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European network of legal experts in gender equality and non-discrimination

Reasonable accommodation for disabled people in employment contexts

A legal analysis of EU Member States, Iceland, Liechtenstein and Norway

Including summaries in English, French and German

Justice and Consumers

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Reasonable accommodation for disabled people in employment contexts

A legal analysis of the EU Member States, Iceland, Liechtenstein and Norway

Prepared by
Delia Ferri, Maynooth University
Anna Lawson, University of Leeds

on the basis of country reports provided by the European network of legal experts in gender equality and non-discrimination

Directorate-General for Justice and Consumers

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The text of this report was drafted by Delia Ferri and Anna Lawson, coordinated by Isabelle Chopin and Jone Elizondo for the European network of legal experts in gender equality and non-discrimination.

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United Kingdom	Aileen McColgan	Aileen McColgan

Executive summary

Chapter 1 – Introduction

This report focuses on reasonable accommodation duties for disabled people[1] in employment. It also addresses the link between reasonable accommodation and accessibility and considers other legal requirements that may be used to enhance the accessibility of workplaces. Legal developments at UN and EU level are examined, together with developments in 31 countries (the 28 EU Member States, Iceland, Liechtenstein and Norway). The report draws on a range of different sources. However, information about developments within the 31 countries included in this study is derived primarily from a series of country-specific reports compiled by the national expert members of the European network of legal experts in gender equality and non-discrimination.

Two legal instruments are used to provide the evaluative framework for this study – the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the Employment Equality Directive. The CRPD has been ratified by the EU and 26 of the countries in this study. It requires parties to it to prohibit discrimination and treats a failure to provide reasonable accommodation as a form of discrimination.

The Employment Equality Directive is important because, in Article 5, it requires Member States to introduce duties to make reasonable accommodations for disabled people in employment contexts. Its material scope (set out in Article 3) extends to employment, occupation and vocational training with Member States being given permission to exclude the armed forces from their national disability-related implementation measures. Its personal scope is less clear. The meaning of 'disability', for purposes of the Employment Equality Directive, has been the subject of numerous Court of Justice (CJEU) decisions and is discussed in section 2.3 below.

The report has 4 chapters – Chapter 1 is the Introduction and Chapter 4 the Conclusion. Chapter 2 focuses on reasonable accommodation duties in employment. Chapter 3 focuses on accessibility-related obligations, including the relationship between reasonable accommodation and accessibility.

Chapter 2 – Reasonable accommodation law and its implementation

2.1 Introduction

This chapter begins with a brief explanation of the idea of 'reasonable accommodation'. Reasonable accommodation duties require different treatment for people whose circumstances are relevantly different. They thus represent the other side of the coin from direct discrimination duties, which focus on requiring "like treatment" for people whose relevant circumstances are alike. Both types of duty, however, are concerned with achieving equality and countering discrimination. Consequently, the phrase 'equal treatment', although commonly (and confusingly) used to refer only to like or identical treatment, will be used here to refer both to the like treatment of people who are similarly situated and also to the appropriately different treatment of people whose circumstances are relevantly different.

1 The term 'disabled people' is used throughout this report, except where context requires otherwise, in line with language commonly used by proponents of the social model of disability – this language being consistent with the idea that people who have (or are perceived to have) 'impairments' are 'disabled' by social structures and systems.

2.2 Reasonable accommodation in the CRPD

The chapter then moves on to discuss what 'reasonable accommodation' means in the CRPD and what reasonable accommodation duties are set out in that treaty. Article 2 of the CRPD defines reasonable accommodation as:

> 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.

This requires a focus on the 'particular case' and entails (1) the effectiveness of the modifications or adjustments in removing the disadvantage for the particular disabled person; and (2) the practicality of carrying them out by the particular employer.

This provision also explicitly classifies the denial of reasonable accommodation as a form of discrimination. Discrimination is prohibited by Article 5 of the CRPD and Article 5(3) requires State Parties to 'take all appropriate steps to ensure that reasonable accommodation is provided' in practice.

Reasonable accommodation duties must be introduced to cover all the rights included in the CRPD. In the employment context, Article 27 gives guidance as to the breadth of its material scope. It covers 'general technical and vocational guidance programmes, placement services and vocational and continuing training',[2] 'labour and trade union rights' and 'self-employment, entrepreneurship, [...] cooperatives and [...] one's own business'. In terms of its personal scope, the duty to provide reasonable accommodation in the CRPD is one that States are required to extend in favour of disabled people. The CRPD does not define 'persons with disabilities' as such, but according to Article 1 (which sets out the purpose of the treaty and not its definitions):

> 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

In *Jungelin v Sweden*, the CRPD Committee held that States Parties enjoy a margin of discretion in the formulation of reasonable accommodation duties. In particular, their decisions about when a burden should be regarded as 'undue' or 'disproportionate' should not be interfered with by the Committee. However, as it had previously made clear (in *HM v Sweden*), the Committee will be willing to find non-compliance with Article 5 where the State has not introduced requirements on organisations or individuals even to consider departing from standard practice in order to accommodate the needs/circumstances of a particular disabled person.

2.3 Reasonable accommodation in the Employment Equality Directive

Article 5 of this Directive requires Member States to introduce reasonable accommodation duties in the employment context. Unlike the CRPD, it does not expressly classify a failure to comply with a reasonable accommodation duty as discrimination. Guidance on the type of 'appropriate measures' which might be required by Article 5 is set out in Recital 20. This provides a non-exhaustive list of examples. Recital 21 provides further guidance, on whether a particular accommodation amounts to a disproportionate burden. It states that 'the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance' should be taken into account.

The material scope of the Directive's reasonable accommodation duty is the same as the scope of the Directive as a whole and governed by Article 3. There is an exception for the armed forces, thus allowing

2 Article 27(1)(d).

States not to impose disability discrimination prohibitions on the armed forces or require them to make reasonable accommodations for disabled employees.

As to the personal scope of the reasonable accommodation duty, Article 5 of the directive operates in favour of 'persons with disabilities'. This phrase is not defined by the Directive but has been the subject of several CJEU cases in recent years. In particular, since the EU's ratification of the CRPD, the Court has changed its approach in order to bring it into line with the Court's understanding of Article 1 of the CRPD to mean. The Court has thus held that 'disability' must be understood as

> 'long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers'.[3]

Whilst this new approach represents a considerable improvement on the Court's earlier approach, there are concerns that it continues to fall short of what the CRPD requires. In particular, the need to show hindrance of 'professional life' appears to be inconsistent with the CRPD.

2.4 Reasonable accommodation in national laws

The remainder of the chapter explores the way in which reasonable accommodation duties in employment have been formulated and implemented in national law. The first issue addressed is the articulation of reasonable accommodation duties. There is no clear and explicit articulation of a reasonable accommodation duty in **Liechtenstein** or in **Iceland**. Otherwise, all the countries included in the study have such a duty, although a range of different approaches are taken to the types of legislation in which this duty is located.

The second major issue discussed in connection with national law is the material scope of employment-related reasonable accommodation duties. In all 28 Member States and **Norway**, the reasonable accommodation obligation extends to both the public and private sectors, in relation to employment and occupation, vocational training and membership of, and involvement in employer and employee organisations. Military services are exempted from the scope of disability discrimination prohibitions (and from the scope of reasonable accommodation duties) in numerous countries. Despite this, only three have entered a reservation against Article 27 of the CRPD in respect of the armed forces. Whilst this is not problematic in terms of consistency with the Directive, it does suggest that many EU countries may fall short of what Articles 5 and 27 of the CRPD require.

As regards personal scope, whilst a fairly consistent approach is generally taken to the term 'worker', there is considerable variation at national level about whether self-employment and unpaid work falls within the scope of reasonable accommodation duties. Self-employment is not covered by disability non-discrimination law (and reasonable accommodation duties) in most countries. In some countries (e.g. **Denmark**, **France** and the **UK**), however, there is provision for at least some types of self-employment to be covered. As regards unpaid work, in some countries (e.g. **Austria**, **Bulgaria**, **Germany**, **Estonia**,[4] **Hungary**,[5] **Latvia**, **Norway**, **Portugal**, **Slovenia**, **Slovakia** and the **UK**), volunteers and unpaid workers are generally not covered. By contrast, in **France**, **Finland** and the **Netherlands** unpaid workers do appear to have rights to reasonable accommodation – as do unpaid trainees in **Denmark**. The issue was one on which there was little clarity in many countries.

3 CJEU, Case C-312/11, *Commission v Italy* 4 July 2013, not yet published.

4 Estonian Law on Equal Treatment (*Võrdse kohtlemise seadus*), RT I 2008, 56, 315.

5 Article 8 Paragraph (1) of Act LXXXVIII of 2005 on Public Interest Voluntary Activities, which lists the obligations of the hosting organisation (guaranteeing the conditions of a safe working environment, providing the necessary recreational time, providing the necessary instructions and information) is silent about reasonable accommodation.

A range of different approaches to the definition of disability (for purposes of reasonable accommodation entitlement) are adopted at national level. Three main types of approach can be identified. First, in some countries there is no clear legislative definition and the question is left to elaboration in the courts – which have tended to follow the lead of the CJEU. Second, in other countries, the legislative definition of disability for purposes of reasonable accommodation entitlement is the same as that used for anti-discrimination law (including reasonable accommodation). Many countries adopting this approach retain definitions of disability which reflect the approach of the CJEU in *Chacón Navas* – an approach which the CJEU has since rejected as inconsistent with the CRPD. Third, a small number of countries appear to adopt a definition of disability (or system for defining it) for the sole purpose of reasonable accommodation. This is generally narrower than the legislative definition used for other aspects of anti-discrimination law. Such an approach is problematic because it would deny entitlement to reasonable accommodation to many disabled people.

An issue which has received surprisingly little attention to date is the question of when reasonable accommodation duties will be triggered – i.e. the circumstances in which employers (or other duty-bearers) will actually be placed under a duty to make (or consider making) reasonable accommodations. Article 5 of the Employment Equality Directive is silent on this, as is the CRPD. It is not addressed explicitly in legislation in any of the countries except the **UK**. Analysis of bodies of law and practice that have accompanied reasonable accommodation duties suggests that three main approaches are adopted. First, the duty will be triggered only where an employer knows or ought to know that the person in question is disabled. Second, the duty is triggered only where a specific request has been made to the employer by the disabled person – and will not arise simply because the employer is aware that an employee or applicant is disabled. Third, the duty will be triggered only when the employer has been informed of the need to make an accommodation by a competent public authority. Despite the silence of the Directive and the CRPD on this issue, the latter two approaches do not capture the spirit of the reasonable accommodation duties in either instrument.

Turning to the substance of what the duties require, despite differences in language and expression, all national laws adopt an individual-oriented and solution-oriented approach. The accommodations required may be divided into two main classes. First, technical solutions – these include assistive devices or other adaptations of the workplace. Second, organisational arrangements – these include organisational arrangements, such as adjustment of working hours and re-distribution of duties, teleworking arrangements, disability leave, extended or additional leave, the provision of assistance, re-location to a different office and redeployment to a different job.

On 'disproportionate burden', the broad criteria adopted in national law generally reflect Recital 21 and Article 5 of the Directive. Particular emphasis is placed on the costs of the accommodation and the subsidies available to cover those costs. In some countries national laws prescribe a wide-ranging evaluation to assess whether the accommodation entails a disproportionate burden – entailing consideration also of factors other than cost (e.g. the activities of the undertaking, the difference the accommodation makes to the disabled person, and the benefit the accommodation makes to others).

In some countries there are specific additional limits to reasonable accommodation duties – e.g. the Italian law that public employers must implement the duty 'without new or increased burdens on public finance and human resources'. At present, there are no data on the implementation of these provisions, and it is not clear whether, in practice, budget constraints will prevent public employers from granting reasonable accommodations to specific individuals.

Explicit requirements on duty-bearers to consult the disabled person about reasonable accommodations did not feature in national law but such consultations nevertheless appear to be expected in most countries. Thus, whilst a failure to consult the disabled person would not itself amount to a breach of the reasonable accommodation duty, the absence of consultation carries with it a risk that accommodations will be made which are not appropriate in the individual case and which are not effective in addressing

the disadvantage in question. Similarly, there are no explicit requirements to consult third parties (e.g. specialist organisations with expertise in adaptive technology, trade unions, disabled peoples organisations or even medical or occupational health experts), but in practice reference is frequently made to them.

Binding guidance on reasonable accommodation is extremely uncommon – but many equality bodies have issued non-binding guidance. DPOs and other organisations have also issued guidance on reasonable accommodation in employment. Data on the impact and effect of this guidance was not available and lack of awareness of reasonable accommodation duties in some EU countries is a matter about which the CRPD Committee has expressed concern in relevant Concluding Observations.

In a small number of countries (namely **Estonia** and **Latvia**), failure to provide reasonable accommodation does not amount to discrimination. This is inconsistent with Article 2 of the CRPD. In other countries, failure to provide reasonable accommodation does amount to discrimination, but it is sometimes treated as a distinct form of discrimination in its own right and sometimes incorporated into direct or indirect discrimination.

Where failure to provide reasonable accommodation does constitute discrimination, the remedies available are generally the same as those available for other forms of discrimination. In many countries, the only remedy is financial damages – a point about which the CRPD Committee has expressed concern. In others, it is also possible for courts to order the carrying out of adjustments.

There is a lack of data about the number and nature of cases on reasonable accommodation in most countries. Barriers to enforcement are often associated with the costs of the proceedings, access to legal assistance and advice and procedural issues such as time limits for bringing actions. In addition, disabled claimants sometimes encounter barriers in the form of inaccessible court (or other) buildings and inaccessible communication or information. Good practice examples of inclusive legal procedures are also apparent.

The final issue addressed in Chapter 2 is that of state subsidies for the cost of disability-related accommodations made by employers. In the vast majority of countries, funding is available from government to assist employers with the cost of accommodations. There is significant variation in terms of their upper limit – and there is currently no upper limit in the **UK** where it has been shown that for every £1 invested by the government, it receives £1.48 back. No reasonable accommodation subsidy appears to be available in **Cyprus**, and is extremely limited in **Greece**.

Chapter 3 – Accessibility-enhancing legal requirements and their relationship with reasonable accommodation in employment

3.1. Introduction

This chapter moves away from the exclusive focus on reasonable accommodation which has shaped earlier parts of this report. It focuses on legal mechanisms by which accessibility of workplaces and systems is enhanced.

3.2 Accessibility in the CRPD

Accessibility is recognised as a 'general principle' of the CRPD. This reflects the key role it has – as a gateway to other rights. In addition to its appearance in Article 3, accessibility obligations appear elsewhere in the Convention. The most significant provision is Article 9, the title of which is 'accessibility'.

According to General Comment No 2 of the CRPD Committee, the right to accessibility in Article 9 of the CRPD has its origins in earlier UN treaties which conferred rights to access public facilities on an equal basis with others. Workplaces are mentioned in Article 9(1) as an example of the type of facility which

must be made accessible in line with the Article. Further guidance on workplaces is set out in the General Comment.

A range of obligations to achieve accessibility are placed on States by Article 9. These include the introduction of accessibility standards and research into the development of more accessible ICT. The General Comment invites States to use non-discrimination law to enforce accessibility requirements. The relationship between accessibility and discrimination is not entirely straightforward. There are conflicting statements in the General Comment about whether all forms of inaccessibility should be treated as discrimination – in which case there would be an expectation that accessibility should be achieved with immediate effect. Other statements in the General Comment suggest that the duty is to achieve accessibility on a gradual basis and over time.

The General Comment gives guidance on the differences between reasonable accommodation (which is concerned with one disabled person) and accessibility (which is concerned with removing barriers for disabled people more generally). Reasonable accommodation obligations have an important role in enabling disabled people to challenge accessibility barriers and accommodations made for one individual and may have the effect of enhancing accessibility for other disabled people.

3.3 Accessibility-enhancing obligations in EU Law

The Employment Equality Directive contains no specific accessibility-enhancing obligations, although indirect discrimination prohibitions, direct discrimination prohibitions and reasonable accommodation duties may all yield results which are accessibility-enhancing in specific cases. EU health and safety law and public procurement law have been used to encourage accessibility in certain circumstances and there is the potential for these initiatives to be further developed.

3.4 Accessibility-enhancing obligations in national law

Some countries (e.g. **Sweden**) have introduced specific forms of discrimination which go beyond reasonable accommodation obligations and make accessibility barriers in employment unlawful. In addition, more generic forms of discrimination prohibition are often very helpful in challenging accessibility barriers. Thus, classic reasonable accommodation obligations, indirect discrimination and also sometimes direct discrimination provide means for challenging accessibility barriers. Some countries have enhanced the potential accessibility-related impact of reasonable accommodation duties in employment. For example, **Austrian** and **Slovakian** legislation affirms that an accommodation shall not be regarded as disproportionate if it is required under separate legislation, such as building codes which deal with accessibility. In **Bulgaria**, failure to ensure that public buildings are accessible cannot be justified.

Where an employer rents a building which is not accessible, consent may be required from their landlord before changes can be made which will enhance the accessibility of the premises. There was considerable variation of approach to whether landlords were entitled to refuse consent to such requests. In some countries (e.g. **Austria**, **Belgium**, **Finland**, and **Spain**) landlords appear to be entitled to refuse requests from their tenants to make such alterations – even where the tenants are employers who have reasonable accommodation obligations to remove physical barriers. In other countries (e.g. the **UK**), landlords are not permitted to withhold consent unreasonably and in others (e.g. **Malta** and **Norway**) landlords are required to consent even if lease agreements provide to the contrary.

Regulations on the accessibility of public buildings or the built environment more generally provide an important means of enhancing the accessibility of at least some places of employment. In addition, in several countries public and private employers are obliged to provide a healthy and safe working environment, and this often carries with it obligations relating to accessibility. In **Denmark**, for instance, an executive order establishes that consideration must be shown to disabled employees in relation to traffic routes, doors, spacious décor, toilets and bathrooms within the workplace. General duties to enhance equality also have the potential to play an important part in enhancing accessibility in some

countries – e.g. the **UK**'s public sector equality duty (contained in the Equality Act 2010 and the Northern Ireland Act 1998).

Chapter 4 – Conclusion

4.1 Apparent inconsistency with UN and/or EU standards

There are a number of respects in which EU and/or national law seems to fall short of CRPD standards.

First, in relation to the definition of disability, it is suggested that recent caselaw of the CJEU sets out a definition of disability which is more restrictive than the approach adopted in the CRPD. Unlike the CRPD, the CJEU's new approach requires claimants to have an impairment which, in interaction with social barriers, hinders their participation in 'professional' life. This focus on 'professional' life seems to restrict the class of 'persons with disabilities' covered by the Directive to a narrower class of people than that which is envisaged in Article 1 of the CRPD – there being no mention of 'professional' life in Article 1. National laws which have followed the CJEU on this point fall short of CRPD standards for the same reason.

Second, **Liechtenstein** and **Iceland** do not appear to have any clearly articulated reasonable accommodation duty. This represents a shortfall from the standard set out in the CRPD (and the Directive). However, as neither country is a member of the EU nor a CRPD State Party, there is no question of breach.

Third, Article 2 of the CRPD clearly requires that denial of reasonable accommodation should be recognised as a form of discrimination. However, in **Estonia** and **Latvia**, it is not classified as discrimination. The importance of this inconsistency with the CRPD depends, to some extent, on the consequences in national law of classifying a claim as one for discrimination – for instance whether there are implications for the type of remedy available, or for the support and involvement of equality bodies.

Fourth, the CRPD Committee's Concluding Observations make it clear that States Parties are expected to ensure that remedies available for denials of reasonable accommodation include injunctive relief directed at changing behaviour. However, in many countries, only financial compensation (in the form of damages) can be ordered.

Fifth, there are concerns (but little data) on the inclusiveness and accessibility of the enforcement mechanisms through which disabled people can challenge discrimination they experience in the employment context (including denials of reasonable accommodation). As well as Articles 5 and 27 of the CRPD, this issue concerns Article 13 on access to justice.

Sixth, despite not entering a reservation against Article 27 of the CRPD in respect of discrimination in the armed forces, disability discrimination law in many EU Member States does not extend to the armed forces.

Turning now to respects in which national law appears to be inconsistent with the Directive:

First, the laws of many Member States on the definition of disability appear to be inconsistent with the Employment Equality Directive. Many Member States continue to define disability in such a way as to assume that a person's impairment necessarily causes a reduction of their working capacity or other hindrance to their professional life. This approach is similar to the CJEU's approach in Chacón Navas – an approach which has since been rejected by the CJEU. Another problem relating to the definition of disability is that some countries (e.g. the **UK**) exclude certain categories of people from the definition of disability and hence exclude them from the possibility of bringing a case for disability discrimination.

Second, explicit restrictions on the operation of reasonable accommodation duties are rare. However, the requirement in the **Italian** legislation that public employers must implement reasonable accommodation duties 'without new or increased burdens on public finance and human resources'[6] is troubling and appears to fall short of what Articles 5 and 27 of the CRPD require.

Third, discriminatory or inaccessible procedures for enforcing rights under the Employment Equality Directive would appear to fall short of Article 9 of that directive – which requires States to make judicial or administrative procedures for the enforcement of Directive rights available to disabled people, as well as others. Although there was little information about the situation in Member States, significant barriers to access justice would suggest that relevant procedures were not in fact being made 'available' to disabled people as required by Article 9. It is worth noting, in this connection, that other EU non-discrimination directives contain provisions couched in the same terms as Article 9 of the Employment Equality Directive. It is suggested that these require that processes for enforcing rights to be free from other types of discrimination (e.g. based on race or gender) should also be made fully 'available' to disabled claimants. Whilst it seems likely that disabled people also encounter barriers to accessing justice in the contexts of challenging forms of discrimination not based on disability (e.g. sex and race discrimination in employment), this was an issue which fell outside the scope of this report and on which evidence was therefore not collected.

4.2 Lack of clarity in EU and UN standards

A number of points addressed in the report are not tackled explicitly in the Directive or the CRPD but have significant implications for the effective implementation of reasonable accommodation duties. Unsurprisingly therefore, in relation to many of them, there is considerable variety of approach at national level. These points include the circumstances in which an employer's duty to make (or consider making) reasonable accommodations will be triggered – in particular whether the duty will be triggered when they know or ought to know of the disability and the potential need for an accommodation; the extent to which duty-bearers are required or expected to consult the disabled worker (or others) about possible accommodations; the extent to which the landlords of employers are required to consent to accessibility-related adjustments of let premises; and the circumstances (if any) in which reasonable accommodation duties will be owed to workers who are self-employed or unpaid.

4.3 Implementation, promotion and guidance

As regards awareness-raising about reasonable accommodation duties and guidance, Article 5(3) of the CRPD requires State Parties to actively promote reasonable accommodation and Article 8 requires them to raise awareness of the rights of disabled people. Official guidance, with binding effect, has rarely been adopted in the countries studied although non-binding guidance is more common. It is not clear, however, how effective this guidance has been at increasing understanding and awareness. Government subsidies towards the costs of reasonable accommodations play an important part in enhancing the effectiveness and impact of reasonable accommodation duties in most of the countries studied. These generally take the form of an allowance with an upper limit, but the **UK** approach of supplementing employers' contributions without an upper limit appears to be highly successful despite recent proposals to introduce a cap.

