following:

> …Refusal to take appropriate measures pursuant to the previous paragraph may constitute indirect discrimination….

Specific language was added to acknowledge flexible time arrangements as a form of 'appropriate step' for workers with disabilities. This should not be interpreted as exhausting the range of potential 'appropriate measures'. Interestingly, such flexible working time arrangements are also contemplated as a form of 'appropriate step' for family assistants or those who are close to the persons with a disability. This means that such associates of persons with disabilities are able not merely to invoke the protective coverage of the non-discrimination norms but can also – and in their own right – claim 'appropriate steps' to enable them to assist the person with a disability.

(c) The Definition of Disability.

Section 1 of the 2004 Bill adds a detailed definition of disability to Section L.114-1 of the Social Action and Family Code:

> A handicap, for the purposes of the present law, shall be any limitation or activity or restriction of participation in life in society suffered within his environment by a person doe to a significant, long-term or permanent alteration, in one or more of his physical, sensorial, mental, cognitive or psychic functions, a multihandicap or an incapacitating health problem.

Until recently each Department had its own technical guidance and professional reclassification committee (COTOREP) under the authority of Article L. 323-11 of the Labour Code. The basic function of this committee was to determine whether a disability existed and its degree and to guide the individual toward work in the open labour market (with possible adaptations) or sheltered work (henceforth to be carried out in enterprises called 'adapted firms') accordingly. Under the 2004 Bill a new committee for each Department will effectively provide a one-stop shop for information, support and services for persons with disabilities.

Germany.

(a) The General Coverage of Disability in German Anti-Discrimination Law.

Employment law in Germany is a matter of concurrent competence between the Federal Parliament and the Lander. In practice most employment law in Germany is regulated by collective agreements or by Federal law and relevant case law.

In the social law sphere and at the Federal level, Book IX (2001) of the *Sozialgesetzbuch (SGB)* is designed to provide a legislative basis for the means of achieving self-determination and equal opportunities by persons with disabilities. It was expressly

intended as a measure to transpose the Framework Employment Directive in the disability context. *SGB IX* gathers together and reforms all previously existing rehabilitation laws. According to the legislator's intent, the new SGB is not based on care or charity – but on self-determination and equal participation. In keeping with this new philosophy, rehabilitation benefits are now called Benefits for Participation. Book IX of the *SGB* is based on the *Severely Disabled Act* which preceded it.

Section 81(2) of *SGB IX* contains an anti-discrimination clause covering employment in the case of severely disabled persons. It was intended as a measure to transpose the Framework Employment Directive. It prohibits (but does not define) 'unfavourable treatment' directed towards severely disabled persons in the employment context. It does not explicitly prohibit indirect discrimination. And it only applies for the benefit of 'severely disabled' persons.

A hearing took place on 13 October 2003 in the Federal Parliament concerning the adequacy of Book IX of the *SGB*. Neither the anti-discrimination clause (Section 81) nor the EU Framework Employment Directive attracted much attention. A review report is due at the end of 2004.

SGB IX grants a subjective right of action to the individual (and his/her representative) before the Labour Court. The remedies are generally limited to damages. The amount of damages is limited to a maximum of three months salary. The *BGG* is enforced by ordinary administrative courts. The burden of proof can shift once a *prima facie* case of discrimination has been laid. Organisations can take claims on behalf of persons with disabilities.

Section 81(2) of *SGB IX* defines differential treatment as legitimate if a certain bodily function or mental capacity is a significant and determining occupational requirement for a given job.

In the civil law sphere and at the Federal level, an *Act on Equality of Opportunities for Persons with Disabilities* was adopted in 2002 *(BGG)*. It was designed to transpose Art. 3(3) of the Grundgesetz (Basic Law or Constitution) into civil law. It amends 52 Federal statutes in all. However, Section 7(3) of that Act defers to *SGB IX* in the employment context. That is to say, employment discrimination is still governed by Book IX of the *SGB* notwithstanding the adoption of the *BGG*. The *BGG* does not define compelling reasons which may be a legitimate ground for unfavourable treatment. Other parts of BGG are indirectly relevant in the employment context.

Goal agreements *(Zielvereinbarungen)* can be negotiated between disability NGOs and private actors (including employers) on a range of topics including employment. It is up to the NGOs to negotiate the contents of such agreements. They have the subjective right to demand the commencement of such negotiations although they cannot dictate the outcome.

A Federal Bill on general civil rights *(ZAG)* was proposed but withdrawn in 2002. Although it mainly covered race, its relevant anti-discrimination provisions would have had some reach into the disability sphere. It also contained interesting provisions on incapacity and participation in courtroom proceedings. It was withdrawn because of Church opposition concerning the latitude felt due to religious bodies. After the general election of 2002 the incoming Justice Minister announced that disability would be excluded from the list of covered categories. No new draft Bill has yet been published. The Federal Disability Ombudsman together with German disability NGOs campaigned during the Summer of 2003 for the inclusion of disability into any new draft proposal.

Several German Lander have enacted relevant anti-discrimination laws. In Berlin the *Act on the Right to Equality for Persons with and without Disabilities* was adopted in 1999. The area of employment is not covered in detail in the Act. However, Section 2 (2) provides that the State Legislature and Government have the duty to create conditions that enable people with disabilities to participate in employment. The *Act on the Equalisation of Disabled and Non-Disabled Persons* was adopted in Saxony-Anhalt in 2001. It imposes duties only upon the State. Employment is covered only indirectly. Section 5 (5) provides that vocational integration and the employment of disabled persons in the open labour market have priority over other forms of rehabilitation. The anti-discrimination law of Saxony-Anhalt is to the effect that unequal treatment on the disability ground is justified if it is considered indispensably necessary or is otherwise in the legitimate interest of the disabled person.

The *Act on Equalisation of Disabled Persons* of Rhineland-Palatinate came into force in December 2002. It modifies pre-existing laws and adds new provisions. The sphere of employment discrimination is not directly covered by the new Act. Like the Berlin Act, this Act also directly obliges the public administration to create the same conditions to participate in employment for both disabled and non-disabled persons. The Bavarian *Act on Equalisation, Integration and Participation of People with Disabilities and the Modification of other Acts* was adopted and came into force in 2003. Employment is not covered. The Saarland *Act on the Equalisation of People with Disabilities in Saarland* was also adopted and came into force in 2003. Likewise it does not cover employment. Similarly the *Act on the Equalisation of People with Disabilities* of North Rhine-Westphalia of 2003 does not reach disability in the employment context.

Disabled employees are also given added protection in Germany against dismissal which can only occur with the concurrence of the social welfare office (now called 'Integration Offices'). This protects those already in employment.

It is not required as a general rule to undergo medical tests either to get a job or whilst in employment in Germany. Exceptions cover food processing, minors and the civil service. Employees or prospective employees are obliged to disclose severe disabilities if they could have an impact on the job. If an employee is asked to disclose whether he/she has a severe disability he/she has to disclose that fact even though it may have no direct bearing on his/her capacity to perform the job. The Federal Labour Court justified such a requirement as being necessary in order to effectuate the employment quota regime.

(b) The Status of the Obligation of 'Reasonable Accommodation'.
Section 81(4) of the *SGB* IX confers a subjective right on disabled employees to demand that their employer provide them with a job in which they can utilise and improve their skills and knowledge to the fullest extent possible. In addition, disabled employees have a right to adjusted work sites, work places, work organisation and technical equipment according to their disability-specific needs. This 'right' to 'reasonable accommodation' was already contained in the old *Severely Disabled Act* which preceded *SGB IX*. The individual has the right to be heard by the employer in determining an appropriate 'reasonable accommodation'. In other words, the process of identifying the accommodation must be interactive and individualised. However, any failure to provide 'reasonable accommodation' is not explicitly linked to the concept of discrimination.

A defence of 'undue burden' is available to employers. The relative availability of appropriate State aids and supports can be taken into account in determining whether an 'undue burden' defence can succeed. Failure to provide a 'reasonable accommodation' can give rise to a suit for damages. The duty is not limited to the place of employment – it can cover toilets, kitchen facilities, etc. A defence to the obligation to provide 'reasonable accommodation' arises if it places an 'undue burden' on the employer or if occupational health and safety regulations or civil service law militate against it. An employer may apply for compensation to meet the costs of 'reasonable accommodation'.

(c) The Definition of Disability.
The *BGG* defines disability in terms of a deviation from species and age typical functioning. The *SGB IX* which protects severely disabled people against employment discrimination, defines disability in terms of the severity of disability (set at 50%). *SGB IX* is designed to transpose the World Health Organisation International Classification of Functioning (WHO-ICF)[38] definition of disability into German law.

The anti-discrimination laws of Berlin and Saxony-Anhalt define disability differently; the latter takes more explicit account of social factors and the former is slightly more medical. All definitions go some way toward incorporating the social model of disability

Greece.

(a) The General Coverage of Disability in Greek Anti-Discrimination law.
Several general clauses in the Greek Civil Code could potentially be invoked by people with disabilities to combat discrimination although they were not specifically designed to do so. They deal with, *inter alia*, legal capacity (34/35) and good faith in business practices (281/288) which have been interpreted by the courts to forbid discriminatory

[38] The ICF is available at: http://www3.who.int/icf/icftemplate.cfm

practices by employers and to establish a general duty of care (666). However, no matter how expansively interpreted, these provisions would not appear to fully do the job required of the non-discrimination principles under the Framework Employment Directive.

A Bill on the *Principe of Equal Treatment* was published by the Greek Government in December 2003. The Bill lapsed at the ensuing General Election and was revived (with minor modifications) by the new Opposition in May 2004. No date has yet been set for a debate and it remains unclear if the new Government will table its own new Bill.

While it is not disability-specific, the 2003 Bill nonetheless covers disability. The purpose of the Bill is to lay down a general regulatory framework for combating discrimination on the grounds covered by both Directives with a view to putting into effect the principle of equal treatment (Article 1). The Bill defines equal treatment and discrimination in Articles 2 and 7 more or less in the same terms as the Framework Employment Directive. Equal treatment is stated to mean (Article 2):

> that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1".

Direct discrimination shall be taken to occur under the Bill (Article 7(1)(a)) where:

> one person is, in an illegitimate or unjustified way, treated less favourably than another is, has been or would be treated in a comparable situation.

The reference to 'illegitimate or unjustified' above would appear to allow for a justification for direct discrimination which is not contemplated under the Framework Employment Directive. Indirect discrimination shall be taken to occur under the Bill (Article 7(1)(b)) where:

> an apparently neutral provision, criterion or practice would put persons having (grounds listed, including disability) at a particular disadvantage compared with other persons.

A defence is provided for in the Bill against a charge of indirect discrimination:

> There will be no illegitimate indirect discrimination when, (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary...

A more specific defence is allowed to a charge of indirect discrimination on the ground of disability:

> …or when disabled people are concerned, with regard to measures taken in favour of them under Article 12 [positive action measures] of the present Bill and Article 21.6 of the Constitution[39].

[39] Article 21.6 of the Constitution reads: "People with disabilities are entitled to benefit from measures ensuring their self-sufficiency, professional integration and participation in the social, economic and political life of the Country".

The exemption for genuine and determining occupational requirement is set out under Article 9(1) of the Bill. It repeats the language used in the Framework Employment Directive.

The material scope of the Bill is set out in Article 8 which repeats *verbatim* the wording of Article 3 of the Framework Employment Directive. Article 9 of the Bill enacts the defence of genuine and determining occupational requirement modelled on the language used in the Framework Employment Directive. A specific defence is crafted on the disability ground covering health and safety:

> With regard to disabled persons, the principle of equal treatment shall be without prejudice to the establishment or to maintaining measures on the promotion of health and safety at work or measures aimed at their integration into work or employment.

Harassment is deemed to be a form of discrimination (Article 2(2)). An instruction to discriminate is also deemed discrimination (Article 2(3)).

The Bill purports to establish three new specialised bodies with the task of promoting the principle of equal treatment: Ombudsman (with public sector responsibilities), an Equal Treatment Committee (which will cover neither the public sector nor employment) and a Work Inspectorate (focusing on the private sector and employment). This latter body will be empowered to impose fines. Interestingly, the Bill envisages a fine of between €150 and €9,000 payable to the State and not to the victim.

Article 12 of the 2003 Bill reproduces the text of the Framework Employment Directive with respect to positive action measures. Article 12(2) of the Bill reads:

> With regard to disabled persons, the principle of equal treatment shall be without prejudice to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Likewise, the drafters of the bill seemed to consider that the health and safety measures might constitute part of the positive action matrix.

In the public sector and local authorities, a considerable proportion of vacancies are reserved for individuals with particular disabilities in special occupations such as messengers, night watchmen, cleaners and receptionists. The Bill also reverses the burden of proof by repeating the language used in the Framework Employment Directive.

The Bill purports to enact criminal sanctions against discrimination but only on the grounds of race, ethic origin or religious belief and only with respect to the provision of goods and services.

Under *Law 2643/2002* all compulsorily placed workers (i.e., under the Greek quota system) are examined medically by the Placement Authorities prior to placement in order to prove a disability. The results are considered to be sensitive personal data and protected as such. No disabled worker in the open labour market is obliged to disclose a

disability before recruitment. If asked he/she can refuse to answer provided that the disability does not constitute an obstacle to the performance of the job. The possibility of 'reasonable accommodation' is not expressly provided for. In the public sector all employees have to submit to a medical examination before recruitment. A finding of disability does not preclude them from employment provided the disability does not render them incapable of performing their job related duties. Again, the possibility of 'reasonable accommodation' is not factored into account.

(b) The Status of the Obligation of Reasonable Accommodation.
Article 662 of the Civil Code, which deals with the duty of care on the part of employers, might be interpreted expansively to cover something akin to an obligation of 'reasonable accommodation'. But even if so, it is not 'reasonable accommodation' for the purposes of the Framework Employment Directive and cannot, by itself satisfy the requirements of the Directive.

With respect to the obligation of 'reasonable accommodation' the 2003 Bill (Article 10) adopts *verbatim* the language used in Article 5 of the Framework Employment Directive.

(c) The Definition of Disability.
The 2003 Bill does not contain a definition of disability.

Law 2643/1998 (compulsory placement and quota system) defines disability as
"persons with limited possibilities to find work due to" [various impairments are described]. Although not an anti-discrimination measure, this contrasts with the underlying philosophy of the Framework Employment Directive which is to focus positively on ability rather than negatively on disability.

Ireland.

(a) The General Coverage of Disability in Irish Anti-Discrimination Law.
A high level Government Commission produced a comprehensive Report in 1996 which called for advanced non-discrimination and civil rights legislation in the disability field: *Report of the Commission on the Status of People with Disabilities – A Strategy for Equality*.[40] It received all-party support in Parliament.

Two principle statutes govern non-discrimination law in Ireland: the *Employment Equality Act* (1998) which, as its title suggests, is confined to the employment sphere and the *Equal Status Act* (1999) which prohibits discrimination with respect to the delivery of

[40] A progress report on measures taken to implement the Report of the Commission was issued by the Government in December 1999: **Towards Equal Citizenship – Progress Report on the Implementation of the Recommendations of the Commission on the Status of People with Disabilities** (Dublin, 1999).

goods and services. Both statutes prohibit discrimination on nine grounds which expressly include disability. Following the adoption of both EU Directives in 2000 the Department of Justice issued a wide ranging Discussion Paper in 2002 seeking views on what amendments were necessary to bring Irish anti-discrimination legislation into line.

The *Equality Act* (2004) was adopted by Parliament and promulgated by the President into law on July 19, 2004. It is the main instrument by which the existing corpus of anti-discrimination law is being brought into line with both Directives. That is to say, the *Equality Act* (2004) amends both the *Employment Equality Act* of 1998 and the *Equal Status Act* of 1999 in order to transpose the Directives. Therefore, the principle piece of legislation in the employment context remains the *Employment Equality Act* (1998) as amended.

An important disability law reform Bill has been proposed by the Government and is currently being debated in Parliament (*Disability Bill, 2004).* This Bill is intended to place a range of positive action measures on a clearer legislative footing. It is not directly tied to the non-discrimination corpus of law but it should serve aims to complement it.

The *Employment Equality Act* (1998) has seven Parts; Part I deals with general matters, Part II deals with general discrimination provisions, Part III deals more particularly with gender-based discrimination, Part IV deals with discrimination on non-genders grounds, Part V sets up and tasks the Equality Authority, Part VI deals with equality reviews and action plans and Part VII deals with remedies and enforcement.

The non-discrimination provisions of the *Employment Equality Act* of 1998 apply to (a) access to employment, (b) conditions of employment, (c) training or experience for or in relation to employment, (d) promotion or re-grading, or (e) classification of posts (Section 8(1)). They also apply in the contexts of vocational training (section 12), advertising (Section 10), collective agreements (Section 9), and employment agencies (Section 11). More specific protection against discriminatory dismissals on a number of grounds (which do not include disability) is contained in the *Unfair Dismissals Act* of 1977 and 1993.

Direct discrimination is defined under Section 6 of the *Employment Equality Act* (1998) as occurring where:

> 6(1)…on any of the grounds in Subsection 2 (in this Act referred to as the discriminatory grounds), one person is treated less favourably than another is, has been or would be treated

Subsection 2(g) of Section 6 specifies that disability is included among the prohibited grounds. Allegations of double or multiple discrimination can and have been entertained.[41] The *Equality Act* (2004) amends Section 6(1)(a) of the 1998 Act to the effect that discrimination shall be taken to occur where-

[41] See *Martinez v Network Catering*, DEC-E2002-013 (allegation of employment discrimination on the grounds of gender, disability and race). See also *John Maughan v The Glimmer Man Ltd*, DEC-S2001-020 (allegation of discrimination in admission to pub on grounds of family status, membership of the Travelling community and disability)

(a) a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified [in this Act] which-

(i) exists,
(ii) existed but no longer exists,
(iii) may exist in the future, or
(iv) is imputed to the person concerned.

(b) a person is associated with another person –

(i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and

(ii) similar treatment of that other person on any of the discriminatory grounds would, by virtue of paragraph (a), constitute discrimination.

It follows that a disability that is merely imputed (e.g., facial disfigurement) to the person is covered. The reference to future disability could well embrace a genetic pre-disposition to a disability not amounting to a current disability. And an association with a person with a disability is also covered. Notably, this is not confined to family members.

There are two prohibitions in the 1998 Act against indirect discrimination – one dealing with gender (Section 22) and another dealing with other grounds including disability (Section 31). Essentially, Section 31 prohibits the use of apparently neutral provisions where the use of such provisions would operate to the disadvantage of a group and can in practice can be complied with by a substantially smaller proportion of employees or prospective employees within that group and where such treatment cannot be justified as being reasonable in all the circumstances of the case. There is no necessity to establish a discriminatory intent as such. A proven discriminatory impact is sufficient.

Section 13 of the *Equality Act* (2004) amends Section 22 of the *Employment Equality Act* (1998) and enacts a new definition of indirect discrimination. It reads as follows:

22.(1)(a) Indirect discrimination occurs where an apparently neutral provision puts persons of a particular gender (either As or Bs) at a particular disadvantage in respect of any matter other than remuneration compared with other employees of the employer.

(b) Where paragraph (a) applies, the employer shall be treated for the purpose of this Act as discriminating against each of the persons referred to (including A or B), unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary

In a somewhat convoluted manner, Section 20 of the *Equality Act* (2004) makes it plain that this definition of 'indirect discrimination' applies to all grounds outside the gender and equal pay applications and modifies Section 31 of the 1998 Act accordingly. The net effect is that the above definition of 'indirect discrimination' now applies on the disability ground in the employment sphere.

The *Employment Equality Act* (1998) established two bodies with oversight and enforcement functions. The Equality Authority works under the Act towards the elimination of discrimination, to promote equality of opportunity, and to provide information to the public on a number of matters[42]. It can also assist an individual in bringing a claim before Equality Officers.

A separate office (which is now called the Equality Tribunal) was also set up to handle individual complaints[43]. Officers who are called Equality Officers handle complaints within the Equality Tribunal. Even though it was originally set up under the *Employment Equality Act* (1998), the Equality Tribunal can also entertain complaints under the *Equal Status Act* (1999). The Tribunal acts as a quasi-judicial body. An appeal can lie from a decision of an Equality Officer to the Labour Court[44] with the possibility of a further appeal to the Circuit Court. Allegations of discrimination with respect to pay or dismissals go directly to the Labour Court. Appeals can be made from either the Labour Court or the Circuit Court to the High Court on a point of law[45]. The Circuit Court has been given the power to enforce orders of Equality Officers and of the Labour Court.

Harassment in the workplace is specifically prohibited by Section 32 of the 1998 Act. Section 32(5) defines harassment as including spoken words, gestures or the production, display or circulation of written words, pictures or other material which is unwelcome or could reasonably be regarded as offensive, humiliating or intimidating. An employer may seek to defend its actions on the basis that it "took such steps as are reasonably practicable" to prevent it occurring (Section 32(6). Section 8 of the 2004 Act will replace the definition of harassment and insert a new Section 14(A)(7) in the 1998 Act which will define such unwanted conduct as "acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material." This would appear to make the test of whether harassment occurs an objective one.

Section 14 of the 1998 Act is to the effect that anyone who procures or attempts to procure discrimination or who engages in victimisation is guilty of an offence. This had the effect of rendering the secondary act (procurement) criminal whilst leaving the primary act (discrimination) subject only to civil sanction. Section 3 of the 2004 Act clarifies the law by amending Section 2 of the 1998 Ac to the effect that "discrimination includes the issue of an instruction to discriminate."

Vicarious liability is prohibited under Section 15 of the 1998 Act.

Section 34(3) of the 1998 had previously permitted discrimination against persons with disabilities "where it is shown that there is clear actuarial or other evidence that significantly increased costs would otherwise result. Section 34(3) appears to have been deleted by Section 23 of the *Equality Act* (2004) on the basis that it could not be

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42 http://www.equality.ie/

43 http://www.equalitytribunal.ie/

44 http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/javapage.htm

45 For a link to the general courts system see http://www.courts.ie/home.nsf/lookuppagelink/home

supported under the Framework Employment Directive. Section 34(3) is now re-focused on exceptions dealing with the age ground.

Section 35(1) of the 1998 Act allows for different rates of pay where the person with a disability is restricted in their capacity (productivity) or in the number of hours they can work. Pay is, as such, covered under by the material scope of the Framework Employment Directive (Article 3(1)(c)). Although the substantive thrust of Section 35(1) was not altered by the *Equality Act* (2004) a new safeguard was added to the effect that wage levels must not fall below the national minimum wage.

A person making a claim under the *Employment Equality Act*, 1998, has to present *prima facie* evidence of his/her allegation. Once that proof is laid the burden of proof shifts to the respondent who must rebut the presumption of discrimination by showing that it did not discriminate unlawfully.

Section 37(3) of the *Employment Equality Act* (1998) as amended by Section 25 of the *Equality Act* (2004) sets out the 'genuine and determining occupational requirement' defence under Irish law for all grounds (including disability) except gender. It is to the effect that discrimination shall not arise where, by reason of any the particular occupational activities concerned or of the contexts in which they are carried out-

> (a) the characteristic constitutes a genuine and determining occupational requirement, and
> (b) the objective is legitimate and the requirement proportionate.
>
> [Section 37(2)(a) & (b)].

Section 37(3) as amended by the 2004 Act is now to the effect that it is an operational requirement that members of the civil police force, prison service or any emergency service that:

> persons employed therein are fully competent to undertake, and fully competent of undertaking, the range of functions that they may be called upon to perform so that the operational capacity [of the service concerned] may be preserved.

Section 37(4) as amended by the 2004 Act states that nothing in Part III of the 1998 (which covers disability discrimination in the employment sphere) applies in relation to the Defence Forces.

Section 22 of the 2004 Act amends the saver originally enacted under Section 33 of the 1998 Act for positive action measures. It provides that the non-discrimination norms of the Act shall not render unlawful measures maintained or adopted with a view to ensuring full equality in practice between employees, being measures:

> 33(a) to prevent or compensate for disadvantages linked to any of the discrimination grounds…
>
> (b) to protect the health or safety at work of persons with disabilities, or
> (c) to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment.

Clearly, health and safety measures are contemplated in a positive manner which would be in line with the Framework Employment Directive.

No direct reference is made to medical testing under the *Employment Equality Act* (1998). It could be argued that the use or abuse of information so derived might amount to indirect discrimination. In its 1999 submission to the Government on the possible shape and content of a new *Disability Bill*, the National Disability Authority (which is a policy body with no enforcement powers) proposed that the issue to be given very careful consideration.