4.4 Accessibility enhancing obligations and employment

accessibility has received less attention, and been tackled more tentatively, in the employment context than it has been in the context of service provision. Clearly, many service providers will also be employers, so there is no clear-cut divide and the enhanced accessibility of services will have an impact on the accessibility of at least some workplaces. Enhancing the accessibility of workplaces is one dimension of

6 Law decree 28 June 2013 No. 76, OJ No. 150 of 28 June 2013, then converted into Law 9 August 2013, No. 99, OJ No. 196 of 22 August 2013, page 1, concerning 'Preliminary Urgent Measures for the promotion of employment, in particular of youngsters, of social cohesion and other Urgent financial measures'.

achieving systemic change which will open up employment opportunities to disabled people other than a particular person for whom a reasonable accommodation might be made in any particular case. Alongside ensuring that employers respond appropriately to the circumstances of particular disabled applicants and workers, it is vital that thought, effort and resources are devoted to entrenching the wider systemic changes that are needed if employment and workplaces are to become truly accessible and inclusive.

4.5 Recommendations

The report concludes with a number of recommendations for further EU-level action.

- That the CJEU revisit its approach to the meaning of 'disability' and refine it so that claimants do not need to demonstrate the impact of an impairment (in interaction with social factors) on 'professional life'.
- That the Commission enters into dialogue with a number of Member States about the transposition of the Employment Equality Directive into their domestic law – e.g., **Italy**, about the stringent restriction placed on reasonable accommodation in the public sector; and, with sensitivity, a range of other countries about the class of disabled people in whose favour reasonable accommodation duties operate. In addition, the Commission is urged to request information about the accessibility and inclusiveness of enforcement procedures
- That the Commission continues and enhances its support of initiatives to provide training in reasonable accommodation, accessibility and inclusive employment.
- That the Commission commissions and disseminates guidance to accompany the Employment Equality Directive, which clarifies aspects of the Directive's reasonable accommodation duty.
- That accessibility of workplaces and effective implementation of reasonable accommodation duties is given a heightened profile in EU 2020 processes – in connection with strategies to enhance the employment rates of disabled people.
- That EU institutions commission further comparative research into issues which this report suggests are currently under-investigated, under-developed and under-valued – e.g. when reasonable accommodation duties are (and should be) triggered; the net benefits of government subsidies toward the cost of workplace accommodations; landlords' consent requirements; consultation and dialogue requirements; and mechanisms (including remedies, accessibility requirements etc.) by which to enhance systemic change.

Résumé

Chapitre 1 – Introduction

Le présent rapport est essentiellement consacré aux obligations d'aménagement raisonnable en faveur des personnes handicapées[1] dans le cadre de l'emploi, mais il s'intéresse également au lien entre aménagement raisonnable et accessibilité ainsi qu'à d'autres exigences légales pouvant servir à améliorer l'accessibilité des lieux de travail. Il examine les évolutions juridiques intervenues au niveau des NU et de l'UE, de même que celles observées dans 31 pays, à savoir les 28 États membres de l'UE plus l'Islande, le Liechtenstein et la Norvège. Il repose sur diverses sources mais les informations relatives aux évolutions dans ces différents pays proviennent principalement d'une série de rapports respectivement élaborés par leurs experts nationaux appartenant au Réseau européen d'experts juridiques en matière d'égalité des genres et de non-discrimination.

Deux instruments juridiques servent de cadre d'évaluation à cette analyse: la convention des Nations unies relative aux droits des personnes handicapées (CDPH) et la directive européenne relative à l'égalité dans le domaine de l'emploi. La Convention, qui a été ratifiée par l'UE et 26 des pays couverts par la présente étude, exige des États parties qu'ils interdisent la discrimination et considère la non-fourniture d'un aménagement raisonnable comme une forme de discrimination.

La directive relative à l'égalité dans le domaine de l'emploi est importante dans la mesure où elle exige des États membres, en son article 5, qu'ils introduisent l'obligation de procéder dans le cadre de l'emploi à des aménagements raisonnables pour les personnes handicapées. Son champ d'application matériel (défini à l'article 3) couvre l'emploi, le travail et la formation professionnelle – les États membres étant autorisés d'exclure les forces armées de leurs mesures d'application nationales relatives au handicap. Le champ d'application personnel de la directive est moins clair et le sens à donner au «handicap» dans son contexte a fait l'objet de plusieurs arrêts de la Cour de justice (CJUE); cette question est examinée au point 2.3 ci-après.

Le rapport comporte quatre chapitres. Le premier en constitue l'introduction, et le quatrième la conclusion. Le deuxième chapitre est consacré aux obligations d'aménagement raisonnable dans l'emploi, et le troisième aux obligations en matière d'accessibilité, en ce compris le lien entre aménagement raisonnable et accessibilité.

Chapitre 2 – Le cadre législatif en matière d'aménagement raisonnable et sa mise en œuvre

2.1 Introduction

Le deuxième chapitre débute par une brève explication de la notion d'«aménagement raisonnable». Les obligations à cet égard requièrent l'application d'un traitement différent envers les personnes dont la situation est pertinemment différente. Elles sont donc le corollaire des obligations en matière de discrimination directe, qui requièrent un même traitement pour les personnes dont la situation pertinente est similaire. Les deux types d'obligations ont néanmoins pour objectif commun de parvenir à l'égalité et

1 Sauf si le contexte indique le contraire, le rapport utilise terme «personnes handicapées» conformément à la terminologie couramment utilisée par les partisans du modèle social du handicap – cette terminologie correspondant à l'idée que les personnes qui ont (ou qui sont perçues comme ayant) des «incapacités» sont «handicapés» par les structures et systèmes sociaux.

de lutter contre la discrimination. En conséquence, l'expression «égalité de traitement», bien qu'elle soit couramment (et confusément) utilisée pour désigner uniquement un traitement similaire ou identique, désigne ci-après à la fois le traitement similaire de personnes se trouvant dans des situations similaires et le traitement différencié à juste titre de personnes dont les situations sont pertinemment différentes.

2.2 L'aménagement raisonnable dans la CDPH

Le chapitre se poursuit par l'analyse de ce que signifie «aménagement raisonnable» dans la CDPH ainsi que des obligations imposées en la matière par cette Convention. L'article 2 de la CDPH définit l'aménagement raisonnable comme:

> «les modifications et ajustements nécessaires et appropriés n'imposant pas de charge disproportionnée ou indue apportés, en fonction des besoins dans une situation donnée, pour assurer aux personnes handicapées la jouissance ou l'exercice, sur la base de l'égalité avec les autres, de tous les droits de l'homme et de toutes les libertés fondamentales».

Cette définition réclame une attention particulière en ce qui concerne la «situation donnée» et implique (1) l'efficacité des modifications ou ajustements en termes d'élimination du désavantage subi par la personne handicapée concernée; et (2) la faisabilité de leur mise en pratique par l'employeur concerné.

Cette disposition assimile également de manière explicite le refus d'aménagement raisonnable à une forme de discrimination. La discrimination est proscrite par l'article 5 de la CDPH dont le troisième paragraphe exige des États parties qu'ils «prennent toutes les mesures appropriées pour faire en sorte que des aménagements soient apportés» en pratique.

Des obligations d'aménagement raisonnable doivent être introduites en vue de couvrir l'ensemble des droits visés par la CDPH. En ce qui concerne le travail et l'emploi, l'article 27 donne des indications quant à l'étendue de son champ d'application matériel, lequel couvre «l'accès aux programmes d'orientation technique et professionnelle, aux services de placement et aux services de formation professionnelle et continue offerts à la population en général»,[2] les «droits professionnels et syndicaux» et «l'activité indépendante, l'esprit d'entreprise, l'organisation de coopératives et la création d'entreprise». Quant au champ d'application personnel, l'obligation d'aménagement raisonnable prévue par la CDPH est une obligation que les États sont tenus de prévoir en faveur des personnes handicapées. La Convention ne définit pas les «personnes handicapées» en tant que telles mais, en vertu de son article premier (qui en précise l'objet et non les définitions):

> «Par personnes handicapées on entend des personnes qui présentent des incapacités physiques, mentales, intellectuelles ou sensorielles durables dont l'interaction avec diverses barrières peut faire obstacle à leur pleine et effective participation à la société sur la base de l'égalité avec les autres».

Dans l'affaire *Jungelin c. Suède*, le Comité des droits des personnes handicapées a considéré que les États parties disposent d'une certaine marge d'appréciation dans la formulation des obligations d'aménagement raisonnable. Plus précisément, le Comité ne devrait pas interférer dans leurs décisions quant au caractère «indu» ou «disproportionné» de la charge. Toutefois, comme clairement indiqué dans une décision antérieure (affaire *HM c. Suède*), le Comité est prêt à constater un non-respect de l'article 5 lorsque l'État n'a pas instauré l'obligation pour les organisations ou les particuliers d'au moins envisager de s'écarter de la pratique courante en vue de répondre aux besoins/à la situation d'une personne handicapée particulière.

2 Article 27, paragraphe 1 sous d).

2.3 L'aménagement raisonnable dans la directive relative à l'égalité en matière d'emploi

L'article 5 de cette directive exige des États membres qu'ils instaurent des obligations d'aménagement raisonnable dans le cadre de l'emploi. Contrairement à la CDPH, la directive n'assimile pas expressément le non-respect de l'obligation d'aménagement raisonnable à une discrimination. Des orientations quant au type de «mesures appropriées» susceptibles d'être exigées en vertu de l'article 5 sont fournies au vingtième considérant où figure une liste non exhaustive d'exemples. Le vingt-et-unième considérant fournit par sa part des indications complémentaires pour déterminer si des mesures particulières d'aménagement raisonnable constituent une charge disproportionnée: il stipule qu'il convient de tenir compte notamment «des coûts financiers et autres qu'elles impliquent, de la taille et des ressources financières de l'organisation ou de l'entreprise et de la possibilité d'obtenir des fonds publics ou toute autre aide».

Le champ d'application matériel de l'obligation d'aménagement raisonnable visée par la directive est identique au champ d'application de l'ensemble de la directive régi par son article 3. Une dérogation est prévue pour les forces armées: elle autorise les États à ne pas imposer d'interdiction de discrimination fondée sur le handicap aux forces armées ou à ne pas exiger de celles-ci qu'elles procèdent à des aménagements raisonnables pour des salariés handicapés.

En ce qui concerne le champ d'application personnel de l'obligation d'aménagement raisonnable, l'article 5 de la directive bénéficie aux «personnes handicapées» – une désignation qui n'est pas définie dans la directive mais qui a fait l'objet de plusieurs affaires devant la CJUE ces dernières années. Depuis que l'UE a ratifié la CDPH, la Cour a modifié son approche pour l'harmoniser avec son interprétation du sens de l'article 1 de la CDPH. Elle considère donc que la notion de «handicap» doit être entendue comme visant

> «une limitation, résultant notamment d'atteintes physiques, mentales ou psychiques durables, dont l'interaction avec diverses barrières peut faire obstacle à la pleine et effective participation de la personne concernée à la vie professionnelle sur la base de l'égalité avec les autres travailleurs».[3]

Si cette approche constitue une avancée considérable par rapport à celle antérieurement adoptée par la Cour, elle n'en suscite pas moins certaines préoccupations dans la mesure où elle persisterait à ne pas satisfaire aux exigences de la CDPH. Ainsi la nécessité de démontrer un «obstacle» à la «vie professionnelle» apparaît-elle notamment comme contraire à la Convention.

2.4 L'aménagement raisonnable dans les législations nationales

La dernière partie du deuxième chapitre s'intéresse à la manière dont les obligations d'aménagement raisonnable dans l'emploi ont été formulées et mises en œuvre en droit national. Le premier point envisagé concerne la formulation d'obligations d'aménagement raisonnable. Une obligation de ce type n'est clairement ou expressément énoncée ni au **Liechtenstein** ni en **Islande**. Tous les autres pays couverts par l'étude prévoient cette obligation, même si les approches varient fortement quant au type de législation dans laquelle elle s'inscrit.

Le second grand point examiné en rapport avec le droit national concerne le champ d'application matériel des obligations d'aménagement raisonnable dans le cadre de l'emploi. Dans **les 28 États membres** et en **Norvège**, l'obligation d'aménagement raisonnable couvre à la fois le secteur public et le secteur privé, et concerne l'emploi et le travail, la formation professionnelle et l'affiliation et l'engagement à une organisation de travailleurs ou d'employeurs. Si l'armée est exemptée du champ d'application de l'interdiction de discrimination fondée sur le handicap (et du champ d'application des obligations d'aménagement raisonnable) dans une série de pays, seuls trois d'entre eux ont formulé une réserve à l'encontre de l'article 27 de la CDPH pour ce qui concerne les forces armées – une situation qui, sans poser

3 CJUE, Affaire C-312/11, *Commission c. Italie*, 4 juillet 2013, non encore publié.

problème en termes de cohérence avec la directive, conduit à penser que bon nombre de pays de l'UE pourraient ne pas satisfaire aux exigences des articles 5 et 27 de la Convention.

Quant au champ d'application personnel, s'il existe une approche assez cohérente vis-à-vis du terme «travailleur», on observe d'importantes variations nationales sur le point de savoir si l'activité indépendante et le travail non rémunéré sont soumis aux obligations d'aménagement raisonnable. Dans la plupart des pays, l'activité indépendante n'est pas couverte par la législation antidiscrimination (ni par les obligations d'aménagement raisonnable). Quelques-uns cependant (parmi lesquels le **Danemark**, la **France** et le **Royaume-Uni**) ont prévu des dispositions couvrant certains types au moins d'activité indépendante. Pour ce qui concerne le travail non rémunéré, les volontaires et les travailleurs non rémunérés ne sont généralement pas couverts dans des pays tels que l'**Allemagne**, l'**Autriche**, la **Bulgarie**, l'**Estonie**,[4] la **Hongrie**,[5] la **Lettonie**, la **Norvège**, le **Portugal**, le **Royaume-Uni**, la **Slovénie** et la **Slovaquie**. En **France**, en **Finlande** et aux **Pays-Bas**, en revanche, il semblerait que les travailleurs non rémunérés aient certains droits en matière d'aménagement raisonnable – de même que les stagiaires non rémunérés au **Danemark**. Il s'agit d'un point qui reste peu clair dans de nombreux pays.

Les approches nationales varient en ce qui concerne la définition du handicap (aux fins de l'établissement du droit à un aménagement raisonnable). Elles peuvent être regroupées en trois catégories: premièrement, un certain nombre de pays ne se sont dotés d'aucune définition législative précise et la question est laissée aux tribunaux – lesquels ont tendance à suivre la CJUE sur ce point. Deuxièmement, une autre série de pays utilisent dans le cadre du droit à un aménagement raisonnable la même définition du handicap que celle utilisée dans la législation antidiscrimination (y compris l'aménagement raisonnable). Beaucoup de pays ayant pris cette option maintiennent des définitions du handicap qui reflètent l'approche de la CJUE dans l'affaire *Chacón Navas* – une approche que la CJUE a abandonnée depuis lors pour cause d'incompatibilité avec la CDPH. Troisièmement, un petit groupe de pays semble avoir adopté une définition du handicap (ou un système pour le définir) exclusivement destinée à l'aménagement raisonnable – laquelle est généralement plus étroite que la définition législative appliquée à d'autres aspects du droit antidiscrimination. Une telle approche pose problème dans la mesure où elle priverait de nombreuses personnes handicapées du droit à un aménagement raisonnable.

Un point qui n'a suscité jusqu'ici qu'une attention étonnamment limitée est celui de savoir à quel moment les obligations d'aménagement raisonnable s'enclenchent – autrement dit, quelles sont les situations dans lesquelles les employeurs (ou autres titulaires de devoirs) se trouvent effectivement dans l'obligation de procéder (ou d'envisager de procéder) à des aménagements raisonnables. L'article 5 de la directive relative à l'égalité en matière d'emploi est muet à ce sujet, tout comme la CDPH. La question n'est explicitement abordée par la législation d'aucun pays hormis le **Royaume-Uni.** L'analyse du corpus législatif et de la pratique ayant accompagné les obligations d'aménagement raisonnable conduit à conclure qu'il existe trois grandes approches. Premièrement, l'obligation ne s'enclenche qu'au moment où l'employeur sait ou devrait savoir que la personne en question est handicapée. Deuxièmement, l'obligation s'enclenche uniquement lorsqu'une demande spécifique est adressée à l'employeur par la personne handicapée – et non du simple fait que l'employeur est au courant qu'un salarié ou un candidat est handicapé. Troisièmement, l'obligation s'enclenche uniquement lorsque l'employeur a été informé par une autorité publique compétente de la nécessité de procéder à un aménagement. En dépit du silence de la directive et de la CDPH à ce propos, on peut considérer que les deux dernières approches ne reflètent pas l'esprit des obligations d'aménagement raisonnable voulues par ces deux instruments.

En ce qui concerne le contenu des obligations, toutes les législations nationales adoptent, moyennant des différences au niveau de la langue et de l'expression, une approche axée à la fois sur l'individu et sur les solutions. Les aménagements requis peuvent être répartis en deux grandes catégories: premièrement,

4 Loi estonienne relative à l'égalité de traitement (*Võrdse kohtlemise seadus*), RT I 2008, 56, 315.

5 L'article 8, paragraphe 1, de la loi LXXXVIII de 2005 sur le volontariat à des fins d'intérêt public, qui énumère les obligations de l'organisation d'accueil (garantir les conditions d'un environnement de travail sûr, assurer des temps de répit suffisants, fournir les instructions et informations nécessaires) est muet au sujet de l'aménagement raisonnable.

les solutions techniques, qui comprennent les appareils et accessoires fonctionnels sur le lieu de travail; et deuxièmement les modalités organisationnelles telles que l'adaptation du temps de travail et la redistribution des tâches, le télétravail, le congé d'invalidité, des congés prolongés ou supplémentaires, la fourniture d'une assistance, le transfert vers un autre bureau et la réaffectation à un autre poste.

Quant à la «charge disproportionnée», les grands critères adoptés par les ordres internes reflètent généralement le vingt-et-unième considérant et l'article 5 de la directive. Un accent tout particulier est mis sur le coût de l'aménagement et les subventions disponibles pour le couvrir. Dans plusieurs pays, la législation nationale prévoit un vaste processus d'évaluation pour apprécier si l'aménagement engendre une charge disproportionnée – prenant également en compte d'autres facteurs que le coût (l'activité de l'entreprise, la différence que fait l'aménagement pour la personne handicapée et l'avantage qu'il peut représenter pour d'autres, par exemple).

Plusieurs pays ont fixé des limites spécifiques supplémentaires en matière d'obligation d'aménagement raisonnable: c'est le cas en Italie où la loi dispose que les employeurs publics doivent mettre l'obligation en œuvre «sans que des charges nouvelles ou plus importantes pèsent sur les finances publiques et les ressources humaines». On ne dispose à l'heure actuelle d'aucune donnée concernant l'application de ces dispositions, et on ne peut déterminer clairement si, dans la pratique, des contraintes budgétaires vont empêcher des employeurs publics de procéder à des aménagements raisonnables à l'intention de personnes particulières.

Même si l'obligation explicite imposée aux titulaires de devoirs de consulter la personne handicapée à propos des aménagements raisonnable ne figure pas dans la législation nationale, cette consultation semble être escomptée dans la plupart des pays. En conséquence, bien que la non-consultation de la personne handicapée ne soit pas intrinsèquement constitutive d'une violation de l'obligation d'aménagement raisonnable, l'absence de consultation comporte le risque que l'aménagement soit effectué d'une façon qui s'avère inadaptée au cas en cause et inefficace pour remédier au désavantage concerné. De même, il n'existe aucune obligation explicite de consulter des tiers (des organisations spécialisées et expérimentées en matière de technologie adaptative, des syndicats, des associations de personnes handicapées, voire même des experts médicaux ou en santé au travail, par exemple), mais on s'adresse régulièrement à eux dans la pratique.

Les orientations contraignantes en matière d'aménagement raisonnable sont extrêmement rares, mais bon nombre d'organismes pour la promotion de l'égalité ont publié des orientations non contraignantes. Des organisations de personnes handicapées et d'autres organisations ont également publié des orientations concernant l'aménagement raisonnable dans le cadre de l'emploi. Les données manquent concernant l'impact et les retombées de ces orientations, et la méconnaissance des obligations d'aménagement raisonnable dans certains États membres de l'UE est une question à propos de laquelle le Comité des droits des personnes handicapées s'est déclaré préoccupé dans ses observations finales à leur sujet.

Dans un petit nombre de pays (en l'occurrence l'**Estonie** et la **Lettonie**), la non-fourniture d'un aménagement raisonnable n'est pas assimilé à une discrimination – ce qui n'est pas conforme à l'article 2 de la CDPH. Dans d'autres cas, cette non-fourniture ne constitue pas une discrimination, mais elle est parfois traitée comme une forme distincte de discrimination à part entière et parfois incorporée à la discrimination directe ou indirecte.

Lorsque la non-fourniture d'un aménagement raisonnable constitue une discrimination, les recours possibles sont le plus souvent les mêmes que ceux disponibles pour d'autres formes de discrimination. Dans de nombreux pays, la seule réparation possible est financière – un point sur lequel le Comité des droits des personnes handicapées s'est dit préoccupé. Dans d'autres, les juridictions saisies peuvent également ordonner l'exécution d'aménagements.

On manque pour la plupart des pays de données concernant le nombre et la nature des affaires relevant de l'aménagement raisonnable. Les freins aux actions visant à faire respecter les droits en la matière

sont souvent liés au coût des poursuites, à la difficulté d'obtenir une aide et des conseils juridiques et à des questions de procédure (délai de prescription notamment). Il arrive en outre que des requérants handicapés se heurtent à des obstacles tels que l'inaccessibilité du tribunal ou d'autres bâtiments ou l'inaccessibilité des communications ou informations. On observe cependant aussi des exemples de bonnes pratiques en termes de procédures judiciaires inclusives.

Le dernier point abordé au deuxième chapitre concerne les aides publiques destinées à intervenir dans le coût des aménagements effectués par l'employeur en rapport avec le handicap. Dans la grande majorité des pays, des fonds sont mis à disposition par l'État pour aider les employeurs à assumer le coût de ces aménagements. On constate néanmoins d'importantes variations quant à leur montant maximum – ainsi le montant n'est actuellement pas plafonné au **Royaume-Uni**, où il a été démontré que le gouvernement retouche 1,48 £ pour chaque livre investie. Aucune subvention à des fins d'aménagement raisonnable n'est apparemment prévue à **Chypre**, et ce type de subvention est extrêmement limité en **Grèce**.

Chapitre 3 – Les exigences légales améliorant l'accessibilité et leur lien avec l'aménagement raisonnable dans le cadre de l'emploi

3.1. Introduction

Ce troisième chapitre s'écarte de la focalisation exclusive sur l'aménagement raisonnable caractérisant les précédentes parties du rapport pour s'intéresser aux mécanismes juridiques qui permettent d'améliorer l'accessibilité des lieux de travail et des systèmes.

3.2 L'accessibilité dans la CDPH

L'accessibilité est reconnue comme un «principe général» de la convention relative aux droits des personnes handicapées, reflétant ainsi son rôle déterminant en tant que porte d'accès à d'autres droits. Outre sa mention à l'article 3, l'accessibilité et les obligations y afférentes figurent ailleurs dans la Convention – la disposition la plus significative à cet égard étant l'article 9, intitulé «Accessibilité».

Selon l'Observation générale n° 2 du Comité des droits des personnes handicapées, le droit à l'accessibilité visé à l'article 9 de la CDPH trouve son origine dans des conventions antérieures des NU qui conféraient à ces personnes les mêmes droits qu'aux autres d'accéder aux équipements publics. Les lieux de travail sont mentionnés au premier paragraphe de l'article 9 en tant qu'exemple de type d'équipement devant être rendu accessible en application dudit article. Des orientations supplémentaires concernant les lieux de travail figurent dans cette Observation générale.