(b) The Status of the Obligation of Reasonable Accommodation.

Section 16(1)(b) of the *Employment Equality Act* (1998) is to the effect that employers are not obliged to hire anyone who is not fully competent and capable of undertaking the duties attached to the post. However, Section 16 (2)(3)(a) tempers this consideration by relating it back to the notion of 'reasonable accommodation'. It is to the effect that a person with a disability shall be treated as fully competent if he/she can undertake "any duties" with the assistance of "special treatment of facilities".

More positively put, the obligation on the part of employers to engage in 'reasonable accommodation' (an obligation which was not included in the original Employment Equality Bill) is set out in Section 16 (3)(b) of the *Employment Equality Act* (1998). This Section obligates an employer to

> do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities….

However, as mentioned earlier and as a direct result of a landmark Supreme Court ruling in 1997,[46] a ceiling was placed on the financial exposure of employers in meeting this obligation. Section 16 (3)(c) was inserted in the Act after this judgment to the effect that any cost above a 'nominal cost' is deemed unreasonable. Section 9 of the *Equality Act* (2004) amends Section 16 of the 1998 Act to make it plain that the previous ceiling of 'nominal costs' no longer applies. The current ceiling is that of 'disproportionate burden' which better reflects Article 5 of the Framework Employment Directive. In *A Motor Company v A Worker*[47] the Labour Court took into account the size of the turnover of the company and in this light viewed the expenditure of €450 as purely nominal. The obligation of 'reasonable accommodation' has also been interpreted to apply at the interview stage[48].

The 1998 Act does not distinguish between the 'essential' and marginal functions of a job. It will be recalled that Recital 17 of the Framework Employment Directive adverts to this distinction which can play an important role in the interpretation of the 'reasonable accommodation obligations. Significantly, and even though this important distinction

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46 *Re: Article 26 and the Employment Equality Bill (1996*), 2 I.R. (1997), 321.

47 ED/01/40.

48 *Harrington v East Coast Area Health Board*, DEC – E/2002/001 (January 2002); affirmed by the Labour Court; *A Health Board v A Worker*, ADE/02/7 Determination No 021 (June 2002).

was nowhere mentioned in the 1998 Act, the Equality Tribunal operates as if it is implicit in the law[49].

There has already been some instructive case law on the 'reasonable accommodation' obligation under Section 16 in Ireland. In *An Employee v A Local Authority*[50] it was held by an Equality Officer that the extent of the obligation to engage in 'reasonable accommodation' might vary depending on the overall resources of the employer and more particularly whether it was in the private or public sector. The latter could presumably bear a higher burden.

Also, even though the legislation does not draw any express link between the 'nominal cost' threshold and the receipt of State aids, the Equality Officer found against the employer on the basis, *inter alia*, that it had failed to use available state aids and resources[51].

An interesting illustration of the interaction between an initial determination of incompetence with the possibility of using 'reasonable accommodation' in order to render the worker 'competent' arose in *A Computer Component Company v. A Worker.*[52] In that case a temporary worker who was being considered for a permanent post was sent for a medical examination. The examination revealed epilepsy that was medically controllable. The worker was dismissed even though the doctor's eventual report indicated that his condition might not interfere with the work. In effect, the company was found at fault because there was no individualised assessment of the true range of the abilities of the complainant. The Labour Court denied the employer recourse to the defence of incompetence since it had not fully investigated whether a 'reasonable accommodation' was available. Indeed, this decision drew a distinction between 'minor' and 'non-minor' duties of a post (echoing the notion of 'essential functions' referred to in Recitals 17 to the Framework Employment Directive) and went on to find that the individual could be relieved of the minor duties by way of 'reasonable accommodation'.

In *Mr C v Iarnod Eireann*[53] an Equality Officer held that no 'reasonable accommodation' would have availed a job applicant with depression who was seeking a post as a gate-keeper at a railway level crossing since the post in question was safety-critical. Evidence showed that the prescribed medication might impair vigilance. However, the mere fact that the claimant suffered from depression was not, *ipso facto*, enough of a defence. Further evidence was required to the effect that the depression could in fact directly impact on his capacity to perform the 'essential functions' of the job and, even if so, that no 'reasonable accommodation' could have helped him surmount the relevant obstacles.

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49 See *A Computer Company v A Worker*, Decision of the Labour Court, ED/00/8 (holding that the operation of certain machinery was a marginal part of a job which could be assigned to others).

50 DEC-E/2002/4.

51 Id at para 6.13.

52 ED/00/8 Determination No 013 (July, 2001).

53 DEC E/2003/054.

Cases where breaches of the obligation have been found have included instances such as a failure to fit hand controls to vehicles to enable a worker with a disability to drive a vehicle.[54] In *O v a Named Company*[55] the Equality Officer found that the company had discriminated against O by imposing tasks and adding new requirements to a worker who was returning from extended sick leave without phasing in his return and without asking for his own views. Essentially, the respondent company failed to individualise the process of adapting the workplace to suit the needs of a returning employee who could handle the 'essential functions' of the job.

In *Kehow v Convertrec Ltd*[56] a company was criticised by an Equality Officer for not sending the complainant for a medical examination since its findings would have been instrumental in determining the kind of reasonable accommodation that might be provided to enable the individual to perform his job related tasks[57].

(c) The Definition of Disability.

Section 2 of the *Employment Equality Act* (1998) provides a mainly medical definition but also includes a disability that existed in the past or one which is imputed to a person. Disability means

> 2(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
> (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
> (c) the malfunction, malformation, or disfigurement of a part of a person's body,
> (d) a condition or malfunction which results in a person learning differently from a person with the condition or malfunction, or
> (e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgments or which results in disturbed behaviour,
> and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person.

The reference to existing, previous or imputed disability is noteworthy. Although the definition is squarely medical in orientation, it has not in fact proven to be a barrier to litigation in the way, for example, that the comparable definition under the British *Disability Discrimination Act* (1995) apparently has (see below). It has thus enabled the primary focus to remain on the phenomenon of discrimination.

Italy.

(a) The General Coverage of Disability in Italian Anti-Discrimination Law.

There are many pieces of legislation in Italy dealing with persons with disabilities. Among the more prominent is Framework Law no. 104 of 5 February 1992 on the *Care,*

54 *Bowes v Sourhern Regional Fisheries Board*, DEC E/E/2004/008.
55 EE/2002/153 (November, 2003).
56 DEC – E – 2001/034 ((November 2001).
57 Id at papa 5.12.

Social Integration and Rights of Disabled Persons (modified by Law no 162 of May 1998). This law innovated in the field of social policies directed towards persons with disabilities. It aims at the full participation, social inclusion and the enjoyment of all civil rights by persons with disabilities. Article 18 deals with integration in the world of work. However, this law does not contain a non-discrimination provision.

A separate statute - Law 68 of 1999 - also protects the rights of workers with disabilities and prohibits discrimination against them in the workplace. It entered into force on 17 January 2000. Besides promoting access to work for persons with disabilities through a compulsory employment quota system this law also concerns insertion into the open labour market provided the entity has more than 15 employees. The accommodation of a person with a disability to a job is determined by a medical commission (previously established under Law 104 of 1992) which has the task of making a functional diagnosis and proposing a specific accommodation on the job. It is to be noted that this does not apply in employment entities having less than 15 employees and it is unclear whether the individual in question has a subjective right to require the accommodation and to compel the employer to enter in to an interactive quest for the most appropriate form of accommodation.

Legislative Decree (Decreto Legislativo) of 9 July 2003 (no. 216) was more specifically adopted to transpose elements of the Directive that were judged not already provided for under existing Italian law. It entered into force on 28 August 2003. The aims of the Decree are to define the notion of discrimination (Article 2), to define its sphere of implementation (Article 3) and to provide for judicial enforcement. The norms of the Decree take precedence over the provisions to the contrary contained in collective agreements.

The material scope of the Decree is set out under Article 3(1). It covers access to employment including selection criteria and recruitment, employment and working conditions including promotions, dismissals and pay, access to all types and all levels of vocational guidance, membership of and involvement in any organisation whose members carry on a particular profession including the benefits provided by such an organisation.

The definition of discrimination is modelled directly on Article 2 of the Framework Employment Directive. Article 2 of the Decree distinguishes between direct and indirect discrimination. The prohibition on direct discrimination requires an employers to ignore distinctions on the prohibited grounds which have no bearing on ability to perform the job. Likewise, the definition of 'indirect discrimination' in the Decree (Article 2(1)(b)) is modelled on the wording of the Framework Employment Directive. The Decree does not contain any equivalent to Article 2(2)(b)(ii) (providing a specific defence on the ground of disability in the context of indirect discrimination).

Harassment on the various grounds (including disability) is prohibited by Article 2(1) of the Decree. Instructions to discriminate are prohibited by Article 2(4) of the Decree.

Article 3(2)(c) of the Decree permits exceptions concerning public security, maintenance of public order, the prevention of crime and the protection of health. A 'genuine and determining occupational requirement' is provided for by Article 3(3) of the Decree "in compliance with the principles of proportionality and reasonableness". Article 7(1) of the Decree creates a saver for positive action measures.

The exclusions from the armed forces and police inserted by Article 3(3) of the decree seem wide and do not cross-refer to the possibility of 'reasonable accommodation' to enable persons with disabilities to perform the 'essential functions' of the relevant job-related tasks.

No reversal or sharing of the burden of proof is envisaged by the Decree. Interest groups would not appear to have sanding to initiate proceedings or support them on behalf of the victim of alleged discrimination unless in limited circumstances the victims of the discrimination cannot be identified. The highly specific justifications for discrimination on the basis of age (Article 6) allowable under the Directive appear to have been applied under the Decree across all grounds.

(b) The Status of the Obligation of Reasonable Accommodation.

Under Italian anti-discrimination law there is no obligation to engage in 'reasonable accommodation' as such. Italian law does give employers a right to claim partial reimbursement for expenses incurred in adjusting the workplace. However, this does not confer a subjective right on the part of the employee or prospective employee to require such adjustments or to initiate an interactive process with the employer.

The *Legislative Decree* of 2003 does not contain any equivalent to Article 5 of the Framework Employment Directive.

(c) The Definition of Disability.

Disability does not appear to be defined for the purposes of Italian anti-discrimination law. It was defined under Article 3 of Framework Law no 104 as follows:

> A person disabled is anyone who has a physical, mental or sensory impairment, of a stable or progressive nature, that causes difficulty in learning, establishing relationships or obtaining employment and is such as to place the person in a situation of social disadvantage or exclusion.

Luxembourg.

(a) The General Coverage of Disability Discrimination in Luxembourg Anti-Discrimination Law.

Sections 454 and 455 of the Luxembourg Criminal Code prohibit intentional discrimination based on disability in the employment and other fields. It covers "refusing to hire, disciplining an employee or making an employee redundant" (Section 455(5)) and "subjecting an offer of employment to a [prohibited] condition" (Section 455(6)).

Section 457(2) of the Criminal Code relieves the employer of criminal liability where it refuses to hire or where it makes an employee redundant based on "a certified medical inaptitude" of the party concerned. There is no explicit cross-reference in the law to the role that 'reasonable accommodation' could play in enabling the individual concerned to perform the essential functions of the job. In studying the post and the aptitude of the applicant to fill the post a staff doctor may recommend several options for altering (i.e., adjusting) the post.

Under Article 457 of the Criminal Code there are two defences available to an allegation of discrimination; (1) health and safety motivations and (2) medical inaptitude as certified. The Public Prosecutor has discretion whether to initiate a prosecution which must be done within three years of the alleged incident of discrimination. A victim can potentially intervene before an investigating magistrate to bring an independent cause of action. The punishment is a fine (€250-€25,000) or imprisonment (8 days-2 years). The penalties are higher if perpetrated in the public sector.

Double discrimination based on disability and other grounds is not covered under the Criminal Code. Nor is indirect discrimination based on disability.

A 1997 Government *Action Plan on Disability* indicates that legislation which "guarantees rights, accessibility and non-discrimination [for] disabled people" is necessary. The Luxembourg *Conseil D'Etat* has itself expressed doubts that Luxembourg can meet its relevant international human rights obligations through the exclusive means of the criminal law.

A Bill was proposed by the Government in 2003 to transpose the Framework Employment Directive. The Bill follows the wording of the Framework Employment Directive as closely as possible. It will apply to the benefit of workers, trainees, apprentices, persons engaged in on-the-job-training. Public employees seem to be excluded. The Bill does not add to the remedies already provided for under national law. Article 1(3) of the Bill states that harassment is itself a form of discrimination. The Bill does not exempt the armed forces on the ground of disability.