L'article 9 impose aux États toute une série d'obligations pour assurer l'accessibilité, et notamment l'instauration de normes en la matière et la promotion de la recherche en vue du développement de TIC davantage accessibles. L'Observation générale invite les États à utiliser la législation antidiscrimination pour faire appliquer les exigences relatives à l'accessibilité. Le lien entre accessibilité et discrimination n'est guère simple. L'Observation générale contient des déclarations contradictoires sur le point de savoir s'il convient de considérer toutes les formes d'inaccessibilité comme une discrimination – auquel cas on pourrait s'attendre à ce que l'accessibilité soit réalisée avec effet immédiat. D'autres déclarations figurant dans l'Observation générale suggèrent en revanche que l'obligation consiste à réaliser l'accessibilité progressivement et au fil du temps.

L'Observation générale fournit des orientations quant aux différences entre l'aménagement raisonnable (qui concerne une personne handicapée particulière) et l'accessibilité (qui vise à éliminer les obstacles auxquels se heurtent les personnes handicapées de manière plus générale). Les obligations en matière d'aménagement raisonnable ont pour rôle important de permettre aux personnes handicapées de contester les entraves à l'accessibilité, et des aménagements réalisés à l'intention d'une seule personne peuvent avoir pour effet d'améliorer l'accessibilité pour d'autres personnes handicapées.

3.3 Les obligations d'améliorer l'accessibilité en droit de l'UE

La directive relative à l'égalité dans le domaine de l'emploi ne contient pas d'obligations spécifiquement axées sur l'amélioration de l'accessibilité, même si les interdictions de discrimination directe et indirecte, et les obligations d'aménagement raisonnable, peuvent, les unes comme les autres, avoir pour effet de contribuer à améliorer l'accessibilité dans des cas particuliers. La législation de l'UE en matière de santé et de sécurité ainsi que celle régissant la passation de marchés publics ont servi à favoriser l'accessibilité dans certaines circonstances et il existe un potentiel de pousser plus avant ces initiatives.

3.4 Les obligations d'améliorer l'accessibilité en droit national

Quelques pays (la **Suède** notamment) ont instauré des formes spécifiques de discrimination qui vont au-delà des obligations d'aménagement raisonnable et qui rendent illégales les entraves à l'accessibilité dans le domaine de l'emploi. Par ailleurs, des formes plus génériques d'interdiction de discrimination s'avèrent souvent très utiles pour contester les barrières à l'accessibilité. Ainsi donc, les obligations classiques d'aménagement raisonnable, la discrimination indirecte et parfois même la discrimination directe sont autant de moyens de mettre en cause certains obstacles à l'accessibilité. Plusieurs pays ont renforcé l'impact potentiel de l'aménagement raisonnable dans l'emploi en termes d'accessibilité. Ainsi par exemple, la législation de l'**Autriche** et de la **Slovaquie** affirme qu'un aménagement ne sera pas considéré comme disproportionné lorsqu'il est requis en vertu d'une législation distincte telle des codes de construction traitant de l'accessibilité. En **Bulgarie**, aucune justification n'est admise lorsque l'accessibilité de bâtiments publics n'est pas assurée.

Lorsqu'un employeur loue un bâtiment qui n'est pas accessible, le consentement du propriétaire est parfois requis avant de pouvoir procéder à des transformations destinées à améliorer l'accessibilité des locaux. Il y a eu des approches très diverses sur le point de savoir si le propriétaire était en droit de refuser de répondre favorablement à ce type de demande. Dans certains pays (**Autriche**, **Belgique**, **Espagne** et **Finlande** notamment), il semble que les propriétaires puissent ne pas accéder à la demande de leurs locataires de procéder à ce type de transformations – même si les locataires en question sont des employeurs légalement tenus d'éliminer les barrières physiques au titre d'une obligation d'aménagement raisonnable. Dans d'autres pays (**Royaume-Un**i entre autres), les propriétaires ne peuvent refuser déraisonnablement leur consentement et, ailleurs encore (**Malte** et **Norvège** notamment), les propriétaires sont obligés de consentir aux travaux même si la convention de bail prévoit le contraire.

Les réglementations relatives à l'accessibilité des bâtiments publics et de l'environnement bâti de façon plus générale sont des instruments importants pour apporter des améliorations à certains lieux de travail au moins. De surcroît, les employeurs publics et privés de plusieurs pays sont tenus de fournir un environnement de travail sûr et sain – ce qui s'accompagne souvent d'obligations en matière d'accessibilité. Au **Danemark**, par exemple, un décret-loi dispose qu'il convient de tenir compte du personnel handicapé pour ce qui concerne la circulation, les portes, les espaces et les toilettes sur le lieu de travail. Les obligations générales destinées à renforcer l'égalité peuvent jouer, elles aussi, un rôle important dans l'amélioration de l'accessibilité dans certains pays: on peut citer ici le devoir d'égalité incombant au secteur public au **Royaume-Uni** consacré par la loi de 2010 sur l'égalité (et la loi de 1998 en ce qui concerne l'Irlande du Nord).

Chapitre 4 – Conclusion

4.1 Apparente incohérence avec les normes des NU et/ou de l'UE

Le droit de l'UE et/ou national semblent ne pas répondre aux normes de la CDPH à plusieurs égards.

Premièrement, en ce qui concerne la définition du handicap, il semblerait que la jurisprudence récente de la CJUE établisse une définition du handicap plus restrictive que l'approche adoptée par la CDPH. À l'inverse de cette dernière, la nouvelle approche de la CJUE exige des parties requérantes qu'elles présentent

des incapacités dont l'interaction avec diverses barrières sociales fait obstacle à leur participation à la vie «professionnelle». Cette focalisation sur la vie «professionnelle» semble restreindre la catégorie des «personnes handicapées» couverte par la directive par rapport à celle envisagée à l'article premier de la CDPH – ledit article ne mentionnant pas la vie «professionnelle». Les législations nationales qui ont suivi la CJUE sur ce point ne satisfont pas aux normes de la CDPH pour la même raison.

Deuxièmement, le **Liechtenstein** et l'**Islande** ne semblent pas avoir prévu la moindre obligation d'aménagement raisonnable clairement énoncée, ce qui représente un manquement par rapport à la norme fixée par la CDPH (et la directive). Étant donné toutefois qu'aucun de ces deux pays n'est membre de l'UE ni État partie à la CDPH, il n'est pas question de violation.

Troisièmement, l'article 2 de la CDPH requiert clairement que le refus d'aménagement raisonnable soit reconnu comme une forme de discrimination. Or en **Estonie** et en **Lettonie**, ce refus n'est pas qualifié de discrimination. L'importance de cette divergence avec la CDPH dépend dans une certaine mesure des répercussions en droit national de la qualification d'une prétention comme relevant d'une discrimination – y a-t-il, par exemple, des répercussions en termes de recours disponible ou en termes de soutien et d'implication d'organismes de promotion de l'égalité?

Quatrièmement, les Observations finales du Comité des droits des personnes handicapées établissent clairement qu'il est attendu des États parties qu'ils veillent à ce que les recours disponibles en cas de déni d'aménagement raisonnable prévoient des mesures destinées à faire changer les comportements par voie d'injonction. Or, dans bon nombre de pays, seule une indemnisation financière (sous la forme de dommages et intérêts) peut être ordonnée.

Cinquièmement, certaines inquiétudes (mais peu de données) existent à propos de l'inclusion et de l'accessibilité de mécanismes d'application permettant aux personnes handicapées de contester la discrimination dont elles font l'objet dans le cadre de l'emploi (en ce compris le refus d'aménagement raisonnable). Outre les articles 5 et 27 de la CDPH, cette question concerne l'article 13 relatif à l'accès à la justice.

Sixièmement, sans comporter de réserve à l'encontre de l'article 27 de la CDPH en ce qui concerne la discrimination dans les forces armées, la législation relative à la discrimination fondée sur le handicap exclut ces dernières, dans de nombreux États membres de l'UE, de son champ d'application.

S'agissant maintenant des aspects sur lesquels le droit national semble en contradiction avec la directive:

Premièrement, les législations de nombreux États membres semblent manquer de cohérence avec la directive relative à l'égalité dans le domaine de l'emploi pour ce qui concerne la définition du handicap. Beaucoup de pays de l'UE continuent en effet de définir le handicap d'une manière conduisant à présumer qu'une invalidité entraîne nécessairement une diminution de la capacité de travail ou entrave d'une autre manière la vie professionnelle. Il s'agit d'une approche similaire à celle que la CJUE avait adoptée dans l'affaire *Chacón Navas* – mais qu'elle a abandonnée entre-temps. Un autre problème se pose en rapport avec la définition du handicap dans la mesure où plusieurs pays (dont le **Royaume-Uni**) excluent certaines catégories de personnes de cette définition et les privent ainsi de toute possibilité d'intenter une action pour discrimination fondée sur le handicap.

Deuxièmement, les restrictions expresses quant à l'application des obligations d'aménagement raisonnable sont rares. La condition fixée par la législation **italienne** en la matière, à savoir que les employeurs publics doivent satisfaire à ces obligations «sans que des charges nouvelles ou plus importantes pèsent

sur les finances publiques et les ressources humaines»[6] pose néanmoins question et semble ne pas répondre aux exigences des articles 5 et 27 de la CDPH.

Troisièmement, le caractère discriminatoire ou inaccessible de certaines procédures de mise en application des droits en vertu de la directive sur l'égalité dans l'emploi font qu'elles ne sont pas conformes à l'article 9 de celle-ci – qui invite les États membres à veiller à ce que des procédures judiciaires ou administratives destinées à faire respecter les droits conférés par la directive soient mises à la disposition des personnes handicapées, comme des autres. Bien que les informations concernant la situation dans les États membres soient peu abondantes, il semblerait, au vu des barrières importantes entravant l'accès à la justice, que des procédures pertinentes ne sont en fait pas «accessibles» aux personnes handicapées comme l'exige l'article 9. Il convient de préciser à cet égard que d'autres directives antidiscrimination de l'UE contiennent des dispositions libellées dans les mêmes termes que l'article 9 de la directive relative à l'égalité dans le domaine de l'emploi. On peut penser que celles-ci requièrent que des processus de défense des droits exempts d'autres types de discrimination (fondée sur la race ou le genre, par exemple) soient également totalement «accessibles» aux requérants handicapés. Il est probable que les personnes handicapées se heurtent aussi à des obstacles en termes d'accès à la justice lors de recours pour discrimination fondée sur d'autres motifs que le handicap (sexe et race dans le domaine de l'emploi notamment), mais cette problématique sort du cadre du présent rapport et des éléments probants n'ont dès lors pas été rassemblés à ce sujet.

4.2 Le manque de clarté des normes de l'UE et des NU

Une série de points abordés dans le rapport ne sont pas explicitement traités par la directive ou la CDPH mais n'en ont pas moins une incidence majeure sur l'efficacité de la mise en œuvre des obligations d'aménagement raisonnable. Il n'est donc guère surprenant que l'on observe, en ce qui concerne bon nombre d'entre eux, une grande diversité d'approche au niveau national. Ces points portent notamment sur les circonstances dans lesquelles s'enclenche l'obligation de l'employeur de procéder (ou d'envisager de procéder) à des aménagements raisonnables – et notamment sur le point de savoir si l'obligation s'enclenche lorsque l'employeur a (ou devrait avoir) connaissance du handicap et de la nécessité éventuelle d'un aménagement; sur la mesure dans laquelle il est exigé ou attendu des titulaires de devoirs qu'ils consultent le travailleur handicapé (ou d'autres personnes) à propos des aménagements possibles; sur la mesure dans laquelle les propriétaires d'employeurs sont tenus de consentir à des transformations en rapport avec l'accessibilité des locaux loués; et sur les situations (éventuelles) dans lesquelles des obligations d'aménagement raisonnable existent envers des travailleurs exerçant une activité indépendante ou non rémunérés.

4.3 Mise en œuvre, promotion et orientations

En ce qui concerne la sensibilisation à l'égard des obligations et orientations en matière d'aménagement raisonnable, l'article 5, paragraphe 3, de la CDPH invite les États parties à promouvoir activement cet aménagement, et son article 8 leur demande de veiller à une sensibilisation aux droits des personnes handicapées. Peu d'orientations officielles avec effet contraignant ont été adoptées dans les pays couverts par l'étude, mais des orientations non contraignantes sont davantage répandues. La mesure dans laquelle ces orientations ont effectivement amélioré la compréhension et la sensibilisation reste toutefois difficile à établir. Les subventions publiques allouées au financement des aménagements raisonnables jouent, dans la plupart des pays analysés, un rôle important dans le renforcement de l'efficacité et de l'impact des obligations en la matière. Ces subventions se concrétisent généralement par une allocation plafonnée, mais l'approche adoptée par le **Royaume-Uni** – qui consiste à compléter la contribution des employeurs sans fixation d'un montant maximum – semble largement couronnée de succès même si de récentes propositions visent à instaurer un plafond.

6 Décret-loi n° 76 du 28 juin 2013, JO n° 150 du 28 juin 2013, converti en loi n° 99 du 9 août 2013, JO n° 196 du 22 août 2013, page 1, portant dispositions d'urgence pour la promotion de l'emploi, et de l'emploi des jeunes en particulier, la cohésion sociale et autres dispositions financières urgentes.

4.4 Obligations en faveur de l'accessibilité et emploi

L'accessibilité a bénéficié d'une moindre attention et a été abordée de manière plus hésitante dans le cadre de l'emploi que dans celui de la fourniture de services. Il est évident que bon nombre de prestataires de services sont également des employeurs, de sorte que la distinction n'est pas clairement établie et qu'une meilleure accessibilité des services se répercute sur l'accessibilité de certains lieux de travail au moins. L'amélioration de l'accessibilité des lieux de travail est l'un des éléments du changement systémique qui ouvrira des possibilités d'emploi à d'autres personnes handicapées que celle pour laquelle un aménagement raisonnable pourrait être fait à titre individuel et dans un cas particulier. Il est donc essentiel de veiller non seulement à garantir une prise en compte adéquate par les employeurs de la situation de candidats et de travailleurs handicapés individuels, mais également de consacrer une réflexion, des efforts et des ressources aux changements systémiques de grande envergure qui seuls permettront que l'emploi et les lieux de travail deviennent véritablement accessibles et inclusifs.

4.5 Recommandations

Le rapport propose en conclusion une série de recommandations en vue de nouvelles actions au niveau de l'UE:

- que la CJUE révise son approche de la notion de «handicap» et l'affine de manière à ce que les requérants n'aient pas à démontrer l'incidence d'une incapacité (en interaction avec des facteurs sociaux) sur la «vie professionnelle»;
- que la Commission entame un dialogue avec un certain nombre d'États membres concernant la transposition de la directive relative à l'égalité en matière d'emploi dans leur ordre juridique interne – on songe notamment ici à l'**Italie** à propos de la stricte restriction imposée aux aménagements raisonnables dans le secteur public; et, en abordant la question avec délicatesse, avec une série d'autres pays concernant la catégorie de personnes handicapées auxquelles les obligations d'aménagement raisonnable s'appliquent. La Commission est instamment invitée en outre à réclamer des informations concernant l'accessibilité et le caractère inclusif des procédures de mise en application;
- que la Commission maintienne et intensifie son soutien à des initiatives de formation en matière d'aménagement raisonnable, d'accessibilité et d'emploi inclusif;
- que la Commission fasse réaliser et diffuse des orientations qui, accompagnant la directive relative à l'égalité dans le domaine de l'emploi, en clarifie les aspects qui concernent l'obligation d'aménagement raisonnable;
- qu'une place plus importante soit réservée à l'accessibilité des lieux de travail et à la mise en œuvre effective des obligations d'aménagement raisonnable dans les processus relevant de la stratégie Europe 2020 – en lien avec les actions destinées à faire augmenter le taux d'emploi des personnes handicapées;
- que les institutions de l'UE commanditent des études comparatives complémentaires concernant des problématiques qui, selon le présent rapport, sont actuellement peu analysées, peu développées et sous-estimées – on peut citer à titre d'exemples le moment auquel les obligations d'aménagement raisonnable s'enclenchent (ou devraient s'enclencher); les avantages nets des subventions publiques allouées au financement d'aménagements sur le lieu de travail; les exigences relatives au consentement des propriétaires; les exigences en matière de consultation et de dialogue; et les mécanismes permettant d'accélérer le changement systémique (y compris les recours, les exigences en matière d'accessibilité, etc.).

Zusammenfassung

Kapitel 1 – Einleitung

Gegenstand dieses Berichts sind die Pflichten zum Treffen angemessener Vorkehrungen für Menschen mit Behinderung[1] in Beschäftigung und Beruf. Der Bericht geht außerdem auf den Zusammenhang zwischen „angemessenen Vorkehrungen" und „Zugänglichkeit" ein und untersucht andere gesetzliche Bestimmungen, die angewendet werden können, um die Zugänglichkeit von Arbeitsstätten zu verbessern. Es werden rechtliche Entwicklungen auf UN- und EU-Ebene sowie Entwicklungen in 31 Ländern (die 28 EU-Mitgliedstaaten sowie Island, Liechtenstein und Norwegen) untersucht. Der Bericht stützt sich auf unterschiedliche Quellen, die in der Studie enthaltenen Informationen über die Entwicklungen in den 31 Ländern stammen jedoch im Wesentlichen aus einer Reihe von Länderberichten, die von den Mitgliedern des Europäischen Netzwerks von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und Nichtdiskriminierung erarbeitet wurden.

Als Bewertungsrahmen wurden für diese Studie zwei Rechtsinstrumente herangezogen: das Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen (*Convention on the Rights of Persons with Disabilities* – CRPD) und die Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung (sog. Rahmenrichtlinie Beschäftigung). Das CRPD wurde von der EU und von 26 der in dieser Studie behandelten Länder ratifiziert. Es verpflichtet die Vertragsparteien, Diskriminierung zu verbieten, und betrachtet das Nichttreffen angemessener Vorkehrungen als eine Form von Diskriminierung.

Die Rahmenrichtlinie Beschäftigung ist deshalb wichtig, weil sie den Mitgliedstaaten in Artikel 5 auferlegt, Pflichten zum Treffen angemessener Vorkehrungen für Menschen mit Behinderung im Beschäftigungsbereich einzuführen. Der (in Artikel 3 verankerte) sachliche Geltungsbereich der Richtlinie erstreckt sich auf Beschäftigung, Berufstätigkeit und berufliche Bildung und räumt den Mitgliedstaaten die Möglichkeit ein, die Streitkräfte von den nationalen behinderungsspezifischen Umsetzungsmaßnahmen auszunehmen. Der persönliche Geltungsbereich der Richtlinie ist hingegen weniger klar. Die Bedeutung von „Behinderung" im Sinne der Rahmenrichtlinie Beschäftigung war Gegenstand zahlreicher Entscheidungen des Gerichtshofs (EuGH) und wird in Abschnitt 2.3 weiter unten erörtert.

Der Bericht umfasst vier Kapitel: Kapitel 1 ist die Einleitung und Kapitel 4 die Zusammenfassung; Kapitel 2 befasst sich mit Pflichten zum Treffen angemessener Vorkehrungen im Bereich der Beschäftigung; in Kapitel 3 geht es um Pflichten in Bezug auf Zugänglichkeit, einschließlich des Zusammenhangs zwischen angemessenen Vorkehrungen und Zugänglichkeit.

Kapitel 2 – Rechtsvorschriften über angemessene Vorkehrungen und ihre Umsetzung

2.1 Einleitung

Kapitel 2 beginnt mit einer kurzen Erläuterung des Konzepts „angemessene Vorkehrungen". Pflichten, angemessene Vorkehrungen zu treffen, verlangen eine unterschiedliche Behandlung von Personen, deren Umstände sich maßgeblich voneinander unterscheiden. Sie sind somit die andere Seite der Medaille, auf

1 Der Begriff „Menschen mit Behinderung" wird in diesem Bericht, soweit der Zusammenhang nichts anderes erfordert, in Einklang mit dem Sprachgebrauch der Verfechterinnen und Verfechter des sozialen Behinderungsmodells verwendet, der von der Vorstellung ausgeht, dass Menschen, die (tatsächlich oder vermeintlich) „beeinträchtigt" sind, durch die sozialen Strukturen und Systeme „behindert" werden.

der die Pflichten stehen, die sich auf unmittelbare Diskriminierung beziehen und die für Menschen, deren maßgebliche Umstände gleich sind, „Gleichbehandlung" verlangen. Beiden Arten von Pflichten geht es jedoch darum, Gleichstellung zu erreichen und Diskriminierung zu bekämpfen. Dementsprechend wird der Begriff „Gleichbehandlung", der gemeinhin (und verwirrenderweise) nur verwendet wird, um eine ähnliche oder identische Behandlung zu bezeichnen, hier in dem Sinne verwendet, dass er sich sowohl auf die gleichartige Behandlung von Menschen bezieht, die sich in einer ähnlichen Situation befinden, als auch auf die angemessen unterschiedliche Behandlung von Menschen, deren Umstände sich maßgeblich voneinander unterscheiden.

2.2 „Angemessene Vorkehrungen" im CRPD

Im weiteren Verlauf wird in dem Kapitel untersucht, was „angemessene Vorkehrungen" im CRPD bedeutet und welche Pflichten zum Treffen angemessener Vorkehrungen das Übereinkommen vorsieht. In Artikel 2 CRPD werden „angemessene Vorkehrungen" definiert als:

> „notwendige und geeignete Änderungen und Anpassungen, die keine unverhältnismäßige oder unbillige Belastung darstellen und die, wenn sie in einem bestimmten Fall erforderlich sind, vorgenommen werden, um zu gewährleisten, dass Menschen mit Behinderungen gleichberechtigt mit anderen alle Menschenrechte und Grundfreiheiten genießen oder ausüben können".

Dies verlangt eine Fokussierung auf den „bestimmten Fall" und beinhaltet, dass (1) die Änderungen oder Anpassungen in Hinblick auf die Beseitigung der Benachteiligung der jeweiligen Person mit Behinderung effizient sind und (2) ihre Umsetzung durch den jeweiligen Arbeitgeber oder die jeweilige Arbeitgeberin machbar ist.

Die Versagung angemessener Vorkehrungen wird in dieser Klausel ausdrücklich als eine Form von Diskriminierung eingestuft. Artikel 5 CRPD verbietet Diskriminierung, und nach Artikel 5 Absatz 3 sind die Vertragsstaaten verpflichtet, alle geeigneten Schritte zu unternehmen, um „die Bereitstellung angemessener Vorkehrungen" in der Praxis zu gewährleisten.

Es müssen Pflichten zum Treffen angemessener Vorkehrungen eingeführt werden, die alle im CRPD enthaltenen Rechte abdecken. Artikel 27 regelt den Umfang seines sachlichen Geltungsbereichs im Beschäftigungskontext. Dieser umfasst allgemeine fachliche und berufliche Beratungsprogramme, Stellenvermittlung sowie Berufsausbildung und Weiterbildung,[2] Arbeitnehmer- und Gewerkschaftsrechte sowie Selbständigkeit, Unternehmertum, Genossenschaften und ein eigenes Geschäft. Was den persönlichen Geltungsbereich der im CRPD enthaltenen Pflicht zum Treffen angemessener Vorkehrungen betrifft, so hat diese seitens der Vertragsstaaten für Menschen mit Behinderungen zu gelten. „Menschen mit Behinderungen" als solche werden im CRPD nicht definiert; in Artikel 1 (in dem der Zweck des Übereinkommens, nicht aber seine Definitionen verankert ist) heißt es jedoch:

> „Zu den Menschen mit Behinderungen zählen Menschen, die langfristige körperliche, seelische, geistige oder Sinnesbeeinträchtigungen haben, welche sie in Wechselwirkung mit verschiedenen Barrieren an der vollen, wirksamen und gleichberechtigten Teilhabe an der Gesellschaft hindern können".

In *Jungelin gegen Schweden* entschied der CRPD-Ausschuss, dass die Vertragsstaaten bei der Ausformulierung von Pflichten zum Treffen angemessener Vorkehrungen über einen Ermessensspielraum verfügen. Insbesondere sollte sich der Ausschuss nicht in deren Entscheidungen darüber einmischen, wann eine Belastung als „unzulässig" oder „unbillig" anzusehen sei. Andererseits ist der Ausschuss, wie bereits früher (in *HM gegen Schweden*) deutlich gemacht, bereit, Fälle, in denen der Staat Organisationen oder Einzelpersonen keinerlei Verpflichtung auferlegt, ein Abweichen von der Standardpraxis auch nur in

2 Art. 27 Abs. 1 Buchst. d.

Betracht zu ziehen, um den Bedürfnissen/Umständen einer bestimmten Person mit Behinderung Rechnung zu tragen, als einen Verstoß gegen Artikel 5 zu betrachten.

2.3 Angemessene Vorkehrungen in der Rahmenrichtlinie Beschäftigung

Artikel 5 der Rahmenrichtlinie Beschäftigung verlangt von den Mitgliedstaaten, Pflichten zum Treffen angemessener Vorkehrungen im Beschäftigungsbereich einzuführen. Anders als im CRPD werden Verstöße gegen die Pflicht zum Treffen angemessener Vorkehrungen in der Richtlinie nicht ausdrücklich als Diskriminierung eingestuft. Der Erwägungsgrund 20 liefert eine Orientierungshilfe für die Arten von „erforderlichen Maßnahmen", die nach Artikel 5 gegebenenfalls zu treffen sind. Es handelt sich dabei um eine nicht abschließende Liste von Beispielen. Orientierungshilfen bei der Frage, ob bestimmte Vorkehrungen zu einer übermäßigen Belastung führen, liefert der Erwägungsgrund 21. Darin heißt es, dass „der mit ihnen verbundene finanzielle und sonstige Aufwand sowie die Größe, die finanziellen Ressourcen und der Gesamtumsatz der Organisation oder des Unternehmens und die Verfügbarkeit von öffentlichen Mitteln oder anderen Unterstützungsmöglichkeiten berücksichtigt werden" sollten.

Der sachliche Geltungsbereich der in der Richtlinie verankerten Pflicht zum Treffen angemessener Vorkehrungen ist identisch mit dem Geltungsbereich der Richtlinie als Ganzem und in Artikel 3 geregelt. Die Richtlinie enthält eine Ausnahmeregelung für die Streitkräfte, die es den Mitgliedstaaten erlaubt, den Streitkräften Diskriminierungen wegen einer Behinderung nicht zu verbieten bzw. von ihnen nicht zu verlangen, angemessene Vorkehrungen für Beschäftigte mit Behinderung zu treffen.

Was den persönlichen Geltungsbereich der Pflicht zum Treffen angemessener Vorkehrungen betrifft, so wird diese in Artikel 5 der Richtlinie auf „Menschen mit Behinderung" bezogen. Der Ausdruck „Menschen mit Behinderung" wird in der Richtlinie nicht definiert, war in den letzten Jahren jedoch Gegenstand mehrerer Verfahren vor dem EuGH. Insbesondere seit der Ratifizierung des CRPD seitens der EU hat der Gerichtshof seinen Ansatz geändert, um ihn mit seinem Verständnis von Artikel 1 CRPD in Einklang zu bringen. Der Gerichtshof stellte somit fest, „Behinderung" sei zu verstehen als

> „physische, geistige oder psychische Beeinträchtigungen von Dauer, die in Wechselwirkung mit verschiedenen Barrieren den Betreffenden an der vollen und wirksamen Teilhabe am Berufsleben, gleichberechtigt mit den anderen Personen, hindern können".[3]

Wenngleich dieser neue Ansatz gegenüber dem früheren Ansatz des Gerichts eine erhebliche Verbesserung darstellt, bestehen doch Bedenken, dass er den Anforderungen des CRPD nach wie vor nicht gerecht wird. Insbesondere die Notwendigkeit, eine Behinderung der Teilhabe am „Berufsleben" nachzuweisen, scheint mit dem CRPD nicht vereinbar zu sein.

2.4 Angemessene Vorkehrungen in den nationalen Rechtsvorschriften

Der Rest des Kapitels untersucht, wie Pflichten zum Treffen angemessener Vorkehrungen im Beschäftigungsbereich in den nationalen Rechtsvorschriften formuliert und umgesetzt wurden. Erstens wurde der Frage nachgegangen, wie Pflichten zum Treffen angemessener Vorkehrungen zum Ausdruck gebracht werden. Weder in **Liechtenstein** noch in **Island** wird eine Pflicht zum Treffen angemessener Vorkehrungen klar und ausdrücklich formuliert. In allen anderen in der Studie erfassten Ländern existiert eine solche Pflicht, wenngleich hinsichtlich der Rechtsvorschriften, in denen diese verankert ist, unterschiedliche Ansätze gewählt wurden.

Der zweite wichtige Punkt, der im Zusammenhang mit dem nationalen Recht erörtert wird, ist der sachliche Geltungsbereich der Pflichten zum Treffen angemessener Vorkehrungen in Bezug auf Beschäftigung. In allen **28 Mitgliedstaaten** und in **Norwegen** gilt die Pflicht, angemessene Vorkehrungen zu treffen, sowohl für den öffentlichen als auch für den privaten Sektor, in Bezug auf Beschäftigung und Beruf,

3 EuGH, Rechtssache C-312/11, *Kommission / Italien*, 4. Juli 2013, noch nicht veröffentlicht.

Berufsbildung sowie die Mitgliedschaft und Mitwirkung in Organisationen der Arbeitgeberinnen/Arbeitgeber bzw. Arbeitnehmerinnen/Arbeitnehmer. Der Militärdienst ist in vielen Ländern vom Geltungsbereich des Verbots von Diskriminierungen wegen einer Behinderung (und vom Geltungsbereich der Pflichten zum Treffen angemessener Vorkehrungen) ausgenommen. Trotzdem haben nur drei Länder im Hinblick auf die Streitkräfte einen Vorbehalt gegen Artikel 27 CRPD angemeldet. Für die Übereinstimmung mit der Richtlinie stellt dies zwar kein Problem dar, es deutet aber darauf hin, dass viele Unionsländer die Anforderungen der Artikel 5 und 27 CRPD möglicherweise nicht erfüllen.

Was den persönlichen Geltungsbereich betrifft, so ist die Umgehensweise mit dem Begriff „Arbeitnehmer/Arbeitnehmerin" im Allgemeinen recht einheitlich; bei der Frage, ob Selbständigkeit und unbezahlte Arbeit in den Geltungsbereich der Pflichten zum Treffen angemessener Vorkehrungen fallen oder nicht, existieren auf nationaler Ebene hingegen erhebliche Unterschiede. In den meisten Ländern gilt das gesetzliche Verbot von Diskriminierungen aufgrund einer Behinderung (und die Pflicht zum Treffen angemessener Vorkehrungen) nicht für selbstständige Tätigkeiten. In einigen Ländern (z. B. in **Dänemark**, **Frankreich** und im **Vereinigten Königreich**) existieren jedoch Vorschriften, die zumindest bestimmte Arten von Selbständigkeit erfassen. Was unbezahlte Arbeit betrifft, so werden ehrenamtliche Kräfte und unbezahlte Arbeitskräfte in einigen Ländern (z. B. in **Bulgarien**, **Deutschland**, **Estland**,[4] **Lettland**, **Norwegen**, **Österreich**, **Portugal**, **Slowenien**, der **Slowakei**, **Ungarn**[5] und im **Vereinigten Königreich**) von den Vorschriften in der Regel nicht erfasst. Im Gegensatz dazu haben unbezahlte Arbeitskräfte in **Finnland**, **Frankreich** und in den **Niederlanden** – ebenso unbezahlte Praktikantinnen und Praktikanten in **Dänemark** – Anspruch auf angemessene Vorkehrungen. In vielen Ländern bestand, was diesen Punkt betraf, wenig Klarheit.

Was die Definition von „Behinderung" (zum Zweck eines Anspruchs auf angemessene Vorkehrungen) betrifft, so werden auf nationaler Ebene unterschiedliche Ansätze verfolgt. Drei grundlegende Ansätze sind zu unterscheiden. Erstens: In einigen Ländern gibt es keine klare rechtliche Definition und bleibt die Auseinandersetzung mit dieser Frage den Gerichten überlassen – die in der Regel dem Beispiel des EuGH folgen. Zweitens: In anderen Länder ist die rechtliche Definition von „Behinderung" zum Zweck eines Anspruchs auf angemessene Vorkehrungen dieselbe wie die, die im Antidiskriminierungsrecht (inklusive angemessene Vorkehrungen) gilt; in vielen Länder, die diesen Ansatz verfolgen, gelten nach wie vor Definitionen von „Behinderung", die dem Ansatz des EuGH in *Chacón Navas* entsprechen – ein Ansatz, den der EuGH inzwischen als unvereinbar mit dem CRPD ablehnt. Drittens: Einige wenige Ländern verwenden eine Definition von „Behinderung" (bzw. ein System zur Bestimmung dieses Begriffs), die allein im Hinblick auf angemessene Vorkehrungen gilt; diese ist in der Regel enger gefasst als die rechtliche Definition, die im Zusammenhang mit anderen Aspekten des Antidiskriminierungsrechts gilt. Dieser Ansatz ist insofern problematisch, als er vielen Menschen mit Behinderung einen Anspruch auf angemessene Vorkehrungen vorenthält.

Ein Thema, dem bisher überraschend wenig Beachtung geschenkt wurde, ist die Frage, wann die Pflicht zum Treffen angemessener Vorkehrungen entsteht – anders ausgedrückt: welche Umstände vorliegen müssen, damit Arbeitgeberinnen und Arbeitgeber (oder andere verantwortliche Personen) tatsächlich verpflichtet sind, angemessene Vorkehrungen zu treffen (oder das Treffen solcher Vorkehrungen in Betracht zu ziehen). Artikel 5 der Rahmenrichtlinie Beschäftigung enthält keinerlei Angaben zu diesem Punkt, ebenso wenig das CRPD. In keinem der Länder – mit Ausnahme des **Vereinigten Königreichs** – wird er in den Rechtsvorschriften ausdrücklich angesprochen. Eine Analyse der Rechtsvorschriften und Praktiken, die mit den Pflichten zum Treffen angemessener Vorkehrungen einhergehen, zeigt, dass im Wesentlichen drei Ansätze existieren. Bei der ersten Variante entsteht die Pflicht erst dann, wenn ein Arbeitgeber oder eine Arbeitgeberin weiß bzw. wissen müsste, dass die betreffende Person eine Behinderung hat. Bei der

4 Estnisches Gleichbehandlungsgesetz (*Võrdse kohtlemise seadus*), RT I 2008, 56, 315.

5 Art. 8 Abs. 1 Gesetz LXXXVIII von 2005 über gemeinnützige ehrenamtliche Tätigkeiten, in dem die Pflichten der Empfängerorganisation (Gewährleistung eines sicheren Arbeitsumfelds, Gewährung der erforderlichen Freizeit und Bereitstellung der notwendigen Anleitungen und Informationen) aufgelistet werden, enthält keinerlei Angaben zu angemessenen Vorkehrungen.

zweiten Variante entsteht die Pflicht erst dadurch, dass die behinderte Person ein konkretes Ersuchen an den Arbeitgeber oder die Arbeitgeberin richtet – und nicht einfach dadurch, dass der Arbeitgeber oder die Arbeitgeberin weiß, dass ein Arbeitnehmer oder eine Arbeitnehmerin bzw. ein Bewerber oder eine Bewerberin eine Behinderung hat. Bei der dritten Variante entsteht die Pflicht erst dann, wenn der Arbeitgeber oder die Arbeitgeberin von einer zuständigen Behörde auf die Notwendigkeit, Vorkehrungen zu treffen, hingewiesen wird. Ungeachtet der Tatsache, dass sowohl die Richtlinie als auch das CRPD zu diesem Punkt schweigen, entsprechen die beiden letztgenannten Ansätze nicht dem Geist der in beiden Instrumenten enthaltenen Pflichten zum Treffen angemessener Vorkehrungen.

Was den eigentlichen Inhalt der Pflichten angeht, so folgen alle nationalen Rechtsvorschriften – ungeachtet der Unterschiede in Bezug auf Sprache und Ausdruck – einem personenzentrierten und lösungsorientierten Ansatz. Die verlangten Vorkehrungen können grob in zwei Kategorien unterteilt werden: Erstens technische Maßnahmen – dazu gehören Hilfsmittel und andere Anpassungen des Arbeitsplatzes. Zweitens organisatorische Maßnahme – dazu gehören Maßnahmen wie zum Beispiel Arbeitszeitanpassung und Umverteilung von Aufgaben, Telearbeitsmodelle, sogenannter „Behindertenurlaub“, verlängerter oder zusätzlicher Urlaub, Hilfestellungen, Wechsel an einen anderen Standort und Versetzung auf einen anderen Arbeitsplatz.

Was „übermäßige Belastung“ angeht, so tragen die weit gefassten Kriterien der nationalen Rechtsvorschriften dem Erwägungsgrund 21 und dem Artikel 5 der Richtlinie im Wesentlichen Rechnung. Ein besonderer Schwerpunkt liegt hierbei auf den Kosten der Vorkehrungen und den Zuschüssen, die zur Deckung dieser Kosten zur Verfügung stehen. Das innerstaatliche Recht mancher Ländern sieht vor, dass anhand einer umfassenden Evaluierung geprüft werden muss, ob die Vorkehrungen eine übermäßige Belastung darstellen oder nicht – wobei neben den Kosten auch andere Faktoren einfließen (beispielsweise die Tätigkeit des Unternehmens, die Bedeutung der Vorkehrungen für die behinderte Person und der Nutzen, den sie für andere haben).

In einigen Ländern gibt es spezielle zusätzliche Beschränkungen der Pflichten zum Treffen angemessener Vorkehrungen – nach italienischem Recht müssen Arbeitgeberinnen und Arbeitgeber der öffentlichen Hand ihrer Pflicht zum Beispiel „ohne neue oder höhere Belastungen für die öffentlichen Finanzen und personellen Ressourcen“ nachkommen. Daten zur Anwendung dieser Vorschriften liegen gegenwärtig nicht vor, und es ist unklar, ob Budgetbeschränkungen Arbeitgeber und Arbeitgeberinnen der öffentlichen Hand in der Praxis davon abhalten, konkreten Personen angemessene Vorkehrungen zukommen zu lassen.

Ausdrückliche Vorgaben an die Verantwortlichen, die behinderte Person im Hinblick auf angemessene Vorkehrungen zu konsultieren, sind im nationalen Recht nicht vorgesehen, offensichtlich werden solche Konsultationen in den meisten Ländern jedoch vorausgesetzt. Die Nichtkonsultierung der betroffenen Person stellt an sich also keinen Verstoß gegen die Pflicht zum Treffen angemessener Vorkehrungen dar; sie birgt jedoch die Gefahr, dass Vorkehrungen getroffen werden, die im konkreten Fall nicht angemessen sind und die fragliche Benachteiligung nicht wirkungsvoll beheben. Ausdrückliche Vorschriften über die Heranziehung Dritter (z. B. Fachverbände mit Knowhow in Assistiver Technologie, Gewerkschaften, Behindertenverbände sowie Allgemeinmediziner/innen und Arbeitsmediziner/innen) existieren ebenfalls nicht, in der Praxis wird jedoch häufig auf diese Bezug genommen.

Verbindliche Leitlinien für angemessene Vorkehrungen sind äußerst selten – viele Gleichbehandlungsstellen haben jedoch unverbindliche Empfehlungen herausgegeben. Datenschutzbeauftragte und andere Organisationen haben ebenfalls Anleitungen für angemessene Vorkehrungen im Beschäftigungsbereich herausgegeben. Daten über die Folgen und Auswirkungen dieser Anleitungen und Empfehlungen waren nicht verfügbar. Das mangelnde Bewusstsein für die Pflichten zum Treffen angemessener Vorkehrungen, das in einigen EU-Ländern besteht, ist ein Thema, über das sich der CRPD-Ausschuss in einschlägigen Abschließenden Bemerkungen besorgt geäußert hat.

In einigen wenigen Ländern (konkret **Estland** und **Lettland)** gilt das Nichttreffen angemessener Vorkehrungen nicht als Diskriminierung, was im Widerspruch zu Artikel 2 CRPD steht. In anderen Ländern gilt das Nichttreffen angemessener Vorkehrungen als Diskriminierung, wird manchmal jedoch als spezielle, eigenständige Form von Diskriminierung behandelt, manchmal bei unmittelbarer und mittelbarer Diskriminierung mit einbezogen.

Wo das Nichttreffen angemessener Vorkehrungen als Diskriminierung gilt, stehen in der Regel dieselben Rechtsmittel zur Verfügung wie bei anderen Formen von Diskriminierung. Viele Länder sehen lediglich die Möglichkeit einer finanziellen Entschädigung vor – ein Punkt, über den sich der CRPD-Ausschuss besorgt gezeigt hat. In anderen Ländern können Gerichte auch die Durchführung von Anpassungen anordnen.

Was die Zahl und Art der Rechtsstreite wegen angemessener Vorkehrungen betrifft, so fehlt es in den meisten Ländern an entsprechenden Daten. Hindernisse für die rechtliche Durchsetzung sind häufig die Verfahrenskosten, der Zugang zu rechtlicher Unterstützung und Beratung sowie Verfahrensfragen wie zum Beispiel Klagefristen. Manchmal stoßen Personen mit Behinderung, die den Rechtsweg beschreiten, aber auch auf Hindernisse in Form von unzugänglichen Gerichten (oder anderen Gebäuden) oder unzugänglicher Kommunikation und Information. Beispiele guter Praxis für inklusive Rechtsverfahren sind ebenfalls zu finden.

Abschließend geht Kapitel 2 auf die Frage der staatlichen Zuschüsse zu den Kosten ein, die den Arbeitgeberinnen und Arbeitgebern für behinderungsspezifische Vorkehrungen entstehen. In der überwiegenden Mehrzahl der Länder stellt die Regierung staatliche Mittel zur Verfügung, um die Arbeitgeberinnen und Arbeitgeber bei den Kosten der Vorkehrungen zu unterstützen. Bei der Begrenzung dieser Unterstützung nach oben gibt es erhebliche Unterschiede – keine Obergrenze existiert jedoch derzeit im **Vereinigten Königreich**, wo sich gezeigt hat, dass für jedes von der Regierung investierte Pfund 1,48 Pfund an sie zurückflossen. In **Zypern** gibt es keinerlei staatliche Unterstützung für angemessene Vorkehrungen, in **Griechenland** nur in äußerst beschränktem Maße.

Kapitel 3 – Gesetzliche Vorschriften zur Verbesserung der Zugänglichkeit und ihr Zusammenhang mit angemessenen Vorkehrungen im Beschäftigungsbereich

3.1. Einleitung

Dieses Kapitel entfernt sich von dem ausschließlichen Fokus auf angemessene Vorkehrungen, der die vorhergehenden Teile des Berichts bestimmt hat, und richtet das Augenmerk auf rechtliche Mechanismen, mit denen die Zugänglichkeit von Arbeitsstätten und Systemen verbessert wird.

3.2 Zugänglichkeit im CRPD

Zugänglichkeit gilt als „allgemeiner Grundsatz“ des CRPD. Darin kommt die zentrale Rolle zum Ausdruck, die sie – als Grundlage für andere Rechte – spielt. Pflichten in Bezug auf Zugänglichkeit tauchen nicht nur in Artikel 3, sondern auch an anderen Stellen der Konvention auf. Die wichtigste Bestimmung ist Artikel 9, der die Überschrift „Zugänglichkeit“ trägt.

Laut *General Comment* Nr. 2 des CRPD-Ausschusses fußt das in Artikel 9 CRPD festgeschriebene Recht auf Zugänglichkeit auf früheren UN-Verträgen, in denen Rechte auf gleichberechtigten Zugang zu öffentlichen Einrichtungen verankert wurden. Arbeitsstätten werden in Artikel 9 Absatz 1 als Beispiel für die Art von Einrichtungen genannt, die diesem Artikel zufolge zugänglich gemacht werden müssen. Weitere Leitlinien zu Arbeitsstätten sind in dem erwähnten *General Comment* zu finden.

In Artikel 9 wird den Staaten eine Reihe von Pflichten zur Herbeiführung von Zugänglichkeit auferlegt. Dazu gehören die Einführung von Zugänglichkeitsstandards und die Forschung zur Entwicklung leichter zugänglicher IKT. In dem *General Comment* werden die Staaten aufgefordert, zur Durchsetzung von Zugänglichkeitsanforderungen das Antidiskriminierungsrecht anzuwenden. Die Beziehung zwischen Zugänglichkeit und Diskriminierung ist nicht ganz unproblematisch. Der *General Comment* enthält widersprüchliche Aussagen dazu, ob alle Formen von Unzugänglichkeit als Diskriminierung zu behandeln sind – in welchem Fall davon auszugehen wäre, dass Zugänglichkeit sofort hergestellt werden müsste. Andere Aussagen des *General Comment* legen den Schluss nahe, dass die Pflicht darin besteht, Zugänglichkeit schrittweise und im Laufe der Zeit herzustellen.

Der *General Comment* bietet Orientierungshilfen zur Unterscheidung zwischen angemessenen Vorkehrungen (die eine einzelne Person mit Behinderung betreffen) und Zugänglichkeit (die die Beseitigung von Barrieren für Menschen mit Behinderung im Allgemeinen betrifft). Pflichten zum Treffen angemessener Vorkehrungen spielen eine wichtige Rolle, wenn es darum geht, Menschen mit Behinderung in die Lage zu versetzen, gegen Zugangsbarrieren und Vorkehrungen vorzugehen, die für eine einzelne Person getroffen wurden, und können bewirken, dass sich die Zugänglichkeit für andere Menschen mit Behinderung verbessert.

3.3 Pflichten zur Verbesserung der Zugänglichkeit im Unionsrecht

Die Rahmenrichtlinie Beschäftigung enthält keine spezifischen Pflichten zur Verbesserung der Zugänglichkeit, wenngleich Verbote mittelbarer Diskriminierung, Verbote unmittelbarer Diskriminierung und Pflichten zum Treffen angemessener Vorkehrungen allesamt dazu führen können, dass sich in konkreten Fällen die Zugänglichkeit verbessert. Die EU-Vorschriften über Sicherheit und Gesundheitsschutz wurden ebenso wie die Vorschriften über die Vergabe von Aufträgen dafür eingesetzt, Zugänglichkeit in bestimmten Situationen zu fördern, und es besteht das Potenzial, diese Initiativen weiterzuentwickeln.