The Bill confers authority on trade unions to lodge complaints of discrimination "that causes direct or indirect prejudice to the collective interest". Article 7 of the Bill seeks to reverse the burden of proof. Article 8 creates a new protection against victimisation.

In Luxembourg aptitude tests must be carried out by an employer's medical service prior to employment and after absences of more than six weeks. The purpose is to assess the fit between the worker and the job. It can lead to adjustments and re-adaptation of the work environment (Section 22(2)). It is governed by two laws dealing with employment health services and health and safety of workers at work. A refusal to hire based on the results of such a test does not amount to discrimination.

Article 454 of the Criminal Code does not itself require the disclosure of disability although failure so to disclose may expose the worker to civil liability. A law of 1994 lays down four stages of redress when challenging a medical decision of inaptitude.

(b) The Status of the Obligation of Reasonable Accommodation.

Staff or company doctors can certify 'inaptitude' which amounts to a defence to an allegation of discrimination. In the process the staff doctor can indicate alterations to the post to make it better fit the aptitude of the worker. In the event of need, a company doctor may recommend an accommodation to an employer and the employer is then entitled to seek a public subsidy to cover the costs. The employer is obliged to follow the medical assessment "in so far as possible". This works best where the State budget is healthy. This does not, however, confer a subjective right on the part of the employee or prospective employee.

The Luxembourg *Conseil D'Etat* has "consider[ed] that a disabled persons has a right to expect from the State any assistance which he/she needs and to obtain all facilities necessary for his/her professional adaptation."[58] However, this 'right' is qualitatively distinct from the obligation to engage in 'reasonable accommodation' as understood under the Framework Employment Directive.

The 2003 Bill contains language on the obligation of 'reasonable accommodation that repeats Article 5 of the Framework Employment Directive. In addition it proposes additional language to the effect that the burden "shall not be disproportionate when it is sufficiently remedied by the measures contained in the amended Grand-Ducal Regulation of 14 April 1992 which determines the form and content of the measures…" (*cf.* Article 5 of the Framework Employment Directive).

(c) The Definition of Disability.

Disability is not defined for discrimination law purposes under the Criminal Code. It is defined under other legislation dealing, for example, with positive action and quotas. In such legislation reference is made to the reduction in capacity for work (at least 30%). Disability is considered an intrinsic feature of the person. Temporary or reversible disabilities are not considered to be disabilities for the purposes of this legislation. Similarly excluded is a record of previous disabilities or an imputed disability or a propensity toward future disabilities.

The Bill of 2003 does not define disability or persons with a disability.

58 Opinion on law of 12 November, 1991.

Netherlands.

(a) The General Coverage of Disability in Dutch Anti-Discrimination Law.

The *General Equal Treatment Act (AWGB)* of 1994 as amended in 1999 did not prohibit discrimination on the ground of disability[59]. Theoretically, discrimination on the basis of the grounds that are covered by the *AWGB* (religion, belief, political opinion, race, sex, nationality, etc) may indirectly implicate discrimination against persons with disabilities (e.g., discrimination against a disabled woman). And so a complaint on the primary ground of sex might well embrace disability as a secondary effect. So far, however, there has been no case law exploring this possibility.

The so-called 'open-norms' of the Dutch *Civil Code (BW)* may have some impact in reinforcing the role of disabled people in the open employment context but do not squarely emanate from a non-discrimination corpus of law.[60] A number of Dutch laws promote the employability of persons with disabilities which do not amount to non-discrimination laws in the strict sense.

A Bill on *Equal Treatment on the ground of Disability and Chronic Disease* (*WGB h/cz)* was previously introduced in Parliament. Prior to this the Government had already produced *Headlines for a Bill* (*proeve van wet*) whose main aim was to stimulate reflection on whether discrimination legislation was necessary in the disability context. The debate was quickly overtaken by the adoption of the Framework Employment Directive in 2000. The *Act on Equal Treatment on the ground of Disability and Chronic Disease* (*WGB h/cz)* was approved by the Second Chamber of the Parliament in July 2002 and on 15 April 2003 by the First Chamber. It came into force on 1 December 2003. It is meant to transpose the Framework Employment Directive on the disability ground.

The *WGB h/cz* has to be read in light of *EG-Implementatiewet AWGB* which amends the original *AWGB* to transpose provisions common to both the Framework Employment Directive and the Race Directive into Dutch law (i.e., dealing with provisions which apply to all grounds covered by both Directives). The *EG-Implementatiewet AWGB* was adopted by the First Chamber of Parliament in February 2004. It entered into force on 1 April 2004.

The *WGB h/cz* covers employment, vocational training and guidance (Art. 6). Public transport was added to the scope of the law by a Government amendment although the relevant provisions have yet to come into force. The material scope of the *WGB h/cz*, as far as employment is concerned, is now supplemented by provisions in Article II of the *EG-Implementatiewet AWGB* covering recruitment, commencement or termination of the employment relationship, employment and dismissal of civil servants, employment

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59 *Algemene Wet Geliijke Behandeling*, 1994 as amended in 1999.

60 [Art. 7:11, good employers practice; Art. 6(2) with Art.3:12 concept of 'reasonableness'; Art. 6:162, tort; Art. 3:13 on misfeasance and Art. 7:681, unreasonable termination of employment contract].

mediation, employment conditions, education or training prior to employment and promotion.

Article 1(b) of the *WGB h/cz* covers 'direct distinction' on the ground of disability. A defence of 'objectively justified' distinction is allowed with respect to indirect discrimination (Art. 3(2)). Article 1 deals with 'distinction', 'direct distinction' and 'indirect distinction'. The Dutch *Raad van State* advised the Government to use the term 'discrimination' instead of 'distinction'. However, the Government contended that 'discrimination' carried with it unwanted overtones of 'disadvantage' and that the term 'distinction' did not bear any such negative connotation.

Direct distinction is defined under Article 1 (b) as:

> Distinction between persons on the ground of an actual or an assumed disability or disease.

It appears that Article 3 allows for three exceptions to the prohibition against 'direct distinction': (1) distinctions which are necessary for the protection of public security and health, (2) the pursuance of supportive policies for the disabled and (3) positive action measures for disabled people.

Indirect distinction is defined under Article 1(c) as:

> A distinction on the ground of other qualities or acts than those meant by indent 'b' which result in direct distinction.

Article 3(2) provides that such 'indirect distinctions' may be permitted where they can be 'objectively justified'. Proof of intention is not required for 'direct distinction' and, *a fortiori*, for 'indirect distinction'. The reference to 'other qualities' might include, for example, the use of a guide dog.

Unlawful distinctions on the ground of disability are specifically prohibited by Article 4 in the settings of (a) offer and selection of employment, (b) the commencement or termination of an employment relationship, (c) the appointment and dismissal of civil servants, (d) employment mediation, (e) terms and conditions of employment, (f) permitting staff to receive education or training during or prior to employment and (g) promotion.

The vicarious liability of employers is not explicitly covered in the Act.

Articles 9-13 of the *WGB h/cz* provide for legal remedies. Article 9(1) protects an employee against dismissal on the basis of an unlawful distinction and on the basis of victimisation. Article 12 imports the remedies provided under the more general AWGB. A complaint is handled at first instance by the *Equal Treatment Commission (ETC)*. Or the applicant may opt to go immediately to an 'ordinary' court. The advantage of the ETC is that it is a specialised body in the field. The *ETC* may initiate an investigation of its own motion. Under Article 13(2) of the *AWGB* the *ETC* may make recommendations to accompany its findings of 'unlawful distinctions'. The *ETC* is also empowered to

institute legal proceedings with a view to obtaining a declaration of illegality or an order that the consequences of such illegality should be rectified. In addition to the remedies provided for under the *WGB h/cz* taken in conjunction with the *AWGB*, the individual may also invoke the general sanctions of administrative or civil law where relevant

Article 10 of the *WGB h/cz* sets out a 'partially reversed' burden of proof in disability cases. Where the individual can submit facts which can lead to a presumption of distinction, it is for the employer to prove that it has not acted in contravention of the *WGB h/cz*. Statistical evidence would appear unnecessary.

Instructions to make distinctions are prohibited by Article IIA of the *EG-Implementatiewet AWGB* which complements Article 1(a) of the *WGB h/cz.* Harassment is prohibited by Article II,B of the *EG-Implementatiewet AWGB.* Harassment as a form of discrimination can never the justified. Permission for positive action measures complementing those in the *WGB h/cz* are now contained in Article II C of the *EG-Implementatiewet AWGB.* The 'objective justification' test for 'indirect distinction' is now provided for in Article II, C of the *EG-Implementatiewet AWGB.* A victimisation clause has been added by Article II,F.

The use of medical tests is regulated by the *Dutch Medical Examinations Act* (1997). The Act is primarily concerned with privacy and the integrity of job applicants and insurance takers. One of its main provisions is contained in Article 4(1). This provides that a medical examination of a prospective employee may only take place in regard to functions for which special medical requirements must be made. In such circumstances the medical examination must be limited to the purpose for which it is deemed necessary. The employer must inform the future employee about this purpose. In its explanatory comments to the *WGB h/cz* Bill the Dutch Government commented that the prohibition on making 'distinctions' on the ground of disability reinforced the legal protection against unlawful medical examinations.

Any negative use of the medical information that gives rise to a 'distinction' must be justified under the *WGB h/cz.* Article 4(2) of the *Medical Examination Act* is to the effect that the prospective employee must not be asked questions related to past illnesses or absences due to past illnesses. The employee is not precluded from revealing such information if to do so would be necessary to enable an 'effective accommodation' to take place. Indeed, prospective employees are obliged to give information at the pre-employment stage that may impact on their ability to perform the essential requirements of the job. Failure so to disclose may result in an annulment of the employment contract under the Dutch Civil Code (Articles 6:677 in conjunctions with 7:678).

(b) The Status of the Obligation of Reasonable Accommodation.

Article 2 of the *WGB h/cz* is to the effect that the prohibition against 'unjustified distinction' includes a duty to engage in 'reasonable accommodation' unless that would impose a 'disproportionate burden' on the employer. In fact, the *WGB h/cz* does not use the term 'reasonable accommodation' but instead refers to 'effective accommodation'. The intention is to focus on the effectiveness of the accommodation.

The relevant explanatory memorandum accompanying the Act explains what is meant by 'effective accommodation'. First, the accommodation must be both appropriate (in the sense of enabling the person to do the job) and also necessary. Secondly, assuming the accommodation to be both appropriate and necessary, the analysis moves to an assessment of the disproportionality or otherwise of the burden involved. The ensuing balancing exercise is carried out against the backdrop of the 'open norms' of Dutch civil law (i.e., the duty of the notional 'good employer' and 'reasonableness').

The Dutch Government has indicated that it is the responsibility of the employee to discuss the need for an accommodation with the employer. It anticipates a consultative process for determining accommodations to suit the circumstances of each individual. Effective accommodation is not tied to more general positive action measures in the law.

(c) The Definition of Disability.
Disability has not been defined under the *WGB h/cz*. The Government deemed it both unnecessary and undesirable in an anti-discrimination statute.

Portugal.

(a) The General Coverage of Disability in Portuguese Anti-Discrimination Law.
A new Labour Code was adopted by Portugal in 2003 with the specific aim of transposing the Framework Employment Directive: *Law 99: 2003.* It came into force on 1 December 2003. Article 22 of that law states sets out the general prohibition against discrimination:

> (1) All workers have the right to equal opportunities and treatment with regard to access to employment, training, job promotion and working conditions.
> (2) No worker or job seeker shall be privileged or favoured, or discriminated against, or deprived of any right or exempted from any duty, namely by reason of ancestry, age, sex, sexual orientation, civil state, family situation, genetic patrimony, reduced working capacity, disability, chronic disease, nationality, ethnic origin, religion, ideological or political beliefs, and membership of a trade union.

Article 23 of the 2003 Act more specifically prohibits direct and indirect discrimination on the above prohibited grounds. It is also to the effect that a difference of treatment based on any one of the above grounds shall not constitute discrimination if, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Article 23 (3) is to the effect that the burden of proof shifts when facts have been laid from which it may be presumed that there has been discrimination. Harassment on the prohibited grounds is expressly prohibited by Article 24. Article 25 creates a general saver for positive action measures.

Damages may be awarded to the victim of discrimination. The amount awardable will vary depending on the seriousness of the act. Account is taken of the annual income of the enterprise. Associations have the right to act on behalf of, or in support of, the claimants of discrimination. An instruction to discriminate is also prohibited. Victimisation is not covered by the new Code. If a person or legal entity is found repeatedly guilty of discrimination then s/he or it may be liable to additional penalties which may include a ban on competing for a public contract (Article 627).

Law No 48/90 of 24 August, 1990, entitled *The Basic Law on Health* refers to the rights and duties of patients. It deals with special measures for groups in high risk categories including persons with disabilities. It also regulates the use of employment medical examinations, either pre-employment or during employment. Many employers request a medical examination before granting employment and are even required to do so if the job applicant is a minor. All resulting information is deemed personal data. It is reasoned that since job applicants have a right to have their health safeguarded, it follows that medical testing can empower the individual to make more knowledgeable choices before exposing himself/herself to health risks. It is also reasoned that since an employer has a duty to provide safe and healthy working conditions, the results of a medical test can enable an employer to provide a better fit between the applicant and a job. Set against this, Articles 53 and 58 of the Portuguese Constitution prohibits dismissal without just cause. To dismiss an employee who is revealed through medical testing to have a disability and whose disability does not directly impact on the performance of the essential functions of the job would presumably amount to an unjust cause.

(b) The Status of the Obligation of Reasonable Accommodation.

Article 74 of the new Labour Code now states that an employer shall adopt positive action appropriate to enable a person with a disability or a chronic disease, 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. It seems that Article 74 is intended to perform the role of 'reasonable accommodation'. The relevant burden is not to be considered disproportionate when it is sufficiently remedied by legal measures existing within the framework of national disability policy.

(c) The Definition of Disability.

Article 2(1) of the *Basic Law on Prevention, Rehabilitation and Integration of People with Disabilities* (Law No. 9/89) defines a 'person with a disability' as

> a person who, by virtue of the loss or abnormality, either congenital o acquired, of a physiological, intellectual, anatomical structure or function, likely to cause restrictions in capacity, may be considered to be in a disadvantageous position for carrying out activities considered normal taking into account their age, sex and dominant social-cultural factors.

Spain.

(a) The General Coverage of Disability in Spanish Anti-Discrimination law.
A law dating back to 1982 on the Integration of the Disabled (*law 13/1982- LISMI)* contained an early prohibition against discrimination directed towards persons with disabilities in the employment sphere (Article 38(2)). This general statute which embraces services, diagnoses, rehabilitation as well as employment, was inspired by Article 49 of the Spanish Constitution.

Article 4(2)(c) of the Spanish *Statute of Workers' Rights* (1995) prohibits discrimination in the employment context on grounds, *inter alia*, of physical, mental or sensory disability provided "they are able to perform the work or job in question". As originally enacted, it made no reference to the possibility of 'reasonable accommodation' as a way of rendering the individual competent to perform the job.

Article 314 of the Spanish *Criminal Code (Organic Law 10/1995)* penalises those

> who commit serious discrimination in the workplace, public or private, against a persons for reason of…illness or disability…,and that do not re-establish a situation of equality before the law following an administrative sanction or instruction…will be punished with a prison sentence of six moths to two years or a fine of equivalent to twelve months salary.

In May 2003 the Spanish Government submitted to Parliament a Bill entitled *Law of Equal Opportunities, Non-Discrimination and Universal Access for Persons with Disabilities.* It has been adopted as *Law 51/2003.* Its primary object is to give effect to the concept of equality of opportunities for persons with disabilities in accordance with various articles in the Spanish Constitution. Its reach is broader than that of the Framework Employment Directive and spans, for example, telecommunications and the information society, infrastructure and buildings, transportation, the provision of goods ands services, etc. It applies indirectly to the workplace.

Law 62/2003 of 30 December 2003 has, as one of its more specific objectives, the transposition of the two EU Directives into Spanish law. In terms of its formal structure, it is of a type of omnibus statute that is normally used to amend or tidy up amendments to previous laws. Title II of that Act (Articles 27-43) is devoted to diverse measures which includes the transposition of the Directives. Chapter III of Title II is divided into three Sections; the first section deals with general matters (Articles 27, 28), the second deals with discrimination on the ground of race (Article 29-33) and the third section deals more specifically with employment discrimination (Articles 34-43). In the relevant parts, *Law 62/2003* modifies the *Statue of Workers Rights* of 1995 as well as the earlier LISMI of 1982.

Article 28(1)(b)of *Law 62/2003* defines 'direct discrimination' as arising:

> when a person is treated in a less favourable manner than another in an analogous situation for reason of racial, or ethnic origin, religion or convictions disability, age or sexual orientation.

Indirect discrimination is defined by Article 28(1)(c) as arising when:

> A regulation, a conventional or contractual clause, an individual pact or unilateral decision, apparently neutral, can cause a particular disadvantage to a person with respect to others for reason of racial or ethnic origin, religion or convictions, disability, age or sexual orientation, provided that it does not objectively correspondent to an adequate or necessary legitimate end.

Harassment is expressly stated to be a form of discrimination under Article 28(1)(d) of *Law 62/2003*.

Article 34 – which forms part of the third section of Title II on employment discrimination – deals with the non-discrimination prohibition in the following areas: access to employment, affiliation and participation in unions and in business organisations, working conditions, promotion and training, participation in any professional organisation whose members manage a particular profession. Article 34 creates a defence of genuine and determining occupational requirement.

Article 36 modifies procedural labour law to provide for a reversal of the burden of proof. Article 38 inserts a new Article 39 to *LISMI* to redefine the objective of national employment policy in the context of disability. The new national priority is the integration of persons with disabilities into mainstream employment. Articles 42 and 43 deal with the promotion of equality and the production of equality plans on the ground of disability.

A *Law on Occupational Risk Prevention* (Law 31/1995) imposes an obligation on employers to take care of their workers' health through regular physical examinations, depending on the work environment they are exposed to. Physical examinations are normally voluntary except in limited circumstances. The Law prohibits the abuse information obtained as a result of such examinations as the basis for discrimination. Article 25 of the Law requires employees to adopt the necessary preventative and protection measures towards employees with disabilities who are susceptible to identifiable risks connected with their jobs. The Law does not specifically require the worker to declare a disability unless it impacts adversely on the performance of the job. There is no intersection between this aspect of the Law and the possibility of using 'reasonable accommodation' to reduce the risks.

(b) The Status of the Obligation of Reasonable Accommodation.

Law 62/2003 enacts a new obligation of 'reasonable accommodation' into Spanish law. Article 37(2) bis of LISMI as modified by *Law 62/2003* defines the obligation as follows:

> Employers are obligated to adopt adequate measures for the adaptation of the work position and accessibility to the company, according to the necessities of each specific situation, with the result to permit persons with disabilities access to the job, carry out heir work, progress professionally and access training, excluding those measures that impose an excessive burden on the employer.

Factors to be taken into account when assessing whether a burden is excessive are stated to include by Article 37(3):

> To determine if a burden is excessive it must be considered whether the measures, support or public subsidy for persons with disabilities are mitigated to a sufficient degree no matter what the financial costs and other types of measures entail for the size, or volume of total business of the organisation of company.

Failure to comply with the obligation constitutes indirect discrimination.

(c) The Definition of Disability.

Article 7(1) of the LISMI defines a disabled person as:

> For the purposes of this Law, disabled shall mean any person whose ability to assimilate into the world of education, work or society is reduced as a result of deficiency, likely to be [permanent, whether congenital or not, in his physical, mental or sensory abilities.

Again the emphasis is on the deficiencies of the person rather than his/her abilities. This definition was not altered by *Law 62/2003*.

Sweden.

(a) The General Coverage of Disability under Swedish Anti-Discrimination Law.

In Sweden, the main protection against workplace discrimination on the basis of disability was contained in the *Prohibition of Discrimination in Working Life of People with Disabilities Act* (1999). The disability discrimination legislation resulted from the findings and recommendations of a Committee of Enquiry report issued in 1997 entitled "*A Ban on Workplace Discrimination concerning Persons with Disabilities"*[61].

The above 1999 disability discrimination Act complements parallel laws dealing with ethnic discrimination in working life (1999: 130) and discrimination on the ground of sexual orientation in working life (1999: 133). Collectively, these three anti-discrimination laws are known as the 1999 laws. A long-standing *Equal Opportunities Act* deals more specifically with gender discrimination and was itself updated in 2000 (SFS 1991:433).

The office of Disability Ombudsman (HO) is entrusted with enforcement of the 1999 Act (Section 17 of the 1999 Act).[62] The HO was earlier established by the Disability Ombudsman Act of 1994. It is a key public institution for the promotion of equality for persons with disabilities especially in working life. It has the right to investigate complaints concerning discrimination and can represent individuals in employment discrimination cases. After 2003 the HO (together with other ground specific Ombudsman offices) have the right to represent individuals bringing civil action in the

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61 SOU 1997: 176.

62 The office was established by *The Disability Ombudsman Act* (1994: 749) and its role further elaborated in *The Disability Ombudsman Instructions Ordinance* (1994: 949).

courts alleging discrimination in areas outside employment. A new National Accessibility Centre has recently been established as part of the HO[63].

In May 2002 a Swedish Government enquiry submitted proposals entitled '*An Expanded Protection Against Discrimination*' to the Ministry for Integration Issues. The suggested expansion would strengthen the protection against discrimination due to ethnic and religious background, sexual orientation and disability. In the disability context it would take due account of the Framework Employment Directive and also apply the non-discrimination norm beyond employment to include the delivery of goods and services. The enquiry also proposed an expansion of the remit of the HO.

In a separate but related development, a new dedicated Parliamentary Committee was set up in Parliament in 2002 with a variety of ongoing tasks including the making of periodic recommendations on further law reform in the anti-discrimination field where required.

The recommendations of the 2002 Government enquiry were substantially modified by the Government Bill (2002/03:65) *An Expanded Protection Against Discrimination* which now operates to transpose both Directives into Swedish Law. A parallel Act was adopted to expand the non-discrimination norm beyond employment (2003:307). Both the 2002/03:65 and 2003:307 laws went into effect on 1 July 2003. The 2002 Act modifies the pre-existing 1999 Act in the relevant parts.

Direct discrimination under the 1999 Act is defined under Section 3 as follows:

> An employer may not disfavour a job applicant or an employee with a disability by treating her or him *less favourably* than the employer treats or would have treated persons without such a disability in a similar situation, *unless the employer demonstrates that the disfavour is not connected to the disability.*
>
> [italics added].

Section 5 of the 1999 Act defines the material scope of the prohibition against direct and indirect discrimination. The prohibition applies to candidate selection, job interviews, promotion, vocational training, education and vocational guidance, pay and other terms of employment, the management and distribution of work, termination. The 2002 amendments to the 1999 Act make it plain that the relevant non-discrimination rules also apply to practical work experience, training or vocational guidance (Section 2 (a)). So, even though not formally 'employed', such persons will receive the benefit of the 1999 Act as amended. No distinction is made between small or large employers.

The concept of 'less favourable treatment' is therefore a key component in Swedish disability discrimination cases. Direct discrimination can only occur of the situation is similar for the person who considers himself to have been discriminated against and the person who is used for comparison. For a job applicant a similar situation means that they have applied for the same job and basically have the same merits in terms of

63 www.ho.se.

education, experience and personal suitability. A situation is similar if both the disabled and non-disabled each have the capacity to carry out the essential tasks of the job (whether with or without 'reasonable accommodation').

Indirect discrimination is defined under section 4 of the 1999 Act as follows:

> An employer may not disfavour a job applicant or an employee with a particular disability by applying a provision, a criterion or a method of procedure that appears to be neutral but which in practice disfavours persons with a disability when compared to persons who do not have such a disability. However, this does not apply if the provision, criterion or method of procedure can be justified by a reasonable goal and the means used are appropriate and necessary to achieve that goal.

Harassment on the ground of disability is expressly prohibited by Section 4(a) of the 1999 Act. The current prohibition on harassment only applies as between employees. Employers are required to investigate allegations of harassment – failure to do so may give rise to a separate cause of action (Section 9). Reprisals are expressly forbidden (Section 8). The 2002 amendments also expressly prohibit instructions to discriminate (Section 4(b)). Contracts are void if or to the extent that they prescribe or permit discrimination (Section 10).