3.4 Pflichten zur Verbesserung der Zugänglichkeit im nationalen Recht

Manche Länder (z. B. **Schweden**) haben spezielle Formen von Diskriminierung eingeführt, die über die Pflichten zum Treffen angemessener Vorkehrungen hinausgehen und bewirken, dass Zugangsbarrieren in der Arbeitswelt als rechtswidrig gelten. Allgemeinere Diskriminierungsverbote sind außerdem oft sehr hilfreich, wenn es um die Bekämpfung von Zugangsbarrieren geht. Klassische Pflichten zum Treffen angemessener Vorkehrungen, Verbote mittelbarer Diskriminierung und manchmal auch unmittelbarer Diskriminierung sind somit Instrumente, um gegen Zugangsbarrieren vorzugehen. Einige Länder haben die Wirkung, die Pflichten zum Treffen angemessener Vorkehrungen im Hinblick auf Zugänglichkeit in der Arbeitswelt potenziell haben, verbessert. Nach **österreichischem** und **slowakischem** Recht gelten Vorkehrungen beispielsweise nicht als unverhältnismäßig, wenn sie in gesonderten Rechtsvorschriften – etwa in Bauvorschriften, die sich mit Zugänglichkeit befassen – verlangt werden. In **Bulgarien** kann mangelnde Zugänglichkeit in öffentlichen Gebäuden nicht gerechtfertigt werden.

Mietet ein Arbeitgeber oder eine Arbeitgeberin ein Gebäude an, das nicht zugänglich ist, so muss der Vermieter bzw. die Vermieterin gegebenenfalls zustimmen, bevor Änderungen vorgenommen werden können, um die Zugänglichkeit der Räumlichkeiten zu verbessern. Was die Frage betrifft, ob Vermieter und Vermieterinnen in solchen Fällen ihre Zustimmung verweigern können, wurden sehr unterschiedliche Ansätze festgestellt. In manchen Ländern (z. B. in **Belgien**, **Finnland**, **Österreich** und **Spanien**) kann der Vermieter oder die Vermieterin das Gesuch einer Mietpartei auf Durchführung solcher Änderungen ablehnen – und zwar selbst dann, wenn die Mietpartei ein Arbeitgeber oder eine Arbeitgeberin und somit verpflichtet ist, angemessene Vorkehrungen zur Beseitigung physischer Barrieren zu treffen. In anderen Ländern (z. B. im **Vereinigten Königreich**) dürfen Vermieter und Vermieterinnen ihre Zustimmung nicht unbillig verweigern, in wieder anderen (z. B. in **Malta** und **Norwegen**) müssen Vermieter und Vermieterinnen auch dann zustimmen, wenn im Mietvertrag etwas anderes festgelegt ist.

Vorschriften über die Zugänglichkeit von öffentlichen Gebäuden oder der baulichen Umwelt im Allgemeinen sind ein wichtiges Instrument, um die Zugänglichkeit zumindest einiger Arbeitsstätten zu verbessern. In etlichen Ländern sind öffentliche und private Arbeitgeberinnen und Arbeitgeber darüber hinaus verpflichtet, für ein gesundes und sicheres Arbeitsumfeld zu sorgen, was häufig Pflichten in Bezug auf Zugänglichkeit mit sich bringt. In **Dänemark** legt zum Beispiel eine Verfügung fest, dass in Bezug auf Verkehrswege, Türen, Raumausstattung, Toiletten und Waschräume am Arbeitsplatz auf Beschäftigte mit Behinderung Rücksicht zu nehmen ist. In manchen Ländern haben auch allgemeine Pflichten zur Förderung von Gleichstellung das Potenzial, in erheblichem Maße zur Verbesserung der Zugänglichkeit beizutragen – beispielsweise die Gleichbehandlungspflicht des öffentlichen Sektors im **Vereinigten Königreich** (verankert im *Equality Act 2010* und im *Northern Ireland Act 1998*).

Kapitel 4 – Schlussfolgerungen

4.1 Offensichtliche Widersprüche zu den UN- und/oder EU-Standards

Es gibt eine Reihe von Punkten, in denen das Unionsrecht und/oder das nationale Recht den CRPD-Standards nicht entspricht.

Erstens: Was die Definition von „Behinderung" angeht, so hat der EuGH in seiner neueren Rechtsprechung eine Definition dieses Begriffes entwickelt, die restriktiver ist als der im CRPD gewählte Ansatz. Im Gegensatz zur CRPD ist es nach dem neuen Ansatz des EuGH erforderlich, dass beschwerdeführende Personen eine Beeinträchtigung haben, die, im Zusammenwirken mit sozialen Barrieren, ihre Teilnahme am „Berufsleben" behindert. Durch diese Fokussierung auf „Berufsleben" wird die Gruppe der „Menschen mit Behinderung", die von der Richtlinie erfasst werden, auf eine kleineren Personenkreis beschränkt als den in Artikel 1 CRPD vorgesehenen – wo in Artikel 1 keine Rede von „Berufsleben" ist. Aus demselben Grund entsprechen nationale Vorschriften, die dem EuGH in diesem Punkt gefolgt sind, den CRPD-Standards ebenfalls nicht.

Zweitens: **Liechtenstein** und **Island** haben keinerlei klar definierte Pflicht zum Treffen angemessener Vorkehrungen. Dies bedeutet, dass der im CRPD (und in der Richtlinie) festgelegte Standard nicht erfüllt wird. Da jedoch beide Länder weder EU-Mitglied noch CRPD-Vertragsstaat sind, liegt kein Verstoß vor.

Drittens: Artikel 2 CRPD verlangt ausdrücklich, dass die Versagung angemessener Vorkehrungen als eine Form von Diskriminierung anzusehen ist. In **Estland** und **Lettland** ist dies jedoch nicht der Fall. Die Tragweite dieses Widerspruchs zum CRPD hängt bis zu einem gewissen Grad davon ab, welche Folgen es im nationalen Recht hat, wenn eine Klage als Diskriminierungsklage eingestuft wird – ob dies zum Beispiel Auswirkungen auf die Art der verfügbaren Rechtsmittel oder auf die Unterstützung durch und die Beteiligung von Gleichbehandlungsstellen hat.

Viertens: Aus den Abschließenden Bemerkungen des CRPD-Ausschusses geht klar hervor, dass von den Vertragsstaaten erwartet wird, dafür zu sorgen, dass eines der Rechtsmittel, die bei Versagung angemessener Vorkehrungen zur Verfügung stehen, die Durchführung eines Unterlassungsverfahrens mit dem Ziel der Veränderung von Verhaltungsweisen ist. In vielen Ländern kann jedoch nur ein finanzieller Ausgleich (in Form von Schadenersatz) verfügt werden.

Fünftens: Es gibt Bedenken (aber nur wenig Zahlen) hinsichtlich der Inklusivität und Zugänglichkeit der Durchsetzungsmechanismen, mit denen behinderte Menschen gegen Diskriminierungen, die sie im Arbeitsumfeld erfahren (u. a. das Versagen angemessener Vorkehrungen), vorgehen können. Dieses Problem betrifft sowohl Artikel 5 und Artikel 27 CRPD als auch Artikel 13 über den Zugang zur Justiz.

Sechstens: Viele EU-Mitgliedstaaten haben, was Diskriminierung in den Streitkräften betrifft, zwar keinen Vorbehalt gegen Artikel 27 CRPD angemeldet, nehmen die Streitkräfte jedoch von ihren Rechtsvorschriften zum Schutz vor Diskriminierung aufgrund von Behinderung aus.

Wenden wir uns nun den Punkten zu, in denen Widersprüche zwischen dem nationalen Recht und der Richtlinie bestehen:

Erstens: In vielen Mitgliedstaaten scheinen die Rechtsvorschriften, was die Definition von Behinderung betrifft, nicht mit der Rahmenrichtlinie Beschäftigung in Einklang zu stehen. In ihrer Definition von Behinderung gehen viele Mitgliedstaaten weiterhin davon aus, dass die Beeinträchtigung einer Person zwangsläufig eine Minderung ihrer Erwerbsfähigkeit nach sich zieht oder ihr Berufsleben anderweitig behindert. Dieser Ansatz gleicht dem des EuGH in *Chacón Navas* – ein Ansatz, den der EuGH selbst inzwischen ablehnt. Ein weiteres Problem im Zusammenhang mit der Definition von Behinderung ist, dass einige Länder (z. B. das **Vereinigte Königreich**) bestimmte Personengruppen aus ihrer Definition von Behinderung ausschließen und ihnen damit die Möglichkeit nehmen, eine Diskriminierung wegen Behinderung vor Gericht zu bringen.

Zweitens: Ausdrückliche Einschränkungen, was die Ausübung der Pflichten zum Treffen angemessener Vorkehrungen betrifft, sind selten. Die Bedingung der **italienischen** Rechtsvorschriften, wonach die Arbeitgeber und Arbeitgeberinnen der öffentlichen Hand ihren Pflichten zum Treffen angemessener Vorkehrungen „ohne neue oder höhere Belastungen für die öffentlichen Finanzen und personellen Ressourcen" nachkommen müssen,[6] ist jedoch besorgniserregend und entspricht nicht den Anforderungen der Artikel 5 und 27 CRPD.

Drittens: Diskriminierende oder unzugängliche Verfahren zur Durchsetzung von Ansprüchen aus der Rahmenrichtlinie Beschäftigung verstoßen offensichtlich gegen Artikel 9 der genannten Richtlinie – dieser Artikel verpflichtet die Mitgliedstaaten, Menschen mit Behinderung sowie anderen Personen, die Ansprüche aus der Richtlinie geltend machen wollen, Zugang zu Gerichts- oder Verwaltungsverfahren zu verschaffen. Auch wenn, was die Situation in den Mitgliedstaaten betrifft, nur wenig Informationen vorlagen, lassen erhebliche Hindernisse beim Zugang zur Justiz doch darauf schließen, dass Menschen mit Behinderung ihre Ansprüche faktisch nicht, wie in Artikel 9 gefordert, in entsprechenden Verfahren geltend machen können. Erwähnenswert ist in diesem Zusammenhang, dass andere Antidiskriminierungsrichtlinien der Union Bestimmungen mit dem gleichen Wortlaut wie Artikel 9 der Rahmenrichtlinie Beschäftigung enthalten. Dies bedeutet, dass auch Menschen mit Behinderung die Möglichkeit haben müssen, Ansprüche, keiner anderen Art von Diskriminierung (z. B. wegen der rassischen Zugehörigkeit oder des Geschlechts) ausgesetzt zu sein, uneingeschränkt in entsprechenden Verfahren geltend zu machen. Es kann davon ausgegangen werden, dass Menschen mit Behinderung beim Zugang zur Justiz auch dann auf Hindernisse stoßen, wenn sie gegen Formen von Diskriminierung vorgehen, die nicht auf Behinderung basieren (z. B. gegen Diskriminierung am Arbeitsplatz wegen des Geschlechts oder der rassischen Zugehörigkeit). Diese Problematik war jedoch nicht Gegenstand des Berichts, weshalb keine entsprechenden Belege gesammelt wurden.

4.2 Mangelnde Klarheit der EU- und UN-Standards

Eine Reihe von Punkten, auf die der Bericht eingeht, werden weder in der Richtlinie noch im CRPD explizit angesprochen, haben jedoch erhebliche Auswirkungen auf die wirksame Umsetzung der Pflichten zum Treffen angemessener Vorkehrungen. Es überrascht daher nicht, dass bei vielen von ihnen die Ansätze auf nationaler Ebene sehr unterschiedlich sind. Zu diesen Punkten gehören folgende: die Umstände, unter denen die Pflicht des Arbeitgebers oder der Arbeitgeberin, angemessene Vorkehrungen zu treffen (oder das Treffen solcher Vorkehrungen zu prüfen), entsteht – konkret: ob die Pflicht dann entsteht, wenn er oder sie von der Behinderung und der möglichen Notwendigkeit, Vorkehrungen zu treffen, erfährt oder erfahren müsste; die Frage, inwieweit von den Verantwortlichen verlangt oder erwartet wird, den behinderten Arbeitnehmer oder die behinderte Arbeitnehmerin (oder andere) im Hinblick auf mögliche Vorkehrungen zu konsultieren; die Frage, inwieweit der Vermieter oder die Vermieterin eines Arbeitgebers oder einer

6 Gesetzesdekret Nr. 76 vom 28. Juni 2013, ABl. Nr. 150 vom 28. Juni 2013, umgewandelt in das Gesetz Nr. 99 vom 9. August 2013, ABl. Nr. 196 vom 22. August 2013, S. 1, über „Vorläufige Sofortmaßnahmen zur Förderung der Beschäftigung, insbesondere von Jugendlichen, des sozialen Zusammenhalts und andere finanzielle Sofortmaßnahmen".

Arbeitgeberin verpflichtet ist, zugänglichkeitsbezogenen Anpassungen des Mietobjekts zuzustimmen; Umstände, unter denen angemessene Vorkehrungen Selbständigen oder unbezahlten Arbeitskräften zustehen (wenn überhaupt).

4.3 Umsetzung, Förderung und Anleitung

Was die Sensibilisierung für die Pflichten, angemessene Vorkehrungen zu treffen, und entsprechende Anleitungen betrifft, so sind die Vertragsstaaten nach Artikel 5 Absatz 3 CRPD verpflichtet, angemessene Vorkehrungen aktiv zu fördern, und verlangt Artikel 8 von ihnen, das Bewusstsein für die Rechte von Menschen mit Behinderung zu schärfen. Offizielle Leitlinien mit bindender Wirkung wurden in den untersuchten Ländern nur selten verabschiedet, unverbindliche Handlungsempfehlungen sind hingegen häufiger anzutreffen. Wie effektiv diese Leitlinien und Handlungsempfehlungen im Hinblick auf ein besseres Verständnis und eine stärkere Sensibilisierung waren, ist jedoch unklar. Staatliche Finanzhilfen zur Deckung der mit angemessenen Vorkehrungen verbundenen Kosten spielen in den meisten untersuchten Ländern eine wichtige Rolle, wenn es darum geht, Effektivität und Wirkung der Pflichten zum Treffen angemessener Vorkehrungen zu verbessern. In der Regel werden diese Hilfen in Form eines nach oben begrenzten Zuschusses gewährt; allerdings scheint das im **Vereinigten Königreich** angewandte Modell, bei dem die Beiträge der Arbeitgeber und Arbeitgeberinnen ohne Begrenzung nach oben aufgestockt werden, sehr erfolgreich zu sein – trotz der jüngsten Vorschläge zur Einführung einer Obergrenze.

4.4 Pflichten zur Verbesserung der Zugänglichkeit im Beschäftigungskontext

Im Beschäftigungskontext hat das Thema Zugänglichkeit weniger Beachtung gefunden und wurde zaghafter angegangen als im Kontext der Bereitstellung von Dienstleistungen. Natürlich sind viele Dienstleister und Dienstleisterinnen auch Arbeitgeber bzw. Arbeitgeberinnen. Es existiert also keine klare Trennlinie, weshalb die verbesserte Zugänglichkeit von Dienstleistungen sich zumindest in einigen Fällen auf die Zugänglichkeit von Arbeitsstätten auswirken wird. Die Zugänglichkeit von Arbeitsstätten zu verbessern, ist eine Dimension der Verwirklichung eines systemischen Wandels, der Beschäftigungsmöglichkeiten für andere Menschen mit Behinderung eröffnen wird als für die konkrete Person, für die im Einzelfall angemessene Vorkehrungen getroffen werden können. Es muss sichergestellt werden, dass Arbeitgeberinnen und Arbeitgeber angemessen auf die Umstände einzelner Stellenbewerber und -bewerberinnen bzw. Arbeitnehmer und Arbeitnehmerinnen mit Behinderung eingehen; gleichzeitig müssen aber auch Gedanken, Anstrengungen und Ressourcen darauf gerichtet werden, die umfassenderen, systemischen Veränderungen zu verankern, die erforderlich sind, damit Beschäftigung und Arbeitsplätze wirklich zugänglich und inklusiv werden.

4.5 Empfehlungen

Der Bericht schließt mit einer Reihe von Empfehlungen für das weitere Vorgehen auf EU-Ebene:

- Der EuGH sollte seine Auslegung des Begriffs „Behinderung“ überdenken und verfeinern, so dass Geschädigte nicht gezwungen sind, die Auswirkungen einer Beeinträchtigung (im Zusammenspiel mit sozialen Faktoren) auf ihr „Berufsleben“ nachzuweisen.
- Die Kommission sollte, was die Umsetzung der Rahmenrichtlinie Beschäftigung in nationales Recht angeht, mit einer Reihe von Mitgliedstaaten in Dialog treten – z. B. mit **Italien** bezüglich der strengen Beschränkungen, die für angemessene Vorkehrungen im öffentlichen Sektor gelten – und, mit entsprechendem Feingefühl, mit einer Reihe anderer Länder darüber sprechen, welcher Kategorie von Menschen mit Behinderung die Pflichten zum Treffen angemessener Vorkehrungen zugutekommen. Die Kommission wird darüber hinaus aufgefordert, Informationen über die Zugänglichkeit und Inklusivität der Verfahren zur Rechtsdurchsetzung einzuholen.
- Die Kommission sollte ihre Unterstützung von Initiativen, die Schulungen zum Thema angemessene Vorkehrungen, Zugänglichkeit und inklusive Beschäftigung durchführen, fortsetzen und ausbauen.
- Die Kommission sollte begleitend zur Rahmenrichtlinie Beschäftigung Leitlinien erstellen und verbreiten, in denen die verschiedenen Aspekte der in der Richtlinie enthaltenen Pflicht zum Treffen angemessener Vorkehrungen geklärt werden.

- Die Zugänglichkeit von Arbeitsstätten und die wirksame Umsetzung der Pflichten zum Treffen angemessener Vorkehrungen sollten in den EU-2020-Prozessen – im Zusammenhang mit Strategien zur Anhebung der Beschäftigungsquoten von Menschen mit Behinderung – stärker ins Blickfeld gerückt werden.
- Die EU-Institutionen sollten weitere vergleichende Untersuchungen zu Themen beauftragen, die, wie aus diesem Bericht hervorgeht, bisher nur unzureichend untersucht, entwickelt und bewertet wurden – etwa zu der Frage, wann Pflichten zum Treffen angemessener Vorkehrungen entstehen (und entstehen sollten), und zu folgenden Punkten: Nettonutzen staatlicher Zuschüsse zu den für die Anpassung von Arbeitsplätzen anfallenden Kosten; Vorschriften über die Einwilligung von Vermietern und Vermieterinnen; Vorschriften über Konsultation und Dialog; Mechanismen (Rechtsmittel, Zugänglichkeitsanforderungen usw.) zur Stärkung des systemischen Wandels.

1. Introduction

1.1 Focus and aims

This report focuses on disability and employment. More specifically, it is concerned with the elaboration and implementation of legal obligations which aim to ensure that workplaces are made accessible to disabled workers and that reasonable accommodations are made to prevent them being placed at a disadvantage compared with their non-disabled peers. Accessibility and reasonable accommodation in the workplace are fundamental preconditions of a disability-inclusive open labour market.

The report addresses UN law, in particular the UN Convention on the Rights of Persons with Disabilities (CRPD). It also addresses EU law, in particular the EU Employment Equality Directive.[1] In addition, it addresses national law in 31 countries – the 28 EU Member States, **Iceland**, **Liechtenstein** and **Norway**.

The report aims to identify any ongoing challenges in the national transposition of Article 5 of the Employment Equality Directive or the implementation (in the employment context) of the reasonable accommodation provisions of the CRPD. It also aims to identify situations in which national obligations are more demanding than the reasonable accommodation obligations contained in the Directive or the CRPD, and to identify examples of national laws (whether or not concerned with reasonable accommodation) that have the effect of requiring enhancements in the accessibility of workplaces and systems. The report thus attempts to detect, on the one hand, lack of conformity with the Directive and/or the CRPD and, on the other hand, emerging examples of good practice. It also explores the relationship between national reasonable accommodation duties and laws requiring accessibility. Throughout, it seeks to highlight emerging patterns and trends.

The 21st Century has witnessed considerable legislative activity in EU countries in the area of reasonable accommodation and employment. The primary catalyst for this activity has been the Employment Equality Directive 2000. Before that Directive, only three EU Member States[2] had enacted legislation prohibiting disability discrimination and, even in those countries, considerable amendments were often needed to ensure that domestic law met the higher standards required by the Directive. For instance, in **Ireland**, the pre-existing limitation on the reasonable accommodation obligation, which protected employers from having to pay anything above a 'nominal' cost, was removed in order to achieve consistency with the Directive; and, in the United Kingdom, the pre-existing exemption from the Disability Discrimination Act 1995 for employers with fewer than 20 employees was removed for the same reason.

In 2009, an evaluation of progress being made at national level in the implementation of the Employment Equality Directive was undertaken by Waddington and Lawson on behalf of the European Network of Legal Experts in the Non-Discrimination Field.[3] This identified the reasonable accommodation obligation (imposed by Article 5 of the Directive) as one of the aspects of the Directive which was proving particularly challenging to implement.[4] Both this 2009 report and a 2011 study by the European Union Agency for Fundamental Rights (FRA),[5] identified a considerable variety of approaches to reasonable accommodation in Member States and a number of problematic cases in which national law appeared to fall short of

1 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303 2.12.2000 pp. 16-22 available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0078.

2 The UK, Ireland and Sweden.

3 Waddington L. and Lawson A. (2009), *Disability and non-discrimination law in the European Union: An Analysis of Disability Discrimination Law Within and Beyond the Employment Field* (European Network of Legal experts in the Non-discrimination Field), Publications Office of the European Union, Luxembourg, 2009, available at: http://www.ec.europa.eu/social/BlobServlet?docId=6154&langId=en.

4 Ibid.

5 European Union Agency for Fundamental Rights (2011), *The Legal Protection of Persons with Mental Health Problems under Non-Discrimination Law,* available at: http://fra.europa.eu/en/publication/2011/legal-protection-persons-mental-health-problems-under-non-discrimination-law.

the Directive's requirements. These problematic cases fell into two broad categories. In the first were situations where national law failed to include a clear and unambiguous reasonable accommodation duty applying to the full range of employment and occupation covered by the Directive. The 2009 study gave **Italy**, **Slovenia** and **Poland** as examples of countries falling into this category; and, in July 2013, the inadequate transposition of the reasonable accommodation obligation led the Court of Justice of the European Union (CJEU) to rule against **Italy**.[6] In the second category of problematic cases were laws restricting entitlement to reasonable accommodation to a subset of those people regarded as disabled (e.g. for purposes of direct and indirect disability discrimination), on the basis, for instance, of official registration as disabled or categorisation as 'seriously disabled' in some way. According to the FRA study, this approach was adopted in **France**, **Germany** and **Spain**.[7]

As regards the practical operation of reasonable accommodation laws, there is also some evidence of difficulties. A 2010 report by the European Disability Forum, for example, drew attention to lack of implementation in practice associated with the fact that employers' levels of awareness of disability rights in general, and reasonable accommodation obligations in particular, were still very low.[8] The need to provide additional guidance and information on this issue featured amongst the plans set out in the European Disability Strategy 2010-2020.[9]

This report seeks to build upon, without duplicating, the work done by earlier evaluations of progress in the national implementation of employment-related reasonable accommodation duties (such as those conducted by Waddington and Lawson in 2009 and by FRA in 2011). It will therefore draw on information and analysis in earlier reports, but focus particularly on developments which have occurred since that time. In addition, unlike earlier reports, this one will explore issues of implementation (to the extent that available data permits) and also refer to analogous laws which have the effect of enhancing the accessibility of workplaces and systems.