If the Disability Ombudsman or the individual's trade union brings a case then it is filed directly with the Labour Court. Section 25 specifically enables the Disability Ombudsman to bring an action on behalf of the individual. If the individual brings the case on his own through the use of a private lawyer then the case is filed with the local District Court. It can thereafter be appealed to the Labour Court. Sufficient factual evidence needs to be adduced in order to ground a reason to believe that discrimination has taken place. Thereafter the burden of proof shifts to the employer who must show that the negative treatment had no connection with the disability. Statistical evidence may be used to prove indirect discrimination. Damages can be awarded to the successful complainant. Damages in the order of SEK 200,000 were recently awarded in a case concerning direct employment discrimination against a worker with diabetes whose illness had found not to have impacted on his ability to carry out the essential functions of the job (systems operator on an oil refinery).[64] The Labour Court emphasised that a person has a right to an individualised assessment of their capacity.

A Government Committee recently examined the issue of medical testing to some extent. The inquiry issued a report in 2002 entitled '*Personal Integrity in Working Life*'[65]. The report recounts how rapid changes in IT and medicine have substantially enhanced the employer's possibilities of checking up on employees in different ways. The report asserts that the risk of intrusion into the personal integrity of employees has increased considerably. The Committee asserted that

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64 Labour Court, DOM nr 47/03.

65 SOU 2002: 18.

> …there are no cohesive rules for protection of personal integrity in working life. Nor has any legislation been formulated in this respect taking into consideration technical and medical advances.

Particular attention was paid by the Committee to protect job applicants. The Committee concluded that "there is no acceptable, legally binding protection of the personal integrity of employees". It went on to propose a new law that provides protection for the personal integrity of employees and job applicants.

(b) The Status of the Obligation of Reasonable Accommodation.
Section 6 of the 1999 Act states:

> The prohibition in Section 3 [prohibition on direct discrimination] also applies when an employer upon employment, promotion or training for promotion by providing support and adaptation measures may create a situation for a persons with a disability that is similar to that for persons without such a disability and it may reasonably be required that the employer implements such measures.

The key issue is whether, through such 'reasonable accommodation', the employer can place the employee with a disability into a 'similar situation' as compared with the employee's non-disabled peers. If so, then the obligation arises. Failure to discharge the obligation, when it arises, amounts to discrimination.

Examples of 'reasonable accommodation' (although that term is not explicitly used) are said to include improvements in physical accessibility, the acquisition of technical support, changes in work tasks, time schedules and working methods. The 'reasonableness' of the various measures will vary from case to case depending on factors such as the company's ability to bear the costs, the technical ability of the company to undertake a particular accommodation, the problems or disruption caused to the employer, and the expected length of the employment.

It appears that there is no express link drawn under the 1999 Act between the assessment of the 'reasonableness' of a claimed accommodation and the availability of State aid or assistance. The scope of 'reasonable accommodation' might therefore depend solely on the employer's own resources. Depending on the level of resources available to the employer, the obligation may extend beyond the goal of enabling the employee to perform the 'essential functions' of the job and sweep in such things as employee leisure facilities. The determination of an appropriate accommodation is left to an interactive process between the employee (or prospective employee), the employer and any relevant intermediaries such as trade unions.

The provision of 'reasonable accommodation' is not formally connected by national law to positive action measures. A 'reasonable accommodation' is something the employer must do in certain circumstances while positive action measures in Sweden are measures that may be undertaken but not required.

(c) The Definition of Disability.
Disability under the 1999 Act is defined as:

> [E]very permanent physical, mental or intellectual limitation of a person's functional capacity that as a consequence of injury or illness that existed at birth, arose thereafter, or may be expected to arise
>
> [Section 2].

The latter phrase would apparently refer to future disabilities (i.e., those than might be detected through medical or genetic testing or which are manifestly expected to arise such as the progression from HIV to AIDs). The severity of disability is not an issue. According to the Disability Ombudsman the definition includes multiple sclerosis (MS) and cancer. The limitation on functional capacity must be long lasting. Having a record of a previous disability is not covered. Perceived disability (so-called attitudinal disability) is apparently covered according to the preparatory legislative materials which, in general, can be relied upon by the courts as a guide to the interpretation of Swedish law.

United Kingdom.

(a) The General Coverage of Disability under British Anti-Discrimination Law.
Sex discrimination and racial discrimination were prohibited in 1975[66] and 1976 respectively[67]. From the outset, both fields have their own Government financed independent Commission charged with promoting the cause of non-discrimination within their respective remits.

The *Disability Discrimination Act (DDA)* was enacted in 1995. However, and unlike the situation with respect to sex and race, a specialist Commission on Disability (*Disability Rights Commission* or *DRC*) was not set up until April 2000 on the foot of the *Disability Rights Commission Act*, 1999. The *DRC* works toward the elimination of discrimination against persons with disabilities. It promotes equalisation of opportunities for disabled people and it encourages good practice in the treatment of disabled people. It also has the power to intervene in litigation in prescribed circumstances as *amicus curia*.

Additionally the *DRC* has various express powers of legal enforcement (ancillary to its powers to conduct formal investigations) to compel compliance with non-discrimination notices, to secure and enforce action plans, to enforce agreements entered into under Section 5 *DDA* and to apply to the courts for injunctions. The *DRC* can also initiate a case on behalf of an individual if it considers that an important point of law or principle is at stake.

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66 *Sex Discrimination Act*, 1975.
67 *Race Relations Act*, 1976.

The *DDA* makes it unlawful to discriminate against people with disabilities in the fields of employment, the provision of goods and services and the buying or renting of land within the UK. The anti-discrimination provisions of the *DDA* were extended to the education sector by the *Special Education Needs Act (SENDA)* of 2001. The employment provisions of the *DDA* (Part II, Sections 4-18) came into force on 2 December 1996 and are supplemented by Regulations issued by way of Statutory Instrument[68] (secondary legislation) and by a *Code of Practice: Code of Practice for the Elimination of Discrimination in the Field of Employment against Disabled persons or Persons who have had a Disability*[69]. As secondary legislation the Regulations are legally binding. While not legally binding, failure to follow the Code of Practice can be highlighted in court as an unreasonable practice (Section 51(5) *DDA*).

Enforcement of the *DDA* in the employment context lies before the Employment Tribunal at first instance and subsequently to the Employment Appeal Tribunal and occasionally to the Court of Appeal on points of law. Under Part II of the *DDA* any individual experiencing employment discrimination can apply to an employment tribunal alleging discrimination provided they do so within 3 months of the act in question. Legal aid is not available (although free or subsidised legal advise and assistance short of representation is). Applicants can require, under the *DDA* (Section 56), that the defendant employer fill out a detailed Statutory Questionnaire similar to those used in sex and race discrimination cases in response to an allegation. A case can be referred to independent arbitration and conciliation service known as ACAS.

The Employment Tribunal has several options in the event of a finding in favour of the applicant including making a declaration that discrimination has occurred, a power to make recommendation to the effect that there is no future recurrence of the discrimination and a power to award potentially unlimited compensation, plus interest, which may include, where appropriate, compensation for 'injury to feelings'. The DRC will occasionally take a case on behalf of an individual when it considers that an important point of law or principle is at stake. The burden of proof in establishing liability rests with the applicant on the *balance of probabilities.*

In general terms, the concept of equality in the U.K. has been one of equal opportunities rather than one or equal outcomes. However, the *DDA* is built around the concept of reasonable adjustment which is discussed below. The concept creates a duty to secure acceptable inclusive outcomes. Interestingly, some disability discrimination cases feature both the European Convention on Human Rights (absorbed into British law by the Human Rights Act of 1998) as well as the *DDA*.

Under the *DDA* it is unlawful for an employer to discriminate against a disabled person in the pre-employment stage by arrangements made to determine to whom s/he should offer

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[68] Two such Regulations are relevant; *The Disability Discrimination (Meaning of Disability) Regulations 1996*, SI 1996/1455 and *The Disability Discrimination (Employment) Regulations 1996*, SI 1996/1456.

[69] The Code is available at http://www.drc-gb.org/uploaded_files/documents/2008_227_copemployment.rtf

of employment, in the terms on which s/he offers employment, and by refusing to offer, or by deliberately not offering employment (Section 4 *DDA*). Whilst in employment, the employer is forbidden to discriminate against disabled persons in the terms of employment, in the opportunities afforded to the employee for promotion, transfer, training, or other benefits, by refusing to make available, or deliberately not making available, any such opportunity, or by dismissing the employee, or subjecting them to any other detriment.

Discrimination is defined first as arising under the *DDA* if, for a reason related to the disabled person's disability, an individual treats that person less favourably than s/he treats others to whom that reason does not, or would not apply and, s/he cannot show that the treatment in question is justified (Section 5(1)(a)&(b)). This covers direct discrimination but does not extend to indirect discrimination. In determining whether 'less favourable' treatment' has occurred a very simple comparator is needed. Case law has emphasised the distinction between the approach to sex and race discrimination and has clarified that the relevant test is

> (1) what was the material reason for the unfavourable treatment,
> (2) does the reason relate to disability and
> (3) if so, would the employer have treated someone else, to whom the material reason does not apply, in the same way[70].

The defence available against a proven charge of 'less favourable treatment' under the British *DDA* is that such treatment is 'justified'. The Code of Practice stresses that the justification should be both "material and substantial" (para 6.10). But there will be no justification if there is a breach of the duty to make reasonable adjustments. Additionally there is a concept of less favourable treatment discrimination.

Employment for the purposes of the DDA means employment under a contract of service or of apprenticeship or a contract personally to do any work. The DDA, as originally enacted, did not apply to employers with less than 20 employees (subsequently reduced to 15 in 1998), prison officers, fire-fighting members of the fire brigade, serving members of the naval, military or air force, statutory office holders (members of the police, judiciary), specialist police forces (e.g., British Transport Police), employees working mainly outside Great Britain, employees working on board ships, aircraft or hovercraft.

An employer may be vicariously liable for the discriminatory acts of an employee if these acts are committed during the course of their employment (Section 58). The DDA does however provide a limited defence if the employer can show that it took reasonably practicable steps to prevent that employee from committing the unlawful act. Vicarious liability may be shared with another person who knowingly aids in the commission of an unlawful act of discrimination. An example might be a personnel manager who, aware of the firm's discriminatory acts or intentions, colludes in their perpetration. Such an individual might be able to escape liability if they can show that they relied on a

[70] *Clark v Novacold* [1999], ICR 951.

statement by the offending party to the effect that the act or omission did not amount to a violation of the DDA. It must of course be reasonable in the circumstances to rely on such a statement. To knowingly or recklessly make such a statement which is false or misleading in a material respect is itself a criminal offence.

There have already been several hundreds of reported cases on the DDA[71]. Research has shown that the success rates in DDA litigation were quite low in its first four years. However, both the rates of success and the levels of compensation ordered have increased dramatically in recent years. In 2001 a total of Stg£1,181,621 was paid out in compensation – an 85% increase on 2000. The average award in a disability discrimination case is now significantly higher than in a sex or race discrimination case.

Even before the adoption of the Framework Employment Directive in 2000 the British Government appointed a *Disability Rights Taskforce* to advise it on how best to secure comprehensive and enforceable civil rights for persons with disabilities and, to that end, review changes needed in the DDA. The *Taskforce* issued a major report in December 1999; *From Exclusion to Inclusion*[72]. The Government's response to the *Taskforce* Report and to the various recommendations contained therein with respect to the *DDA* was published in March 2001 in a report entitled *Towards Inclusion – Civil Rights for Disabled People*[73]. Further legislation was promised to build on and expand the *DDA.*

Following the adoption of the Framework Employment Directive the UK Government published a major consultation document concerning its appropriate transposition into British law: *Towards Equality and Diversity – Implementing the Employment and Race Directives*[74]. The consultation period on this document ended in March 2002. It received over 1,050 submissions in all. In the consultation document the Government stated:

> We are ending the exemption of small employers from the DDA in October 2004, and also propose to make the other changes to the DDA required by the Employment Directive at the same time. These will include ending the other occupational and employment exemptions and omissions from the DDA mentioned in *Towards Inclusion*.