1.2 Methodology

This report draws on a range of different sources. Information about developments within the 31 countries included in this study is derived primarily from a series of country-specific reports compiled by the national members of the European network of legal experts in gender equality and non-discrimination.[10] These reports were supplemented by a specific response for additional information in a template tailored to fit the particular questions covered in this study. These same national experts have also provided all translations of materials originally written in languages other than English. An annex consisting of summaries of country-specific information provided by these experts is set out at the end of this report.

Research carried out by the authors of this report supplements that carried out by the national experts and focuses particularly on EU and UN-level developments. It draws upon a range of sources including EU primary and secondary legislation, case law and policy documents; UN treaty law and the general

6 Court of Justice of the European Union (CJEU), Case C-312/11 *European Commission v Italian Republic*, 4 July 2013, not yet reported.

7 European Union Agency for Fundamental Rights (2011), *The Legal Protection of Persons with Mental Health Problems under Non-Discrimination Law,* available at: http://fra.europa.eu/en/publication/2011/legal-protection-persons-mental-health-problems-under-non-discrimination-law.

8 European Disability Forum (2010), *Ten Years On: Practical Impact of the Employment Directive on persons with disabilities in Employment,* Brussels. See also European Union Agency for Fundamental Rights (2012), Choice and Control: The Right to Independent Living, Luxembourg: Publications Office of the EU – in which empirical evidence is presented which demonstrates that difficulties in accessing reasonable accommodations contributed to the exclusion from employment of many of the research participants; and – Comparative Study of the Institutional Framework on Accessibility and people with disabilities in Greece and Bulgaria, Athens, 2012 (S?????t??? µe??t? t?? Tesµ???? ??a?s??? ??a t?? «???sßas?µ?t?ta» ?a? ta ?t?µa µe a?ap???a se ????da ?a? ?????a??a) which highlights the gap between legislation and practice, drawing attention to lack of enforcement and monitoring in Greece in particular.

9 European Commission, Initial plan to implement the European Disability Strategy 2010-2020, List of Actions 2010-2015, SEC(2010) 1324 final, sections 1.3 and 1.4.

10 See details available at: http://www.equalitylaw.eu/.

comments and concluding observations of the Committee on the Rights of Persons with Disabilities (CRPD Committee); academic literature; and NGO literature and reports.

Throughout the analysis of national developments in this report, reference is made to two key instruments which provide an important evaluative framework. The first is the EU Employment Equality Directive 2000 and the second is the UN CRPD. The CRPD has a broader scope than the Employment Equality Directive and thus provides an evaluative framework where the latter does not. It also provides a framework that can be used to evaluate EU-level developments (including those relating to the Employment Equality Directive). Because of the centrality of the Employment Equality Directive and the CRPD to this report, a more detailed introduction to each of them will now be provided but before the structure of this report is explained in more detail.

1.3 Legal and policy context

1.3.1 The European Disability Strategy 2010-2020

Current EU disability policy is to be found in the Commission's European Disability Strategy 2010–2020.[11] This has the 'overall aim' of 'empower[ing] people with disabilities so that they can enjoy their full rights, and benefit fully from participating in society and in the European economy'. It identifies EU-level actions that, alongside national measures, are designed to achieve this goal and 'ensure effective implementation of the UN Convention across the EU'.[12] It focuses on the elimination of barriers under eight main 'areas for action.' One of these 'areas for action' is employment and the others are accessibility, participation, equality, education and training, social protection, health, and external action. In relation to employment, the key objective of the Commission is stated to be to '[e]nable many more people with disabilities to earn their living on the open labour market.'[13] The commitments set out in connection with this area for action principally concern 'providing Member States with analysis, political guidance, information exchange and other support'[14] relating to disabled people and employment, with a view to identifying challenges and proposing recommendations to support on-going efforts to move toward Europe 2020 targets.[15]

As already mentioned, 'equality' and 'accessibility' are other areas for action included in the European Disability Strategy (EDS) – both of which have clear relevance to the current study. As regards 'equality', the Commission pledges that it will adopt a two-pronged approach to tackling discrimination which seeks both to implement fully existing EU legislation prohibiting discrimination (i.e. the Employment Equality Directive) and also to ensure that EU policy more generally works to enhance disability equality.[16] 'Accessibility' is given a high priority in the EDS, which recognises that accessibility is a 'precondition for participation in society and in the economy' and indicates that the Commission will work towards proposing a European Accessibility Act[17] – a commitment which was fulfilled on 2 December 2015.

1.3.2 The Employment Equality Directive

The purpose of the Employment Equality Directive, as expressed in Article 1, is

11 European Commission (2010), European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM (2010) 636 final, Brussels, 15 November 2010.
12 Section 2.
13 Section 2.1.4.
14 Section 2.1.4.
15 The targets include '75% of the 20-64 year-olds to be employed'. See http://ec.europa.eu/europe2020/targets/eu-targets/index_en.htm.
16 Section 2.1.3.
17 European Commission (2010), *Commission Staff Working Document*, table 3.

> 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

It sets out minimum standards which Member States must ensure are met in their national laws. It thus requires them to prohibit discrimination on grounds of disability (as well as sexual orientation, age and religion or belief) in the sphere of employment, occupation and vocational training. Of key relevance to this report is Article 5, which obliges Member States to require employers to provide reasonable accommodation to disabled applicants and employees. This will be discussed more fully in Chapter 2 below. Here, however, other disability-related aspects of the Employment Equality Directive will be outlined briefly in order to provide context for the more detailed discussion which follows.

The material scope of the Employment Equality Directive is laid down in Article 3. According to this provision, the Directive applies to all persons, as regards both the public and private sectors, including public bodies, in relation to employment and occupation, vocational training and membership of and involvement in employer and employee organisations. Article 3(4) allows Member States to exclude the armed forces from the scope of their prohibition of discrimination on grounds of disability (and also age). Consistently with it, the EU has entered a reservation against Article 27 of the CRPD in relation to the employment of disabled people in the armed forces.[18]

The personal scope of the Employment Equality Directive is less clear. Its protection extends to people who experience unequal treatment because of a relevant characteristic, such as disability. However, it does not define 'disability' and therefore (as Waddington and Lawson have noted)[19] creates uncertainty as to the Directive's personal scope. As will be explained more fully in Chapter 2 of this report (and as has been highlighted in other studies),[20] Member States have chosen to define the group of individuals who are entitled to protection from disability discrimination in different ways, leading to diverse levels of protection. Unsurprisingly, it is a matter which has come to the attention of the CJEU.

In its first decision on the matter, in the case of *Chacón Navas,* the CJEU made it clear that the meaning of 'disability' in the Employment Equality Directive must be 'given an autonomous and uniform interpretation' and that it is not a question which can be simply left to national-level laws for determination.[21] According to it 'disability', for these purposes, means 'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.[22] Furthermore, it must 'be probable that [the limitation] will last for a long time'.[23] This decision has attracted considerable criticism for the stress it places on the fact that the limitations must arise from the impairment (independently of environmental factors).[24] In the more recent cases of *Ring and Werge,*[25]

18 European Commission (2014), *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union*, SWD(2014) 182 final, Brussels, 5 June 2014, available at: http://ec.europa.eu/justice/discrimination/files/swd_2014_182_en.pdf.

19 Waddington L. and Lawson A. (2009), *Disability and non-discrimination law in the European Union: An Analysis of Disability Discrimination Law Within and Beyond the Employment Field* (European Network of Legal experts in the Non-discrimination Field), Publications Office of the European Union, Luxembourg, 2009, available at: http://www.ec.europa.eu/social/BlobServlet?docId=6154&langId=en.

20 See e.g. Lane, J. and Videbaek Munkholm, N. (2015) 'Danish and British Protection from Disability Discrimination at Work – Past, Present and Future'. *The International Journal of Comparative Labour Law and Industrial Relations* Vol. 31, no. 1, pp. 91–114; and Mabbett, D. (2002) 'Definitions of Disability in Europe. A Comparative Analysis', Final Report 13 December 2002, a study prepared by Brunel University, UK (European Commission).

21 CJEU, Case C-13/05, *Sonia Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467, paragraph 40.

22 Paragraph 43.

23 Paragraph 45.

24 Waddington, L (2007) 'Case C-13/05, *Chacón Navas v Eurest Colectividades SA*, judgment of the Grand Chamber of 11 July 2006' *Common Market Law Review*, Vol. 44, No. 2, pp. 487-499; Hosking, D. (2007) 'A High Bar for EU Disability Rights', *Industrial Law Journal,* Vol. 36, No. 2, pp. 228–237; Evangelista, F. (2006) 'Malattia e Handicap, Distinte le Tutele Ue' *Diritto e giustizia*, Vol. 34, pp. 100-101.

25 CJEU, Joined cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab* (C-335/11) and H*K Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro*

Commission v Italy,[26] *Z v A Government Department and the Board of management of a community school*,[27] and *Kaltoft*[28] – all of which were decided after the EU became a party to the CRPD – the CJEU had regard to Article 1 of the CRPD in its interpretation of the term 'disability' within the Directive. Instead of requiring that the 'limitation' is caused by the impairment, the CJEU now recognises a long-term limitation 'which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers'.[29]

In *Coleman v Attridge Law*,[30] the CJEU ruled that the Directive's protective scope extended to a person who themselves had no 'disability' within the meaning of the Directive, but who experienced direct discrimination or harassment on grounds of their relationship (or 'association') with somebody who did have such a disability. This raises the question of whether the Directive requires employers to make reasonable accommodation to people (e.g. carers) who are associated with disabled people. This has not been unequivocally resolved. However it seems extremely unlikely that the Directive will be read in this way.

Turning to the nature of obligations (other than those concerning reasonable accommodation) created by the Directive, Member States are required to prohibit direct and indirect discrimination.[31] They are also required to prohibit harassment (which is deemed to be a form of discrimination);[32] instructions to discriminate;[33] and victimisation.[34] Positive action is governed by Article 7, paragraph (2) of which relates specifically to disability and provides that:

> '[w]ith 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'.[35]

The Directive (like other EU non-discrimination directives dealing with race and gender) also contains a number of provisions on enforcement and remedies which provide important context for later discussion. Thus, Article 9(1) requires Member States to establish and make available appropriate 'judicial and/or administrative procedures' for the enforcement of rights protected by the Directive.[36] Article 17 requires Member States to develop a system of sanctions for breach of the national measures which implement Directive rights and to ensure that these sanctions are applied in practice. Where these sanctions take the form of compensation to the victim, they must be 'effective, proportionate and dissuasive'. It is also worth noting that Articles 13 and 14 of the Directive impose obligations on Member States to promote dialogue with social partners and encourage dialogue with NGOs about fostering equality on grounds of disability (as well as the other grounds covered by the Directive).

*Display A/S, in liquidatio*n (C-337/11) 11 April 2013, not yet published.

26 CJEU, Case C-312/11 *European Commission v Italian Republic*, 4 July 2013, not yet reported.

27 CJEU, Case C-363/12 *Z. v A Government Department and The Board of management of a community school*, not yet published.

28 Case C-354/13, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund,* 18 December 2014, not yet published.

29 Above n 27, paragraph 46.

30 *Case C-303/06, Coleman v Attridge Law [2007] IRLR 88*.

31 Article 2 Employment Equality Directive.

32 Article 3.

33 Article 4.

34 Article 11.

35 See, generally, De Vos, M. (2007), *Beyond Formal Equality. Positive actions under Directive 2000/43/EC and 2000/78/EC*, Brussels.

36 See the analogous requirements set out in Article 7 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19/07/2000, p. 22; and Article 17 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204, 26/07/2006 p. 23.

Finally it should be stressed that, like all other EU secondary law, the Employment Equality Directive must now be interpreted in light of the Charter of Fundamental Rights of the European Union (CFR) and the CRPD. The CRPD is the subject of the next Section, and will therefore not be further discussed here. The CFR, which was solemnly proclaimed in 2000, contains a range of provisions directly and indirectly related to disability. Article 20 recognises equality before the law, Article 21(1) sets out an all-embracing prohibition of discrimination, and Article 26 states that '[t]he Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'.[37]

1.3.3 The UN Convention on the Rights of Persons with Disabilities

The CRPD has particular significance to any study of the implementation of EU disability law because it has been ratified by the EU itself,[38] Article 44 of the CRPD having made this possible by enabling ratification (or formal confirmation) by 'regional integration organisations'. The CRPD has also been ratified by 26 of the countries discussed in this report (all except **Ireland**, **Finland**, the **Netherlands**, **Iceland** and **Liechtenstein** – and signed by all but **Liechtenstein**). The implications of CRPD ratification for EU law will be discussed in 1.3.4 below. Here, however, the general purpose, principles and obligations of the CRPD will be introduced, together with the provisions which have key relevance to the current study. This section will conclude with a brief mention of the CRPD reporting processes, with particular emphasis on the EU's engagement in them.

According to Article 1 of the CRPD, its purpose is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'. The centrality of the word 'equal' here is noteworthy. It reflects the terms of reference given by the UN General Assembly to the Ad Hoc Committee which negotiated the text of the CRPD – i.e. not to create new types of right, but to facilitate the enjoyment of existing human rights to disabled people. The CRPD thus provides a disability-sensitive articulation of the full range of civil, political, economic, cultural and social rights.

Article 3 enunciates the Convention's general principles, which include: respect for individual dignity, autonomy, and independence; respect for difference and acceptance of disability as human diversity; non-discrimination; equal opportunity; meaningful participation; accessibility; gender equality; and respect for children's rights and support for their evolving capabilities. These principles infuse the substantive CRPD Articles – Articles which create benchmarks against which national (and EU) law can now be assessed. Article 4 sets out the CRPD's 'general obligations' which include requirements that States Parties take measures to ensure that their laws and policies do not discriminate on the basis of disability; promote training on the Convention for people working with disabled people; (importantly) consult with and involve disabled people's organisations (DPOs) in the development and implementation of law and policy and in decision-making processes which concern them; and mainstream rights of disabled people in all policies and programmes.

Before moving on to identify the CRPD Articles which have particular relevance to this report, it should be noted that the term 'disability' does not appear in the CRPD's definition Article – Article 2. Instead, some guidance as to its meaning is included in Article 1, which sets out the purpose of the CRPD. According to this:

37 Bongiovanni, V. (2014) 'La Tutela dei Disabili tra Carta di Nizza e Convenzione delle Nazioni Unite' available online at http://www.iusme.it/contributi/04%20-%20Veronica%20Bongiovanni.pdf. See also Olivetti, M (2001) 'Uguaglianza. Art. 26 Inserimento dei disabili', in Bifulco,R. Cartabia, M., Celotto, A. (eds) *L'Europa dei Diritti. Commentario alla Carta dei Diritti Fondamentali dell'Unione Europea*, Il Mulino, Bologna, pp. 202-209; O'Brien, C. (2014) 'Article 26' In: Peers S, Hervey T, Kenner J, Ward A (eds) *The EU Charter of Fundamental Rights – a commentary*, Hart Publishing, Oxford/Portland, pp. 709-748.

38 The former European Community signed the CRPD in 2007, and concluded it on 26 November 2009 (Council Decision 2010/48/EC, [2010] OJ L 23/35). Under the Decision, the Council authorised the deposit of the instrument of formal confirmation with the Secretary General of the United Nations, which occurred in December 2010.

> '[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

The dynamic nature of 'disability, in this sense of an interaction between 'impairment' and social 'barriers', is echoed in the preamble, according to which:

> '[d]isability is an evolving concept and … results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others …'

Turning now to the CRPD Articles of particular relevance to reasonable accommodation and accessibility in employment, Articles 27, 5 and 9 merit particular attention. Article 27 requires States Parties to recognise and take appropriate steps to protect and promote 'the right of persons with disabilities to work, on an equal basis with others'.[39] An illustrative list of these specific steps is set out in Article 27(1), which includes prohibiting discrimination[40] and also ensuring that reasonable accommodation is provided in the employment context.[41] Other examples in this list demonstrate the breadth of coverage of the Article, which extends to 'general technical and vocational guidance programmes, placement services and vocational and continuing training',[42] 'labour and trade union rights', and 'self-employment, entrepreneurship, (…) cooperatives and (…) one's own business'.[43]

Article 5(2) requires States Parties to prohibit 'discrimination on the basis of disability' – a phrase which is defined in Article 2 as follows:

> 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation'.

Thus, the definition of 'discrimination on the basis of disability' in Article 2 of the CRPD makes it crystal clear that a failure to provide reasonable accommodation is a form of discrimination – a point not made explicit by Article 5 of the Employment Equality Directive. Article 5(3) of the CRPD goes on to deal specifically with reasonable accommodation, obliging Parties to 'take all appropriate steps to ensure that reasonable accommodation is provided'.

Accessibility is addressed primarily by Article 9 of the CRPD – an Article which is appropriately titled 'accessibility'. It sets out a range of measures which States Parties are required to take in order to enhance the accessibility of the 'physical environment', 'transportation', 'information and communications, including information and communications technologies and systems', and 'other facilities and services open or provided to the public, both in urban and in rural areas'.[44] 'Workplaces'[45] appear in the list of examples of where accessibility should be enhanced through a wide range of measures aimed at both the public and the private sector. The accessibility obligations of Article 9 are the subject of General Comment No 2 of the CRPD Committee. More detailed reflection on these obligations and their relationship with reasonable accommodation, however, will be reserved for Chapter 3 below.

39 CRPD, Article 27(1).
40 Article 27(1)(a).
41 Article 27(1)(i).
42 Article 27(1)(d).
43 Article 27(1)(f).
44 CRPD, Article 9(1).
45 CRPD, Article 9(1)(a).

The EU, like all other Parties to the CRPD, is obliged by Article 35 of the CRPD to submit a comprehensive report on measures taken to give effect to the CRPD on a four-yearly basis. These reports provide the basis of a 'constructive dialogue' between the country or regional integration organisation concerned and the CRPD Committee, after which Concluding Observations are issued by the CRPD Committee. The initial report of the EU was examined by the Committee in 2015, with Concluding Observations on the EU being issued in September of that year.[46] The CRPD Committee has also (at the time of writing) issued Concluding Observations on nine of the countries included in this study – reference to which will be included at relevant points in the analysis.

1.3.4 The CRPD and the EU legal order

As mentioned above, the CRPD has been ratified both by the EU and by many of its Member States. It is a 'mixed agreement' – part of it falling within the scope of EU competence and part falling outside EU competence- but within the scope of the powers of Member States.[47] Thus, according to Article 216(2) of the TFEU, the fact of EU accession makes international agreements (such as the CRPD) binding on EU institutions and on EU Member States (to the extent of EU competence).

More detailed guidance as to the legal implications of EU accession to international treaties has been provided by the CJEU in connection with other treaties. This has made it clear that international treaties form 'an integral part of [EU] law'[48] once they enter into force. Thus, when required to interpret the Employment Equality Directive, the CJEU observed in *Ring and Werge* that:

> '[i]t follows from Decision 2010/48 that the European Union has approved the UN Convention. The provisions of that convention are thus, from the time of its entry into force, an integral part of the European Union legal order'.

As regards the status of international agreements within the hierarchy of sources of EU law, the CJEU has held that international treaties are situated formally below the provisions of the Treaties but above secondary legislation,[49] and that mixed agreements 'have the same status as purely Community agreements, in so far as the provisions fall within the scope of Community competence'.[50] The CRPD is thus EU law, and, as suggested above, in hierarchical terms is inferior to the provisions of the Treaties, but superior to secondary EU law.[51] The latter point implies that provisions of EU secondary law must, as far as possible, be interpreted in a manner that is consistent with the CRPD. Hence, if the wording of secondary EU legislation is open to more than one interpretation, preference should be given, as far as practicable, to the interpretation which renders the European provision consistent with the Convention.[52] This principle of consistent interpretation was recognised, in connection with the CRPD, by the CJEU in *Ring and Werge* – where it was stated that '[i]t follows that Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with that convention'.[53] Similar statements were included in *Z. v A*

46 Committee on the Rights of Persons with Disabilities *Concluding observations on the initial report of the European Union* CRPD/C/EU/CO/1, 4 September 2015, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FEU%2FCO%2F1&Lang=en.

47 See European Commission (2014), *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union*, SWD(2014) 182 final, Brussels, 5 June 2014, available at: http://ec.europa.eu/justice/discrimination/files/swd_2014_182_en.pdf.

48 CJEU, Case 181/73, *R. & V. Haegeman v Belgian State,* [1974] E.C.R. 449, [5]. In this decision, the Court used the notion of incorporation, according to which provisions of international agreements are not transposed and do not need further validation. They become part of the EU legal order after the conclusion of the agreement, simply by entering into force.

49 CJEU, Case C-61/94, *Commission v Germany,* [1996] E.C.R. I-3989.

50 *Ex multis,* CJEU, Case C-239/03, *Etang de Berre*, [2004] E.C.R. I-07357.

51 CJEU, Case C-61/94, *Commission v Germany,* [1996] E.C.R. I-3989.

52 Casolari, F. (2011) 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation', in Cannizzaro, E., Palchetti, P. and Wessel R.A. (eds), *International Law as Law of the European Union*, Leiden/Boston: Martinus Nijhoff Publishers, pp. 394-406. See also Ferri D. (2010), The conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: a constitutional perspective, in L. Waddington, G. Quinn (eds.), *European Yearbook of Disability Law*, Intersentia, pp. 47-71.

53 CJEU, *HK Danmark,*above n 31, paragraph 32.

Government Department and the Board of management of a community school,[54] in *Kaltoft*,[55] and most recently in *Glatzel*.[56]

Even if international agreements form an integral part of the EU legal order, the principle of direct effect – which implies enforceable rights for the individual vis-à-vis the EU and its Member States – cannot automatically be extended to them. The direct effect of an international agreement, which determines the ability of parties to rely on it not only before a national court but also before an EU court, is a matter that must be decided by the CJEU.[57] In general, to determine whether a provision displays direct effect, the Court has examined whether the Parties to the agreement have established the effect of its provisions in their internal legal order.[58] If not, it has considered whether an agreement is capable of stipulating directly effective provisions by examining 'the purpose, the spirit, the general scheme and the terms' of the agreement.[59] Then, it has examined whether the relevant provision contains a clear and sufficiently precise obligation, which is not subject, in its implementation or effect, to the adoption of any subsequent measure. In relation to the CRPD, the Court found in *Z. v A Government Department and the Board of management of a community school*,[60]

> 'without there being any need to examine the nature and broad logic of the UN Convention, it must be held that the provisions of the Convention are not, as regards their content, provisions that are unconditional and sufficiently precise (...), and that they therefore do not have direct effect in European Union law'.

The CJEU has also firmly asserted its competence to interpret international agreements, including mixed agreements.[61] In *Hermés*,[62] the CJEU affirmed that

> 'where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of [EU] law, it is clearly in the [EU] interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply'.[63]

The Court, hence, has jurisdiction over the interpretation of the UNCRPD – although it has not yet engaged in extensive interpretation of specific UNCRPD provisions.

1.4 Structure of the report

In addition to the introduction (Chapter 1) and the conclusion (Chapter 4), this report is divided into two main parts. The first of these, Chapter 2, focuses on reasonable accommodation and the second, Chapter 3, focuses on analogous requirements which have the effect of enhancing the accessibility of workplaces and systems.

Chapter 2 is divided into four Sections. Section 2.1 explains the origin of the concept of reasonable accommodation. Section 2.2 analyses the way in which reasonable accommodation obligations are

54 Case C-363/12 *Z. v A Government Department and The Board of Management of a Community School*, not yet published.
55 Case C-354/13, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund,* 18 December 2014, not yet published.
56 Case C-356/12, *Wolfgang Glatzel v Freistaat Bayern* of 22 May 2014, not yet published.
57 Opinion of AG Maduro in *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC- Giorgio Fedon & Figli SpA,* Joined cases C-120/06 P and C-121/06 P, E.C.R. [2008] I-6513.
58 CJEU, Joined Cases C-120/06 P and C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v Council of the European Union and Commission of the European Communities*, [2008] E.C.R. I-6513, paragraph 108.
59 CJEU, Case C280/93, *Germany v Council,* [1994] E.C.R. I4973, paragraph 110.
60 CJEU, Case C-363/12 *Z. v A Government Department and The Board of management of a community school*, not yet published.
61 CJEU, Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd*, [1987] E.C.R. 3719.
62 CJEU, Case C-53/96, *Hermés International v FHT Marketing*, [1998] E.C.R.I-3603.
63 Case C-53/96, *Hermés International v. FHT Marketing*, [1998] E.C.R. I-3603, Para. 23.

defined in the CRPD and interpreted by the CRPD Committee; and Section 2.3 analyses the way in which it is defined in the Employment Equality Directive and interpreted by the CJEU. Section 2.4 will then focus on the way in which reasonable accommodation obligations are being elaborated and implemented in the employment context at national level.

Chapter 3 focuses on accessibility measures and their relationship with reasonable accommodation. It is divided into two sections. Section 3.1 explores the concept of accessibility and the way in which it is defined in the CRPD and interpreted by the CRPD Committee. Particular emphasis will be given to its relationship with reasonable accommodation. Section 3.2 will focus on accessibility obligations in national laws and their relationship with national non-discrimination frameworks.

In Chapter 4, conclusions will be set out which will draw together the discussion in Chapters 2 and 3.

2. Reasonable accommodation law and its implementation

2.1 Introduction

This chapter focuses on the elaboration and implementation of reasonable accommodation duties in employment. Section 2.2 below will focus on reasonable accommodation duties in UN law; Section 2.3 on reasonable accommodation in EU law; and Section 2.4 on reasonable accommodation in national law. Before the detail of any of these legal systems is tackled, a few words will be devoted here to the history and function of reasonable accommodation.

Reasonable accommodation duties originated in the US Equal Employment Opportunity Act of 1972 which introduced (into the Civil Rights Act 1964) a duty to reasonably accommodate the religious needs of employees. In the disability context, the term 'reasonable accommodation' first appeared in the US Rehabilitation Act of 1973 and was subsequently incorporated into the Americans with Disabilities Act 1990 (ADA).[64] In EU law, a reasonable accommodation duty first appeared in Article 5 of the Employment Equality Directive 2000 – a development which, as noted by Waddington and Lawson,[65] was directly influenced by the emergence of the duty in the US.[66] At the international level, the concept of reasonable accommodation first appeared in General Comment 5 of the Committee on Economic, Social and Cultural Rights (CESCR).[67] However, the first legally binding document to include the concept of reasonable accommodation was the CRPD.

Reasonable accommodation duties require different treatment for people whose circumstances are relevantly different. They thus represent the other side of the coin from direct discrimination duties, which focus on requiring identical treatment. Both types of duty, however, are concerned with achieving equality and countering discrimination. Consequently, the phrase 'equal treatment', although commonly (and confusingly) used to refer to identical treatment, will be used here to refer both to the similar treatment of people who are similarly situated and also to the appropriately different treatment of people whose circumstances are relevantly different.

In the disability context, reasonable accommodation is concerned with the removal of the disadvantage to which a disabled person would otherwise be subjected by an employer's standard working practices or systems – practices and systems generally designed and developed to suit non-disabled people. As Waddington has observed:

> 'the obligation to make a reasonable accommodation on the grounds of disability is based on the recognition that, on occasions, the interaction between an individual's impairment and the physical or social environment can result in the inability to perform a particular function, job or activity in the conventional manner'.[68]

64 See generally de Campos Velho Martel, L. (2011), 'Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective', *International Journal of Human Rights*, Vol. 8, No. 14, pp. 84-110; and Bribosia, E. and Rorive, I. (2013), *Reasonable Accommodation beyond Disability in Europe,* Brussels.

65 Above n 25, p 25.

66 See also Quinn G. and Flynn, E. (2012), 'Transatlantic Borrowings: The Past and Future of EU Non Discrimination Law and Policy on the Ground of Disability' *Am. J. Comp. L.*, pp. 23-48.

67 Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 5, Persons with disabilities (Eleventh session, 1994), U.N. Doc E/1995/22 at 19 (1995), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 24 (2003) at paragraph 9 cited in Lord J. and Brown R. (2011), 'The role of reasonable accommodation in securing substantive equality for persons with disabilities: the UN convention on the rights of persons with disabilities', available at http://www.socialrightsontario.ca/wp-content/uploads/2011/08/article_RebeccaBrown_Reasonableness-for-Convention-for-persons-with-disabilities.pdf.

68 Waddington, L. (2011) 'Reasonable Accommodation. Time to Extend the Duty to Accommodate Beyond Disability?', *NTM|NJCM-Bulletin*, Vol. 36, No. 2, pp. 186-198, available at: http://ssrn.com/abstract=1847623.

Thus, the concern of reasonable accommodation is to remove disadvantage and not to confer advantage. It is solution-oriented, requiring a focus on identifying a way of removing the disadvantage experienced by the particular individual in the particular workplace that can realistically be implemented by the particular employer.

2.2 Reasonable accommodation in the CRPD

2.2.1 Content and classification of the duty

Unlike the Employment Equality Directive, the CRPD explicitly classifies the denial of reasonable accommodation as a form of discrimination. According to Article 2:

> '"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation'.

Reasonable accommodation is thus unequivocally incorporated into the non-discrimination principle by the CRPD. The right to be free from discrimination is a civil and political right and thus implementation of reasonable accommodation duties is required with immediate effect.

The unequivocal embedding of reasonable accommodation within the non-discrimination framework is an acknowledgement that it is an essential element in the effort to ensure that human rights are enjoyed by disabled people 'on an equal basis' with others. Its purpose is thus affirmed as being the removal of the specific disadvantage to which a particular disabled individual would otherwise be exposed so as to ensure equality. As well as differentiating it from more generic target-driven positive action measures, which are purely permissive rather than mandatory in nature,[69] this approach also confines reasonable accommodation duties to situations in which meaningful comparisons can be made with the position of people who are not disabled or who are not disabled in the same way.

States Parties are required by Article 5(2) of the CRPD, as mentioned in Chapter 1, to prohibit discrimination on the basis of disability. Because this is defined by Article 2 to include reasonable accommodation, they are required to impose reasonable accommodation duties on employers and others as part of a non-discrimination legal framework – as well, of course, as ensuring that State entities themselves provide reasonable accommodation. In the words of the CRPD Committee in *HM v Sweden*,

> '[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different'.[70]

Alongside the duty to formulate and introduce reasonable accommodation duties, Article 5(3) requires States to 'take all appropriate steps to ensure that reasonable accommodation is provided' in practice – a requirement which, as argued by Lawson elsewhere,[71] may well be interpreted (particularly when read with Article 8) as entailing a duty to raise awareness of the existence and nature of reasonable accommodation duties. The Article 5 duties imposed on States to introduce reasonable accommodation obligations and make them effective should be distinguished from the actual reasonable accommodation

69 See e.g. CRPD, Art 5(4).

70 Committee on the Rights of Persons with Disabilities, *H.M. v Sweden* – Communication No. 3/2011 (CRPD/C/7/D/3/2011) available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f7%2fD%2f3%2f2011&Lang=en.

71 Lawson, A. (2008*), Disability and Equality Law in Britain: The Role of Reasonable Adjustment*, Portland, Hart Publishing.

duties they create – duties which should (as discussed in Section 2.2.2 below) be imposed on public and private employers, service providers, managers of detention facilities, police and others.

Turning now to the nature of the reasonable accommodation duties which States must introduce and make effective, reasonable accommodation is defined in Article 2 of the CRPD as follows:

> 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.

The CRPD itself gives no more specific guidance than is contained in its definition in Article 2, but this is now supplemented by guidance which can be found in various decisions and comments of the CRPD Committee.

The purpose of reasonable accommodation is clear from Article 2 – it is to enable a disabled person to enjoy or exercise their rights 'on an equal basis with others'. The individual-oriented nature of the duty is also evident – from the reference to the making of modifications 'where needed in a particular case' and is also recognised in the following words of the CRPD Committee:

> '…the duty to provide reasonable accommodation is an *ex nunc* duty, which means that it is enforceable from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis in a particular context. […] Reasonable accommodation can be used as a means of ensuring accessibility for an individual with a disability in a particular situation. Reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is assured, taking the dignity, autonomy and choices of the individual into account. Thus, a person with a rare impairment might ask for accommodation that falls outside the scope of any accessibility standard'.[72]

This focus on the particularity of each individual case suggests that attention needs to be given to two key concerns – the effectiveness of the modifications or adjustments in removing the disadvantage for the particular disabled person; and the practicality of carrying them out by the particular employer.

Turning first to the issue of the effectiveness of the adjustment in removing the disadvantage, the Article 2 definition specifies that the modifications or adjustments will be 'necessary and appropriate'. 'Effectiveness' is implicit within the notion of 'appropriate' and identification of the most effective means of removing the relevant disadvantage for the particular disabled person in question is likely to necessitate some dialogue between that person and the duty-bearer. Impairments vary enormously in nature and severity and so do the characters, experiences and preferences of people with similar impairments. This variety inevitably results in differences in the levels of effectiveness of the various steps that might be taken by the duty-bearer. The individual-orientated nature of reasonable accommodation should thus encourage duty-bearers to resist making assumptions as to what might be most appropriate for a particular disabled individual and instead engage in a dialogue with such a person about how the relevant disadvantages might most effectively be tackled.[73] Failure to consult and involve the disabled person in question would also appear to sit uncomfortably with the CRPD's general principle of 'respect for inherent dignity'.[74] It is argued by de Campos Velho that 'the idea of effectiveness includes the prevention and elimination of segregation, humiliation and stigma'.[75]

72 UN Committee on the Rights of persons with Disabilities (2014), *General Comment on Article 9 of the Convention*, available at http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx.

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

74 CRPD, Article 3(a).

75 de Campos Velho Martel, L. (2011), 'Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective, *International Journal on Human Rights*, Vol. 8, No. 14, pp. 84-110, available at SSRN: http://ssrn.com/abstract=2000291.

The second issue of relevance in any assessment of what steps a reasonable accommodation duty might demand is that of the potential burden of a proposed step on the particular duty-bearer. The Article 2 definition does not require modifications or adjustments which would impose a disproportionate or undue burden. A 'burden', for these purposes, would not be confined to financial cost and might, for instance, include factors such as disruptiveness to working arrangements or deterioration in the quality or nature of core services. It is important to remember, however, that many proposed steps will carry net benefits rather than burdens for duty-bearers[76] – in addition to the benefit of securing the custom or employment of the particular individual, benefits might flow from measures such as the introduction of a system or structure that will improve accessibility and thereby increase the organisation's potential customer base. Reasonable accommodation requires assessments of the level of any potential burden to be conducted in a manner that is sensitive to the circumstances of the particular duty-bearer. Thus, a financial cost that represents a small fraction of the annual budget of a large, wealthy organisation might nevertheless represent so large a sum as to threaten the financial health of a small and poorly resourced organisation. Clearly, a step that might represent an undue burden for the latter might well not do so for the former.

The CRPD Committee accepted, in *Jungelin v Sweden*,[77] that States Parties enjoy a margin of discretion in the formulation of reasonable accommodation duties. In particular, their decisions about when a burden should be regarded as 'undue' or 'disproportionate' should not be interfered with by the Committee. However, as it made clear in the non-employment case of *HM v Sweden*,[78] the Committee will be willing to find non-compliance with Article 5 where the State has not introduced requirements on organisations or individuals even to consider departing from standard practice in order to accommodate the needs of a particular disabled person.

2.2.2 The material scope of the duty

Article 2's definition of reasonable accommodation suggests that reasonable accommodation duties should extend across 'all human rights and fundamental freedoms'. Explicit reference is made to the obligation on States to introduce reasonable accommodation duties in a number of areas – including liberty and security of the person,[79] education,[80] and employment.[81] Even had such explicit references not been made, the obligation to ensure implementation of these (and all other) rights in a non-discriminatory manner would, because of Articles 5 and 2 of the CRPD, necessarily imply the imposition of reasonable accommodation duties. Thus, in *HM v Sweden*,[82] the CRPD Committee found that a failure to require planning authorities to make reasonable accommodations for disabled people had led to a violation of Article 5(3).

Interestingly, in *X v Argentina*,[83] the Committee held that failure to provide reasonable accommodation to a disabled person deprived of their liberty amounted to a violation of Article 14(2) of the CRPD but did not also find a violation of Article 5. Given that the reasonable accommodation obligation is firmly embedded in the prohibition of discrimination in Article 5 (thanks to the definition of discrimination on the basis of disability in Article 2), a violation of the reasonable accommodation requirement of Article 14(2) would appear to necessarily entail a violation of Article 5 as a matter of principle. The silence of the Committee on Article 5 is not inconsistent with this understanding – it might have been based on the

76 Kayess, R. and French P. (2008), 'Out of Darkness into Light', *Human Rights Law Review* 1, section 5d.
77 Committee on the Rights of Persons with Disabilities, *Jungelin v Sweden* – Communication No. 5/2011 (CRPD/C/12/D/5/2011) available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD-C-12-D-5-2011&Lang=en.
78 *HM v Sweden* above n 76.
79 CRPD, Article 14(2).
80 CRPD, Article 24.
81 CRPD, Article 27.
82 *HM v Sweden* above n 76.
83 Committee on the Rights of Persons with Disabilities, *X v Argentina* – Communication No. 8/2012 (CRPD/C/11/D/8/2012) available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/11/D/8/2012&Lang=en.

view that consideration of Article 5 as well as Article 14(2) was not necessary given that the failure to provide reasonable accommodation had already been found to violate the CRPD.
Of particular relevance to the present report is the extent to which the reasonable accommodation obligation should apply in the employment context. As mentioned in Chapter 1, Article 27 is the CRPD provision which governs the right to work. Its scope is wide, extending to 'general technical and vocational guidance programmes, placement services and vocational and continuing training',[84] and 'labour and trade union rights'. It also extends to 'self-employment, entrepreneurship, [...] cooperatives and [...] one's own business'.[85]

2.2.3 The personal scope of the duty

In terms of its personal scope, the duty to make reasonable accommodation provided for in the CRPD is one that States are required to extend in favour of disabled people. The CRPD does not provide a definition of 'persons with disabilities' as such, but according to Article 1 (which sets out the purpose of the treaty and not its definitions):

> 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

This suggests that States Parties should ensure that the personal scope of reasonable accommodation duties is not more restrictive than this guidance. An expansive approach to the interpretation of Article 1 is evident in the Committee's reasoning in *SC v Brazil*.[86] In that case, although the complaint was deemed inadmissible, the Committee affirmed that persons with disabilities include, but are not limited to, those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society. This suggests that the Committee understands 'disabled persons' to be a broader class of people than those mentioned in Article 1. The Committee drew attention to the relationship between illness and disability, explaining that

> '... the difference between illness and disability is a difference of degree and not a difference of kind. A health impairment which initially is conceived of as illness can develop into an impairment in the context of disability as a consequence of its duration or its chronicity. A human rights-based model of disability requires the diversity of persons with disabilities to be taken into account (preamble, paragraph (i)) together with the interaction between individuals with impairments and attitudinal and environmental barriers (preamble, paragraph (e))'.

2.3 Reasonable accommodation in the Employment Equality Directive

2.3.1 Content and classification of the duty

The starting-point for any analysis of 'reasonable accommodation' in EU law is Article 5 of the Employment Equality Directive. According to this,

> 'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training for such a person,

84 Article 27(1)(d).
85 Article 27(1)(f).
86 Committee on the Rights of Persons with Disabilities, *S.C. v Brazil* – Communication No. 10/2013 (CRPD/C/12/D/10/2013) available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD-C-12-D-10-2013&Lang=en.

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

Unlike the CRPD, the Employment Equality Directive does not explicitly define the denial of reasonable accommodation as a form of discrimination. It does not therefore compel Member States to classify it in that way either. There is, however, some indication that the CJEU is interpreting Article 5 and its reasonable accommodation duty as being part of a wider non-discrimination obligation – an interpretation which would enhance consistency with the CRPD.

In *Commission v Italy*,[87] for instance, the CJEU found that **Italy** had failed to fulfil its obligations under the Employment Equality Directive because it had not expressly included a reasonable accommodation duty in its non-discrimination law implementing the Directive. The Italian Government argued that, whilst the duty had not been included in the Legislative Decree No. 216/2003 implementing the Directive, it was contained in other laws on the rights of disabled people.[88] The CJEU rejected these arguments, ruling that although these laws provided for measures of aid and support, social integration and protection, none of them provided for a general duty to provide for reasonable accommodation.

As noted by Waddington and Lawson,[89] the obligation to make a reasonable accommodation laid down by Article 5 of the Employment Equality Directive can be broken into two constituent elements:

1) the employer must take 'appropriate measures'
2) unless this would result in a disproportionate burden.

These will be discussed in turn.

Article 5 of the Directive does not elaborate on the meaning of 'reasonable accommodation' but additional guidance can be derived from some of the recitals in the Directive's non-binding preamble. Recital 20 states that:

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

It thus appears that the term 'reasonable' in the Directive is to be, 'understood to mean that any accommodation must be effective in allowing an individual with a disability to participate in employment related activities whilst not resulting in an excessive burden for the employer'.[90]

The term 'accommodation' in the Directive denotes any modification of, or adjustment to, a job, an employment practice, the work environment, or the manner or circumstances under which a position is held or customarily performed that makes it possible for a qualified individual to apply for, perform the essential functions of, and enjoy the equal benefits of employment. Recital 20 sets out a non-exhaustive list of measures which might constitute an accommodation. A wide interpretation of the

87 *Commission v Italy*, Case C-312/11, 4 July 2013, not yet published.
88 The Government referred to Act no. 104/1992, Framework law on care, social integration and rights of disabled people; to act no. 68/1999 on the right to work of disabled people; to Act no. 381/1991 on Social cooperative and to Legislative decree no. 81/2008 on work health and safety.
89 Above n 25.
90 Ibid.

term 'accommodation', which embraces technical, physical and organisational adaptations, has been confirmed by the CJEU in the *Ring and Werge* case[91] and in *Commission v Italy*.[92]

In *Ring and Werge*, the referring court asked whether an 'accommodation', within the meaning of Article 5 of the Directive, included a reduction in working hours. The CJEU confirmed that the list of measures that may constitute reasonable accommodations listed in Recital 20 is non-exhaustive. It also made it clear that an accommodation may entail a physical, organisational and/or educational measure and that the Employment Equality Directive must be interpreted consistently with Article 2 of the CRPD which 'prescribes a broad definition of the concept of "reasonable accommodation"'.[93] It concluded that an adaptation of working hours might well be an accommodation measure, within the meaning of Article 5, and that:

> '….even if it were not covered by the concept of 'pattern of working time', a reduction in working hours could be regarded as an accommodation measure referred to in Article 5 of the directive, in a case in which reduced working hours make it possible for the worker to continue employment, in accordance with the objective of that article'.[94]

Moving to the second element – disproportionate burden – according to Article 5 (and in line with Article 2 of the CRPD), the employer is not required to make an accommodation if it would impose a disproportionate burden on them. What amounts to a 'disproportionate burden', however, is not spelled out in the Directive. Article 5 simply states that '[w]hen this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate'. This statement appears to allude to subsidies or other measures that subsidise the cost of the accommodation or which otherwise support the employer to make accommodations. Recital 21 gives some further guidance as regards assessments of whether a particular accommodation amounts to a disproportionate burden. It reads:

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

It is clear from this recital that a 'disproportionate' burden exists when the accommodation required involves a significant financial cost for the employer, which is not sustainable having regard to the financial resources of the enterprise and the subsidies available. However, it does not clarify how decisions should be made about the point at which the cost of an accommodation should be regarded as not sustainable. Nor does it clarify the nature of non-financial considerations (if there are any) which may render the making of an accommodation disproportionately 'burdensome' to an employer. The CJEU has not yet offered additional guidance on what might be considered a disproportionate burden. Accordingly, to date this task has been left to Member States and their domestic courts and tribunals.

91 CJEU, *HK Danmark*,above n 31. For a comment see Bell, M. (2015), 'Sickness Absence and the Court of Justice: Examining the Role of Fundamental Rights in EU Employment Law', forthcoming in *European Law Journal* available online at: http://onlinelibrary.wiley.com/doi/10.1111/eulj.12143/abstract; Ferri D. and Favalli S. (2015-forthcoming), 'Tracing the Boundaries between Disability and Sickness in the European Union: Squaring the Circle?', *European Journal of Health Law*; Favalli, S. and Ferri, D. (2016 forthcoming), 'Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints' (13 September 2015), *European Public Law,* Vol. 22, No. 3, 2016 Forthcoming. Available at SSRN: http://ssrn.com/abstract=2659829.

92 CJEU, Case C-312/11, *Commission v Italy*, 4 July 2013, not yet published.

93 CJEU, *HK Danmark,* above n 31. See in this respect also Bell, 'Sickness Absence and the Court of Justice', above n 97.

94 CJEU, *HK Danmark,* above n 31. See in this respect also Bell, 'Sickness Absence and the Court of Justice' above n 97.

2.3.2 Material scope of the duty

The duty to provide reasonable accommodation is placed on all employers, in both the public and private sectors, as the CJEU confirmed in *Commission v Italy*.[95] Indeed, the material scope of the duty to provide reasonable accommodation appears to correspond to the material scope of the Employment Equality Directive as a whole. Accordingly, reasonable accommodation applies in relation to employment and occupation, vocational training and membership of and involvement in employer and employee organisations. It is worth recalling that, according to Article 3(4) of the Directive, 'Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces'. It thus appears that exemption from the duty to provide reasonable accommodation can be allowed by national laws in the armed forces – this matter being left to the discretion of Member States.

2.3.3 Personal scope of the duty

The duty to make reasonable accommodation operates in favour of 'persons with disabilities'. The Directive makes it clear that the prohibition of direct and indirect discrimination, and arguably failure to make reasonable accommodation, applies to nationals of third countries but is without prejudice to provisions governing entry and residence.[96]

As explained in Chapter 1, the Employment Equality Directive does not define 'disability' or 'persons with disabilities' and the CJEU has been called upon to fill this gap. After the ratification of the CRPD, the CJEU modified the initial approach enunciated in *Chacón Navas*,[97] based on a medical model understanding of 'disability', to adopt a more expansive definition of disability inspired by Article 1 of the CRPD. According to this new approach, 'disability' must be understood as

> 'long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers'.[98]

Whilst this new approach represents a considerable advance on the earlier *Chacón Navas* approach, it is not free from difficulty and there are concerns that it continues to fall short of what the CRPD requires. The source of the concern is the last phrase regarding hindrance with 'professional life' and the case which best illustrates the problem is *Z v A Government Department and the Board of Management of a Community School*.[99]

Z concerned a woman who, because of a physical impairment, was unable to bear a child naturally and arranged for a surrogate mother to carry her child. Her employer refused to grant her paid leave (equivalent to maternity or adoption leave) on the grounds that she had neither given birth nor adopted a child. The CJEU was requested to consider (among other things) whether this amounted to disability discrimination contrary to the Employment Equality Directive.[100] The Court, which recognised the importance of interpreting the Directive consistently with the CRPD, interpreted in line with the CRPD and in line with its earlier decision in the *Ring and Werge* case,[101] found that she did not have a 'disability' for purposes of the Employment Equality Directive because her inability to bear children did not hinder her ability to participate in professional life. It stated that:

95 *Commission* v *Italy*, Case C-312/11, 4 July 2013, not yet published.
96 Recital 12 of the Employment Equality Directive.
97 *Chacón Navas*, above n 27, para 40.
98 *Chacón Navas*, above n 27, para 40.
99 CJEU, Case C-363/12 *Z. v A Government Department and The Board of management of a community school*, not yet published.
100 Question 3.
101 CJEU, *HK Danmark,* above n 31, paragraphs 75–76 of Judgment and paragraphs 79–81 of Opinion.