Having received and analysed the response from the consultation process, the UK Government published two more documents; *Equality and Diversity – the Way Ahead*[75], and *Equality and Diversity – Making it Happen.* These documents set out the Government's strategy with regard to the transposition of the Directive. It was the stated intention of the British Government to amend the DDA to bring it into line with the Framework Employment Directive by way of Regulation. To this end, the Government published in the Autumn of 2002 *(Draft) Disability Discrimination Act 1995 (Amendment) Regulations 2003* accompanied by *Explanatory Notes* and *Supplementary*

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71 The Disability Right Commission maintains a digest of case law at: http://www.drc-gb.org/thelaw/legalcases.asp?showfulllist=true

72 Taskforce Report available at http://www.disability.gov.uk/drtf/full_report/

73 Copy available at http://www.disability.gov.uk/drtf/towards_inclusion/

74 Copy available at http://www.dti.gov.uk/er/equality/consult.pdf

75 Available at http://www.dti.gov.uk/er/equality/wayconsult.rtf

Questions[76]. Feedback on the Draft Regulations was invited by the end of January 2003. The Regulations were approved by Parliament in July 2003 and will come into effect on 1 October 2004 (now the *Disability Discrimination Act 1995 (Amendment) Regulations*, (2003))[77].

With respect to the transposition process, the British Government took the view that the *DDA* needed to be amended as follows. First, to rule out any justification for direct discrimination. Second, to clearly prohibit harassment against persons with disabilities. Third, to bring currently excluded employments within the coverage of the *DDA.* It is estimated that this will extend the coverage of the *DDA* to another seven million people. Fourth, to make instructions to discriminate on the ground of disability unlawful. Fifth, to provide that collective agreements that discriminate on the ground of disability are null and void. Sixth, to clarify rules on the burden of proof. Seventh, to require 'reasonable adjustments' in the context of indirect discrimination save in a few limited circumstances where the 'objective justification' test will apply.

Parallel to this process a Private Member's Bill sponsored by Lord Ashley of Stoke also worked its way through the UK Parliament. Although it passed the Committee Stage in the Lords in March 2002 and has passed its Second Stage in the Commons it is unlikely to become law since it does not have the support of the Government.

In October 2003 the Government announced its decision to replace the three existing equality bodies (sex, race and disability) with a single or unified *Equality and Human Rights Commission*. In May 2004 a White Paper was published by the Government setting out its detailed proposals in this regard: *Fairness for All – A New Commission for Equality and Human Rights*[78].

The 2003 *Regulations* introduce significant modifications to the defence of 'justification' with respect to direct discrimination to bring the *DDA* more into line with the Framework Employment Directive. The revised Section 3A(3) of the *DDA* will make it clear that 'less favourable treatment' cannot be justified if it occurs merely because an individual has a disability (inserted by Section 4 of the *Regulations*). It will be justified only if "the reason for it is both material to the circumstances of the particular case and substantial". Blanket bans on certain occupations for categories of persons with disabilities will not be permissible. The *Explanatory Notes* to the *Draft Regulations* give the following illustrations of the amendment in action:

> (a) an employer, on learning that a job applicant has diabetes, summarily rejects the application without giving any consideration of the applicant's circumstances or whether the person concerned would be competent to do the job (with or without reasonable adjustment),
> (b) a disabled employee is refused access to the employer's sports and social club simply on the basis that the club does not allow disabled members, and without any consideration of whether the employee might benefit from membership, and even through they could access the club with reasonable adjustment,

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76 www.dti.gov.uk/er/equality/index.htm.
77 Statutory Instrument (S.I.) 1673, 2 July 2004.
78 Available at http://www.dti.gov.uk/access/equalitywhitepaper.pdf

(c) without any consideration of whether he will be able to work for as many years as other employees, a newly recruited disabled person is required to pay the same contributions to an occupational pension scheme even though he is denied access to ill-health retirement benefits available to other members of the scheme.

The DRC published its own first full review of the DDA in 2003. Among its key proposals for reform in the employment context were the following; that persons with HIV should be deemed disabled from the moment of diagnosis, that persons with cancer should be deemed disabled from the moment that a diagnosis is made that it will require substantial treatment, that all progressive conditions should be covered, that receipt of specific state disability benefits should automatically allow the applicants to be deemed to be disabled, that the list of 'day to day activities' should include 'the ability to communicate with others', that the requirement that a mental illness should be 'clinically well recognised' should be removed, that the 12 month period should be reduced to 6 in the case of those with depression, that discrimination 'based on association' with a persons with a disability (e.g., carers) and other 'volunteers' (e.g., those volunteering in a hospice) should be included, that tribunals should be able to order reinstatement or re-engagement, that disability specific enquiries prior to a job offer should be permitted in only very limited circumstances, that the armed services should in principle be covered, that employers should be oblige to remove anticipatable access barriers in advance of any individual coming forward and claiming the same, that less favourable treatment should only be justifiable where a person is shown not to be competent, capable or available to perform the essential functions of the job even after allowing for 'reasonable adjustments.'[79]

Building on the transposition process and delivering on its commitment to achieve civil rights for persons with disabilities, on 22 January, 2003 the British Work and Pensions Secretary (Andrew Smith MP) announced his intention to publish a new draft *Disability Bill*. He stated that it would represent a further "and very major step to…[extend] rights and opportunities for disabled people". It will include new measures recommended by the *Disability Rights Taskforce*, extend further the duties on service providers and provide a legislative basis for Regulations to transpose the Framework Employment Directive. The definition of disability is to be widened.

The Government Bill was in fact published in late 2003. Among it more notable clauses in the general employment context are the following: Clause 1 will amend the *DDA's* new provision on discriminatory job advertisements (section 16B, as inserted by the Amendment Regulations) and will cover a third party who publishes a discriminatory advertisement (for example, a newspaper) as well as the person placing the advertisement; Clause 2 will amend the *DDA* to ensure that discrimination by an insurer in relation to group insurance provided to the employees of a particular employer is covered by sections 19 to 21 of the Act; Clause 8 will introduce a new duty on public authorities which will require them to have regard to the need to eliminate unlawful discrimination against and harassment of disabled persons, and to promote equality of opportunity for such persons; Clause 11 will make a chief officer of police vicariously

[79] The Latest DRC Monitoring Report (2004) is available at http://www.drc-gb.org/publicationsandreports/_Toc73852391

liable for acts of discrimination committed by police officers in the course of their employment where these are unlawful under Part 3 of the Act; Clause 12 will deem people with HIV infection, multiple sclerosis, or cancer to be disabled for the purposes of the *DDA.*

There are no quotas in operation in the United Kingdom, the previous quota having being deemed a failure and abolished by the DDA. Similarly, there are no affirmative action programmes as such for disabled people. There are however a number of positive assistance measures to prevent or compensate for disadvantages linked to disability in force in the UK in the employment sector in addition to the 'reasonable adjustment' provisions of the DDA including a *Job Introduction Scheme (*to give a disabled worker time to demonstrate his abilities to an employer), an *Access to Work Scheme* (meets the cost of aid or equipment in the workplace), *A Work Preparation Scheme* (individually tailored work preparation), a *Disabled Person's Tax Credit* (means-tested benefit to enable lower-income disabled workers gain employment), *Disability Living Allowance* (living and mobility allowance*), Residential Training for Disabled Adults* (residential training for disabled workers with complex needs) and *WORKSTEP* (supported employment).

(b) The Status of the Obligation of 'Reasonable Accommodation'.

Under the *DDA* employers are required to provide 'reasonable adjustments' to disabled employees whether actual or potential (Section 6). The obligation arises whenever any physical feature of the premises, or any arrangement made on or on behalf of an employer, place the disabled person concerned at a substantial disadvantage in comparison with those who are not disabled. In these circumstances the employer must take such steps as can be considered reasonable in order to prevent those features or arrangements from having that effect. While the employee is not obliged to reveal a disability, the obligation on the part of the employer with respect to the provision of 'reasonable adjustments' only arises when the disability is made known.

Typical 'reasonable adjustments' under the *DDA* include making physical adjustments to premises, re-assigning 'non-essential' duties of the job to other employees, flexible working hours, acquiring or modifying equipment, modifying procedures or reference manuals, modifying procedures for testing and assessment, providing a reader or interpreter and providing supervision (Section 6(3) *DDA*)[80].

Among the factors to be taken into account in determining whether a claimed 'adjustment' is 'reasonable' the *DDA* lists the following; a consideration of whether the preventative effect of the action will achieve its goal, whether the proposed adjustment is practicable, the financial and other costs that will be incurred, whether financial or other assistance is available to the employer to offset the costs[81], the disruption posed to the employer's activities [see Section 6 DDA].

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80 See also 4.12-4.34 of the Code of Practice and Section 17 of the 2004 Regulations.

81 British employers faced with expensive work adaptation measures may have recourse to the *Access to Work* scheme under which they can receive an unlimited grant toward the cost of 'reasonable adjustments' to premises over a five year period.

In meeting the costs of 'reasonable adjustments' employers may well have recourse to the *Access to Work* Scheme under which they can receive a potentially unlimited grant towards such costs.

Failure to comply with the obligation is deemed to be discrimination (Section 5(2) *DDA*) and a failure to make a reasonable adjustment will also mean that less favourable treatment type discrimination cannot be justified.

(c) The Definition of Disability.
Section 1 of the *DDA* defines a disabled person as:

> a person who has a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

Normal day-to-day activities include mobility, manual dexterity, physical coordination, the ability to lift, carry or otherwise move everyday objects, hearing or eyesight, memory or the ability to concentrate, learn or understand, the perception of the risk of danger. The 'adverse' effect must also be long-term, that is, having lasted for at least 12 months, or the period that it can reasonably be expected to last is at least 12 months or the rest of the person's life (whichever is the shorter).

Thus the focus is on what the individual cannot do as opposed to what they can do. So fare, cases involving acute vertigo, chronic pain in the legs and feet induced by fallen arches, transient epileptic fits, a sight loss in one eye, back strain with a continuing ability to carry out light duties and rheumatoid arthritis in the absence of independent medical evidence have all failed the test of having a substantial adverse impact upon normal day-to-day activities. Increasingly it is the practice for tribunals to hear medical evidence as to whether an impairment objectively exists. The determination of whether the impairment is 'substantial' remains a question of fact for the tribunal alone to determine.

Mental impairment is not as such defined under the *DDA*. The Act does states that if the mental impairment results from mental illness then the disability will only be established if it is 'from, or consisting of, a mental illness that is clinically well recognised' in the WHO's International Statistical Classification of Diseases and Related Health Problems (ICD – not to be confused with the ICIDH and, more lately, the ICF).

Progressive conditions such as HIV (which have 'some but not yet substantial' adverse effect) are covered by the Act. Conditions that are corrected or medically controlled are also covered (with the exception of sight impairment correctable by spectacles or contact lenses). Severe disfigurement is also covered even if the disfigurement itself does not itself amount to a disability (with the exception of disfigurement caused by oneself, e.g., body piercing,). The rationale for this inclusion is that others are prone to react to the person with such disfigurement *as if* that person were disabled. Those who are already registered as 'disabled' under different Government or local Government schemes do not, *ipso facto,* qualify as disabled for the purposes of the *DDA*.

Part 4
The Main Challenges Ahead.

The purpose of this Part is to summarise the current situation with respect to the transposition of the Framework Employment Directive on the ground of disability and to indicate where continuing challenges remain.

1. Focus on Ability – the Key Message of the Framework Employment Directive in the Disability Context.

At the level of ideas, the significance of the Framework Employment Directive is that it marks a decisive shift toward using the language and tools of civil rights – especially non-discrimination law - in the disability context in Europe.

More particularly, it forces a consistent focus on the person behind the disability. Indeed, it does not so much focus on disability as on ability and on ways and means of creatively using anti-discrimination law to create space in the labour market in order that the abilities of all persons regardless of disability can find expression.

This innovation is startling given the history of the dominance of social provision in the field. The way in which disability is handled under constitutional law in the Member States gives a hint of just how novel this new orientation is. It also conveys a sense of just how powerful is the undertow of traditional social policy in the disability field. The preponderance of constitutional provisions that deal expressly with disability tend to fall under the heading of general social provision or specific social rights. Disability rarely gets an express mention in the relevant equality clauses (with the notable exceptions of Germany, Finland, Austria). In the few cases that have reached Constitutional Courts it is obvious that the courts are only at the beginning of a process of coming to terms with a civil rights framework of reference in the disability context.

The danger or temptation, as always, with all hitherto neglected groups is to assume that their segregation is natural. Thus, the fact of that persons with disabilities have been absent from the mainstream for a long time might be mistaken as a social prescription against mainstreaming and in favour of segregation. It is to be seriously questioned whether a *de facto* or *de jure* policy of 'separate but equal' (e.g., segregated employment policy) really meets the requirements of equality. The spirit of the Framework Employment Directive cuts in exactly the opposite direction at least in the field of employment – namely towards inclusion and mainstreaming and the anchoring of disability within a civil rights context. Indeed, the Framework Employment Directive seems to fit with – if not motivated by - the key sentiment expressed in the Green Paper on European Social Policy mentioned at the outset of this Study:[82]

[82] Green Paper, **European Social Policy – Options for the Future**, COM (93) 551.

> Social segregation, even with adequate income maintenance and special provision, is contrary to human dignity…[83]

All Member States have highly developed social programmes in the field of disability. In general, these programmes play a positive and largely successful role in priming people to enter and remain in the labour market.

The advent of the anti-discrimination idea should not be seen as the bearer of an obsessively individualist philosophy that is intrinsically at odds with these programmes. Rather, the advent of the civil rights model should best be seen as something that can refresh the European social model in the disability context by placing (or restoring) due emphasis on individual ability and merit and by conferring subjective rights on the person to enter and remain in the mainstream.

The Framework Employment Directive is careful to create space for such positive action measures and thus for the synergy than can and should emerge between the two sets of norms (Article 7 (1)). Most positive action measures assume some level of ability and individual merit and leverage public policy to overcome inherited obstacles and create space for ability.

A principled debate has yet to take place on the question whether some types of positive action (e.g., reserving certain categories of low level jobs for certain categories of persons with disabilities) are fully compatible with the spirit if not the letter of the Framework Employment Directive since they seem to either deny ability altogether or telescope it excessively narrowly toward pre-determined jobs. It would appear that there is space for such a debate despite the apparently open-ended language of Article 7 (1).

However, whatever else it is, positive action is not anti-discrimination. The broad range of positive action measures currently in place have a use. But the mere existence of these measures does not satisfy the need for non-discrimination legislation covering disability under the Framework Employment Directive.

2. Challenges Ahead in Refining Anti-Discrimination Legislation to Implement the Framework Employment Directive.

Most Member States have either enacted fresh law or have amended their existing anti-discrimination law to cover disability. This fact alone is in itself remarkable. What follows from the analysis provided in Part 3 is a set series of challenges that remain which need to be met order to maintain this positive momentum.

(a) The Challenge of Moving away from a Literal Transposition of the Directive.

The Framework Employment Directive, *qua* Directive, is sensitive to the need to respect legal differences between the Member States. Notwithstanding this discretion, some Member States have copied elements of the Framework Employment Directive *verbatim* into their laws. However, it is to be questioned whether a simple copy of the terms of the

[83] Id. at 48.

Directive or some of its key obligations is sufficient to marry its requirements with local legal circumstances. This is particularly true in the context of disability where clarity is needed on the exact implications for the norms of the Framework Employment Directive in the context of domestic law.

(b) The Challenge of using Criminal Law to Complement but not to Substitute for Civil Anti-Discrimination law.
Many Member States make use of the criminal law to prohibit discrimination. The use of the criminal law is powerfully symbolic in the disability context since it harnesses the coercive apparatus of the State behind the fight against discrimination.

However, the standards of proof in criminal law are generally higher with no possibility for reversing the burden of proof. By definition, the criminal law will only reach intentional discrimination and cannot be used to get at systemic or indirect discrimination. Furthermore, criminal law does not generally enjoin positive action such as 'reasonable accommodation' which is arguably the single most important element in the Framework Employment Directive from a disability perspective. The penalties are generally high in the criminal system rendering it less likely that prosecutions will be successful and indeed less likely that they will be brought in most 'ordinary' cases. The ain purpose of criminal law is to sanction behaviour but not to provide remedies to individuals. The criminal law does not generally confer subjective rights.

In short, the criminal law is a useful complement to civil anti-discrimination law but it does not substitute for it and does not, on its own, satisfy the requirements of the Framework Employment Directive.

(c) The Challenge of Bringing Definitions of Direct and Indirect Discrimination into closer alignment with the Directive.
There is a clear need in some Member States to continue to bring the definitions of direct and indirect discrimination as well as the provision for defences more closely into line with the Framework Employment Directive. It bears emphasising that the Framework Employment Directive does not allow for any defence to direct discrimination on the ground, *inter alia,* of disability.

(d) The Challenge of Clearly Distinguishing the 'Essential Functions' of the job in Law.
Very few anti-discrimination statutes analysed in Part 3 above distinguish between the 'essential functions' of a job and its other more marginal functions. This is surprising given the prominence that term receives in the Recitals and in the explanatory documentation accompanying the Commission's original proposal. Its absence in the legislation may well hamper the search for appropriate 'reasonable accommodations' tailored to ensure that employees can perform the major components of a job. And its absence may allow too broad a discretion on the part of the employer to seek and use the results of medical tests that may indeed reveal a disability (or future disability) but in circumstances where the disability may not in fact impact negatively on the individual's capacity to perform the 'essential functions' of the job. Greater legislative attention to this distinction would appear to be required.

(e) The Challenge of Framing a Definition of Disability that Keeps the Focus on Discrimination.

With respect to the definition of disability it is interesting to note that some Member States have opted not to define it for the purposes of non-discrimination law. This approach would certainly be in keeping with the spirit of the Framework Employment Directive which is to shift the focus of attention away from the peculiarities of the person and toward tackling the phenomenon of discrimination.

It is surely worthy of note that Article 2 of the Directive prohibits discrimination on the 'ground' of disability and not against 'persons with disabilities'. This should underscore the need to focus on discriminatory behaviour rather than on the taxonomical question of who is or is not disabled for the purposes of the Directive. There is, however, some cause for concern that the definitions actually in the various statutes adopted might impede a consistent focus on discrimination.

At any event, it would certainly be consistent with the underlying purpose of the Framework Employment Directive to apply, or interpret, general definitions of disability to include those with a record of a disability (e.g., former victim of a heart attack). If knowledge of their record of disability is widely available it is possible that they may become the victim of 'discrimination' on the ground of disability. It would also be consistent to include within the definition those who are susceptible to acquire a future disability (revealed for example through medical or genetic testing). Likewise, if this knowledge is freely available then there is a standing temptation to refuse to hire such an individual notwithstanding the fact that the future disability might have no bearing on his/her capacity to perform the essential functions' of the relevant job. Indeed, it would also be consistent with the spirit of the Framework Employment Directive to cover those who do not have a disability but who are treated by others as if they do (e.g., persons with facial disfigurement).

It would also seem consistent with the Framework Employment Directive to include relevant third parties (e.g., parents or carers) within the protective embrace of the relevant non-discrimination norms since such persons are also likely to be the victims of discrimination.

(f) The Challenge of Adequately Providing for the Obligation of 'Reasonable Accommodation'.

The concept of 'reasonable accommodation' lies at the very heart of the civil rights advance in the context of disability. In the past, Member States have little difficulty in grasping the reality that some positive action is needed to create space for the ability of disabled persons in the labour market. Yet, most such positive action measures are conceptualised as wholly distinct from non-discrimination law.

The Framework Employment Directive requires that an obligation should be placed directly on the employer to accommodate the ability of a person with a disability. This obligation flows from the logic of direct and indirect discrimination (Articles 2(2)(a) and

2(2)(b)(ii)) and also directly from Article 5. This obligation is not without limits and does not apply if a 'disproportionate burden' arises (Article 5). In assessing whether a 'disproportionate burden' arises account must be taken of the availability of State aids.

It is important to emphasise that this obligation is not wholly new in the anti-discrimination field.[84] Whatever its true provenance, this obligation is not currently well catered for in European anti-discrimination law in the context of disability and employment. This gap is crucial. For example, much of the statute law examined does not draw a sufficiently explicit link between the failure to provide 'reasonable accommodation' and non-discrimination. That is to say, there does not appear to be a uniform approach adopted whereby a failure to provide for 'reasonable accommodation' would be deemed to amount to discrimination. Failure to expressly and unambiguously draw the link could undercut the main value of the non-discrimination model in the disability context. Furthermore, the linkage between 'reasonable accommodation' and available State aid does not tend to be sufficiently drawn in much of the legislation examined. This matters. Accommodations that are *prima facie* 'unreasonable' with respect to a particular employer may well become 'reasonable' when the availability of State aid is factored in.

The various kinds of 'reasonable accommodation' possible (e.g., modifying plant, modifying individual workstations, reassigning 'marginal functions, flexible work arrangements, etc.) do not appear to be clearly differentiated in much statute law. This is important since such accommodations do not simply refer to accessible physical plant. The importance of individualising the search for a 'reasonable accommodation' and the absolute necessity for an interactive dialogue between the employer and the employee or prospective employee is likewise poorly provided for under the relevant statute law.

In short, the treatment of this core obligation of 'reasonable accommodation' would appear to require much more detailed legislative provision in many Member States.

(g) The Challenge of Ensuring that Medical Testing (including Genetic Testing) is brought clearly within the embrace of Anti-Discrimination law.

It is clear from the analysis in Part 3 that the whole area of pre-employment medical testing (including genetic testing) deserves much more careful analysis and regulation. Law and policy in many European countries seems to incline in favour of requiring such tests – and implicitly mandate a waiver of privacy rights over the disclosure of sometimes completely irrelevant impairments. The potential for abusing such information – notably through the making of future risk assessments - could undermine one of the key objectives of the Framework Employment Directive by allowing sheer prejudice to get in the way of a rational appraisal of ability.

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[84] See, e.g., Christine Jolls, *Anti-Discrimination and Accommodation*, Harvard Law School, Centre for Law, Economics, and Business, Discussion Paper 344 (2001) at http://www.law.harvard.edu/programs/olin_center/ and, by the same author, *'Accommodation Mandates'*, 53 Stanford L.Rev 223 (2000-2001).

Unless tightly controlled through statute law the unrestrained use of the medical data by employers might constitute direct discrimination. Indirect discrimination could arise where such medical tests screen applicants with disabilities from consideration notwithstanding the fact that any disability revealed may not in fact impact negatively on the performance of the 'essential functions' of a given job. Arguably, a faithful transposition of the spirit as well as the letter for the Framework Employment Directive requires more detailed statutory provision.

(h) The Challenge of Using Health & Safety Law to Underpin and not to Undermine Anti-Discrimination Law.

The analysis in Part 3 also revealed a disturbing possibility to set up an artificial competition between health and safety law and the non-discrimination provisions of the Framework Employment Directive. That is to say, employers might refuse to hire persons with disabilities or otherwise segregate them in the workplace due to exaggerated or misplaced health and safety concerns. There would seem to be a general lack of statutory provisions dealing with and reconciling the interface between health and safety law on the one hand and anti-discrimination law on the other with respect to disability. Such statutory law is needed. They two would appear to be eminently reconcilable. It will be recalled that the intention behind the reference to health and safety in Article 7(2) was positive and was not intended as an exception to the non-discrimination norms of Article 2. This fact is underscored by the reality that the reference occurs in an Article entitled 'Positive Action' and not in a provision dealing with exceptions or justifications.

In sum, much more has been done in the past three years than was even imaginable ten years ago. Written in a constructive spirit, our analysis shows that more can and should be done to achieve the purpose of the Framework Employment Directive which is to put into effect the principle of equal treatment on the disability in the employment context.

This study has been produced under the European Community Action Programme to combat discrimination (2001-2006). This programme was established by the European Commission's Directorate-General for Employment and Social Affairs as a pragmatic support to ensuring effective implementation of the two Directives on "Race" and "Equal treatment in the workplace" (2000) emanating from Article 13 of the Amsterdam Treaty. The six-year Programme primarily targets all stakeholders capable of exerting influence towards the development of appropriate and effective anti-discrimination legislation and policies, across the EU-25, EFTA and the EU candidate countries.

The Action Programme has three main objectives. These are:

1. To improve the understanding of issues related to discrimination
2. To develop the capacity to tackle discrimination effectively
3. To promote the values underlying the fight against discrimination

http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm

As such activities funded under the Programme analyse and evaluate, develop and raise awareness of measures that combat discrimination on the grounds of race or ethnic origin, religion or belief, disability, age and sexual orientation. Discrimination on the grounds of gender is dealt with under separate legislative instruments. For more information on Community policies, legislation and activities on gender discrimination, please contact the Unit for Gender Equality within DG Employment and Social Affairs.

http://www.europa.eu.int/comm/employment_social/equ_opp/index_en.htm

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