> '... the concept of 'disability' within the meaning of Directive 2000/78 presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person's full and effective participation in professional life on an equal basis with other workers.'[102]

It was also stated that 'the inability to have a child by conventional means' did not prevent her from 'having access to, participating in or advancing in employment' – there being no evidence that her condition 'made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity'.[103] The ruling in *Z* is troubling for a number of reasons.[104]

First, the decision that Z's 'impairment' or condition did not hinder her professional life failed to take into account the very employment-related disadvantage which had brought Z to court – i.e. her employer's refusal to grant her the same paid leave granted to natural and adoptive mothers. The whole point of her claim was that her inability to bear her own children had hindered her enjoyment of employment benefits – benefits to which mothers without her physical condition were entitled.

Second, the requirement that a person's 'impairment' must hinder their participation in professional life before it can be classified as a 'disability' within the meaning of the Directive, sits very uncomfortably with the CJEU's reasoning in *Coleman.*[105] As explained in Chapter 1, the CJEU ruled in *Coleman* that the Directive extended to discrimination by association – allowing non-disabled people to claim for disability discrimination if they had been subject to harassment or direct discrimination because of their relationship or association with a disabled person. It was thus ruled in *Coleman* itself that a non-disabled mother of a disabled child was able to rely on the Directive to challenge the negative treatment she received from her employer because of her son's disability. It would plainly have been nonsensical to require Ms Coleman to demonstrate that her young son had impairments which (in due course) would hinder his professional life.

Third, this need to demonstrate that impairment hinders one's ability to participate in professional life seems to fly in the face of the CRPD, which contains no such condition. The confusion appears to have crept in because the material scope of EU non-discrimination law is confined to the field of employment. However, it does not follow from this that protection from discrimination law should only be granted to people who can demonstrate that (independently of the alleged discriminatory treatment about which they are litigating) their impairment impacts on activities which are employment-related. Questions relating to the employment experiences of a claimant should be relevant only to the question of whether or not the discrimination is of a type falling within the Directive's material scope – not its personal scope.

Finally, on the personal scope of the reasonable accommodation duty in the Employment Equality Directive, it is important to return to *Coleman*. As already mentioned, *Coleman* established that claims for direct discrimination and harassment under the Directive could be brought by people who, although not themselves disabled, had been harassed or treated less favourably because of their association with a disabled person. The question of whether the Directive could found a reasonable accommodation claim on the basis of association (e.g. by a carer for a disabled person) has not yet reached the CJEU. Such a case, however, would seem doomed to failure. Article 5 of the Directive requires reasonable accommodation to be made only for 'persons with disabilities' and does not use the phrase 'on grounds of disability' which lay at the heart of the *Coleman* reasoning. Further, as the CJEU confirmed in the *Ring and Werge* case, reasonable accommodation 'must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities [not their carers] in professional life on an equal basis with other workers'.[106]

102 Ibid, paragraph 80 of Judgment.
103 Ibid, paragraph 81 of Judgment.
104 For fuller discussion of these, see Lawson, A. and Waddington, L. (2015-forthcoming), 'The Unfinished Story of EU Disability Non-Discrimination Law', in Bogg, A., Costello, C. and Davies, A. (eds), *Research Companion on EU Labour Law*, Edward Elgar.
105 Case C-303/06 *S. Coleman* v *Attridge Law and Steve Law*, Judgment of the Court (Grand Chamber) of 17 July 2008.
106 CJEU, *HK Danmark,* above n 31, paragraph 54 of Judgment.

2.4 Reasonable accommodation in national laws

This section examines the way in which the States included in this study are addressing and defining reasonable accommodation duties. It is based primarily on country-specific reports compiled by the non-discrimination national experts from the European network of legal experts in gender equality and non-discrimination. All translations of legislation and case law originally written in languages other than English has also been provided by the national experts.

This section does not aim to provide a detailed comparative analysis of relevant law and practice in all 31 countries. Instead, it aims to identify emerging patterns and themes and, for this purpose, to draw upon examples from the national reports. After an introductory overview, the variety of definitions of reasonable accommodation will be investigated. After this, the material and personal scope of the duty and the degree of knowledge of disability that employers must have (before they are bound by reasonable accommodation duties) will be discussed. Finally, the content of the duty will be considered, with a focus on the meaning of disproportionate burden.

2.4.1 Legislative formulations of the duty

(a) Existence of a reasonable accommodation duty in legislation

All 28 EU Member States and **Norway** have introduced legislative reasonable accommodation requirements for disabled people in employment contexts. In **Italy**, this duty was introduced only in 2013,[107] following the ruling of the CJEU in *Commission v Italy*.[108] In **Liechtenstein** and **Iceland**, the situation appears more complex – there being no clear and unambiguous reasonable accommodation duty.

In **Liechtenstein**, Article 10(1) and (2) of the Act on Equality of People with Disabilities – *Behindertengleichstellungsgesetz*[109] (AEPD) sets out a duty to make provisions for the avoidance of discrimination in employment and occupation. This prohibits direct and indirect discrimination against disabled employees in the public and private sectors. Article 7(3) AEPD states that indirect discrimination occurs if no attempts are undertaken to accommodate the situation of a relevant person. These provisions, read together, appear to create a form of reasonable accommodation duty despite the fact that no such duty is explicitly articulated.

In **Iceland**, no duty to provide reasonable accommodation is expressed in national law. Article 29 of the Icelandic Act on the Affairs of Persons with Disabilities 59/1992 simply states that disabled people shall be given assistance in holding jobs in the open labour market when necessary, including through the provision of special personal support and through the provision of information and training to other workers. It also states that, where possible, disabled people should have access to vocational training in private enterprises and institutions. These provisions are suggestive of reasonable accommodation, but seem to fall short of imposing clear binding reasonable accommodation duties on employers.

(b) Type of legislation

In the countries which do have explicit reasonable accommodation duties, the legislative context of the requirements varies. Three main groups may be identified: First, in several countries (e.g. **Denmark**,[110]

107 Law decree 28 June 2013 No. 76, OJ No. 150 of 28 June 2013, then converted into Law 9 August 2013, No. 99, OJ No. 196 of 22 August 2013, page 1, concerning 'Preliminary Urgent Measures for the promotion of employment, in particular of youngsters, of social cohesion and on and other Urgent financial measures'.

108 *Commission v Italy*, Case C-312/11, 4 July 2013, not yet published.

109 *Gesetz vom 25. Oktober 2006 über die Gleichstellung von Menschen mit Behinderungen (Behindertengleichstellungsgesetz; BGlG*), LGBl. 2006, no. 243.

110 Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. [*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*] – Consolidated Act No. 1349 of 16 December 2008.

Estonia,[111] **Finland**,[112] **Greece**,[113] **Ireland**,[114] **Latvia**,[115] and the **UK**)[116] the reasonable accommodation duty is included in generic multi-ground anti-discrimination law. By contrast, as noted by Waddington and Lawson,[117] a second group (including **Austria**,[118] **Hungary**,[119] the **Netherlands**,[120] **Poland**,[121] **Romania**,[122] **Slovenia**[123] and **Spain**)[124] have opted to implement the disability provisions of the Employment Equality Directive in disability specific legislation. In a third group (including **Croatia**,[125] the **Czech Republic**,[126] **Luxembourg**,[127] **Malta**,[128] **Norway**[129] and **Slovakia**)[130] employment-related reasonable accommodation duties are contained in a combination of different pieces of legislation – typically a combination of both generic antidiscrimination law or labour codes and also disability-specific statutes.

In principle, the legislative context or setting of reasonable accommodation duties would seem to be totally irrelevant to assessments of their compliance with either the CRPD or the Directive. However, positioning the duty within social legislation designed to favour only a limited class of disabled people – e.g. those

111 Article 11 of the Estonian Law on Equal Treatment (*Võrdse kohtlemise seadus*), RT I 2008, 56, 315.
112 Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)].
113 Article 10 of the Antidiscrimination Law 3304/2005 on the Application of the principle of equal treatment regardless of racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation (that transposes EU Directives 2000/43 and 2000/78), OJ 16 A /27.07.2005.
114 Section 16(3) of the Employment Equality Act available at http://www.irishstatutebook.ie/eli/1998/act/21/enacted/en/html.
115 Section 7(3) Labour Law. The Labour Law is one of the laws transposing the Directives and addressing the issue of discrimination systematically, lists "race, skin colour, age, disability, religious, political or other conviction, national or social origin, property or marital status, sexual orientation or other circumstances".
116 Equality Act 2010.
117 Above n 25.
118 Act on the Employment of People with Disabilities.
119 Article 15 of Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities, Paragraphs (1) and (2).
120 Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease (*Wet van 3 april 2003 tot vaststelling van de Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte*), Staatsblad 2003, 206.
121 Article 23a (1-3) of the Act of 27 August 1997 on the Vocational and Social Rehabilitation and Employment of Disabled Persons (*Ustawa z 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*). The Act was amended by the Act of 03 December 2010 on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (*Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), which introduced the concept of reasonable accommodation.
122 Article 5(4) Disability Act, Law 448/2006 on the protection and promotion of the rights of persons with a handicap, adopted on 6 December 2006.
123 Article 3(3) of the 2010 Act on Equal Opportunities of People with Disabilities.
124 Article 2.m and 63 of the General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013, of 29 November 2013 (BOE, 3 December 2013).
125 In Croatia, even though the Antidiscrimination law mention that the failure 'to participate in public and social life and to have access to the workplace and appropriate working conditions in line with their specific needs by adapting infrastructure and premises and by using equipment and other means which do not present an unreasonable burden for the person obliged to provide it, is considered discrimination' (Art.4/2 of the Anti-discrimination Act), a definition of reasonable accommodation, is set out in Article 7(2) of the Act on Professional Rehabilitation and Employment of Persons with Disability (*Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba s invaliditetom)* Official Gazette 157/2013, 152/2014).
126 In addition to the provision of reasonable accommodation in antidiscrimination law, According to the Section 103(5) of Czech Labour Code (the Czech Republic, Law No. 262/2006 Coll., Labour code, *Zákon č. 262/2006 Sb., zákoník práce),* 21 April 2006) an employer is obliged to ensure disabled employee technical and organisational measures on his expenses, especially accommodation of working conditions and working places, creation of protected places, training and qualification of disabled persons.
127 Article 20 of the General Discrimination Law of 28 November 2006, and in Article 8 of the Law of 12 September 2003 on Disability.
128 The Equal Opportunities (Persons with Disability) Act 2000, provides that employers must provide reasonable accommodation for employees with disabilities, but the duty is also affirmed in the Equal Treatment in Employment Regulations 2004, issued under the Employment and Industrial Relations Act.
129 Working Environment Act (WEA) of 17 June 2005 no 62, section 4-6 and in the Anti-Discrimination and Accessibility Act (AAA) of 21 June 2013 No 61, section 26.
130 Reasonable accommodation for disabled people in employment contexts is required by the Anti-discrimination Act, i.e. Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination and on Changing and Supplementing Other Laws (Anti-discrimination Act) (*zákon č. 365/2004 Z. z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon*)), in effect from 1 July 2004, Sections 7 and 2(3)), and by Act No 311/2001 Coll. Labour Code, as amended (*zákon č. 311/2001 Z. z. Zákonník práce v znení neskorších predpisov*), in effect from 1 April 2002, Article 8 of the Basic Principles and Sections 158, 159 and 87(3).

who are 'severely' disabled – is problematic as it denies the benefit of reasonable accommodation duties to disabled people who do not fall into the more limited group. This approach seems to be adopted in **Germany**, where a reasonable accommodation duty is not located in the General Law on Equal Treatment of 2006 (AGG), but instead appears in s 81.4 of the Social Code IX – but only for the benefit of severely disabled people.

(c) Legislative formulations: specific wording

In some States (e.g. **Austria**, **Croatia** and **Latvia),**[131] the national provision echoes the wording of the Directive. Thus, s 6 of the **Austrian** 'Act on the Employment of People with Disabilities' states that:

> 'Employers are obliged to take the appropriate and according to individual cases the necessary measures to enable persons with disabilities to enjoy access to employment or occupation, to promotion and to participate in vocational training as well as in in-service training, unless such measures would pose a disproportionate burden on the employer. Such burden shall not be deemed disproportionate if it can sufficiently be compensated by public aid funds according to federal or provincial regulations'

As Waddington and Lawson noted,[132] in some jurisdictions the word 'accommodations' has been replaced by another term. For example, the **Finnish** law refers to 'steps' and in the **UK** the term 'adjustments' is used.[133] Sometimes the term 'reasonable' does not appear in national legislation. For example, Article 3(3) of the **Slovenian** Act on Equal Opportunities of People with Disabilities of 2010 deals with 'appropriate accommodation', while Article 2 of the **Dutch** Act on Equal Treatment on the Ground of Disability or Chronic Illness, employs the term 'effective'. In the **Dutch** Government's view, the latter term conveys the idea (more clearly than does 'reasonable') that an accommodation must aim to enable a person with disability to exercise their right to work.[134] The **Irish** Employment Equality Act 1998-2004,[135] drawing inspiration from Recital 20, defines a reasonable accommodation as an 'appropriate measure' and this word is also found in the **Lithuanian** Law on Equal Treatment of 2005.[136] Similarly, the **French** Labour Code provides that 'employers are to take, in relation to the need dictated by a concrete situation, all appropriate measures to allow disabled workers to have access to or to keep a position of employment that corresponds to their qualifications, to execute the work, progress therein or to have access to adapted professional training'.[137]

In **Romania**n and **UK** legislation, interestingly, there is no explicit reference to the 'disproportionate burden', but the question whether any particular adjustment is reasonable entails determination of this question. In **Hungary**, Article 15(2) of Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities (RPD Act), which states that the employer of a disabled person must provide them with accommodations to the extent necessary for the performance of the work, but contains no reference to 'disproportionate burden'. That phrase is mentioned in paragraph (4), according to which the obligation to provide accommodations will be imposed on the employer if (a) they publicly advertised the vacancy; (b) when applying for the job, the disabled person states their special needs related to the job interview; and (c) the accommodation of those needs does not impose a disproportionate burden on the employer.

131 Section 7(3) Labour Law. The Labour Law is one of the laws transposing the Directives and addressing the issue of discrimination systematically, lists "race, skin colour, age, disability, religious, political or other conviction, national or social origin, property or marital status, sexual orientation or other circumstances".

132 Above n 25.

133 Finnish Non-Discrimination Act 21/2004, Section 5 In the UK see e.g. Equality Act 2010 S20 (see also s4A DDA).

134 Explanatory Memorandum to the DDA, *Tweede Kamer*, 2001-2002, 28 169, No. 3, p. 25.

135 Employment Equality Act 1998-2004, section 16.

136 Law on Equal Treatment, Article 5.

137 Art. 323-9-1 LC reads as follows: ' […] *les employeurs prennent, en fonction des besoins dans une situation concrète, les mesures appropriées pour permettre aux travailleurs handicapés d'accéder à un emploi ou de conserver un emploi correspondant à leur qualification, de l'exercer ou d'y progresser ou pour qu'une formation adaptée à leurs besoins leur soit dispensée'.*

In some countries (e.g. **Cyprus**,[138] **Spain** and **Malta**[139]), reasonable accommodation provisions have been amended after ratification of the CRPD and their wording brought into line with Article 2 of the Convention. For example, in **Spain** the General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013)[140] sets out the duty to provide reasonable accommodation (Article 2(m) and 63). Article 2 (m) defines reasonable accommodation as:

> 'necessary and appropriate modifications and adaptations of the physical, social and attitudinal environment to the specific needs of persons with disabilities not imposing a disproportionate or undue burden, where needed in a particular case effectively and practice, to facilitate accessibility and participation and to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others, of all human rights'.

Similarly in **Italy**, where reasonable accommodation duties were included in anti-discrimination legislation only in 2013, the obligation placed on employers is phrased as being to adopt reasonable accommodations 'as defined by the UN Convention on the Rights of Persons with Disabilities'.[141]

Finally, it should be noted that in **Sweden**, before the 1st of January 2015, the term used in the relevant legislation was 'reasonable accommodation'. However, the provision has now been amended and the current wording refers to 'lack of accessibility' as a form of discrimination in the Discrimination Act Chapter 1 Section 4 point 3.[142] It is unclear whether this extends the duty beyond that which is required by the reasonable accommodation provisions of the Directive and the CRPD – as will be discussed in Chapter 3. It is currently too early to determine whether the amended wording has had any impact in practice.

2.4.2 Material scope

In line with the material scope of the Employment Equality Directive, in all 28 Member States and **Norway** the reasonable accommodation obligation extends to both the public and private sectors, in relation to employment and occupation, vocational training and membership of, and involvement in employer and employee organisations.[143]

The armed forces in **Austria**, **Finland**, **Luxembourg** and the **Netherlands** are subject to reasonable accommodation duties in employment contexts. In line with Article 3(4) of the Directive,[144] exceptions to non-discrimination principles, and thus (arguably) reasonable accommodation duties, apply to military services in several countries (e.g. **Cyprus**, the **Czech Republic**, **Denmark**, **France**, **Germany**, **Greece**, **Ireland**, **Italy**, **Malta**, **Slovakia**,[145] **Spain**, and the **UK**). In some countries (e.g. **Bulgaria**, **Croatia**,

138 Cyprus, Law amending the Law on Persons with Disabilities No. 63(I)/2014, 23 May 2014, available at http://www.cylaw.org/nomoi/arith/2014_1_63.pdf.

139 Article 7 of the Equal Opportunities (Persons with Disability) Act, 2000.

140 RDL 1/2013 of 29 November 2013, BOE, 3 December 2013.

141 Law decree 28 June 2013 No. 76, OJ No. 150 of 28 June 2013, then converted into Law 9 August 2013, No. 99, OJ No. 196 of 22 August 2013, page 1, concerning 'Preliminary Urgent Measures for the promotion of employment, in particular of youngsters, of social cohesion and on and other Urgent financial measures'.

142 Act 2014 (958) changing the Discrimination Act. Government bill 2013/14:198.

143 It is worth recalling that, according to Article 3(4) of the Directive, 'Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces'. In line with this provision in several countries exceptions are provided for the military service (Germany Denmark….). The Law on the Equal Treatment of Soldiers (*Gesetz* über *die Gleichbehandlung der Soldatinnen und Soldaten, SoldGG*) covers all grounds with the exception of age and disability in Article 1, taking advantage of the exception for military service in Article 3.4 Directive 2000/78. However, there are regulations on severely disabled soldiers based on the premises of the relevant Section 1.2 and Section 18 SoldGG.

144 According to this provision 'Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces'.

145 In Slovakia, exceptions to the duty to provide reasonable accommodation apply to military services, and to other armed forces (e. g. the police, the National Security Office, the fire service etc.). However exceptions only apply to military public servants, but not to civilians employed by the armed forces.

Estonia, **Hungary**, **Latvia**, **Norway**, **Poland**, **Portugal**, and **Romania**), national antidiscrimination legislation does not explicitly contain a specific exception to non-discrimination legislation for the armed forces, but entry into the armed forces is dependent on 'ability' requirements[146] or health standards being met. It is clear that these explicit or implicit limitations on the scope of the duty fall short of the CRPD. However, only three EU countries (**Cyprus**, **Greece** and **UK**), together with the EU itself, have entered reservations against Article 27 of the CRPD in respect of the armed forces. To date, however, it is not an issue which has attracted the attention of the CRPD Committee in its Concluding Observations.

2.4.3 Personal scope

Reasonable accommodation duties operate in favour of disabled workers but there is variation amongst the countries about how 'worker' and 'disability' are interpreted. These will be considered in turn.

(a) Worker

In all 31 countries in this study, reasonable accommodation duties operate in favour of disabled workers, and the term 'worker' is broadly understood, in line with consistent CJEU case law, to cover any person who performs a specific economic activity, under the direction of another person in return for which they receive remuneration.[147] Self-employed people are usually excluded from the personal scope of the duty. However, in some countries, courts have started to consider this category of people as entitled to reasonable accommodation – e.g. **Denmark** and **France**. In **Denmark**, self-employed consultants with a long-standing working relationship with an organisation will typically be treated in the same way as employees. Similarly, managing directors, who traditionally do not fall within the definition of employee, are also covered by the protection of the anti-discrimination act,[148] and have the right to be provided with reasonable accommodation. In **France**, in the *Bleitrach* case,[149] the *Conseil d'Etat* (i.e. the French Supreme Administrative Court) held that the State has a duty to make reasonable accommodations in order to provide access to courthouses for disabled people who work as *auxiliaires de justice*. In **Great Britain**, specific provisions in the Equality Act 2010 extend reasonable accommodation duties to a range of types of worker (without recognising them as employees) – e.g. public officers, barristers (in Scotland, advocates), partners and contract workers.

In all countries, reasonable accommodation duties also extend to (disabled) applicants for posts, people on work placements, trainees, and participants in vocational training events or programmes. However, a range of different approaches is taken to volunteers and unpaid workers. In some States, such as **Austria**, **Bulgaria**, **Estonia**,[150] **Germany**, **Hungary**,[151] **Latvia**, **Norway**, **Portugal**, **Slovakia**,[152] **Slovenia** and the **UK**, volunteers and unpaid workers appear not to be considered workers. Therefore the right to be provided with reasonable accommodation does not extend to them. By contrast, in **Finland**[153] and **France** and in

146 *Defence and Armed Forces of the Republic of Bulgaria Act,* Article 141 (1).

147 See, e.g., CJEU, Case C-432/14 *O v Bio Philippe Auguste SARL*, not yet published, paras 25 *et seq*. See also CJEU, Case 66/85, *Lawrie-Blum*, [1986] ECR I-2121; CJEU, Case C-357/89, *Raulin,* [1992] ECR I-01027; CJEU, Case C-138/02, *Collins*, [2004] ECR I-02703.

148 Statement by the Ministry of Labour in case 6601-0049 of 28 October 2005.

149 *Conseil d'Etat*, 30 October 2010, no 301572.

150 Estonian Law on Equal Treatment (*Võrdse kohtlemise seadus*), RT I 2008, 56, 315.

151 Article 8 Paragraph (1) of Act LXXXVIII of 2005 on Public Interest Voluntary Activities, which lists the obligations of the hosting organisation (guaranteeing the conditions of a safe working environment, providing the necessary recreational time, providing the necessary instructions and information) is silent about reasonable accommodation.

152 This argument (i.e. that the duty to provide reasonable accommodation does not extend to volunteers and unpaid workers) is also supported by the wording of Section 6(1)(a) of the Anti-discrimination Act, which stipulates that the principle of equal treatment applies only in connection with rights of persons stipulated by special laws mainly in the field of (apart from other fields) `access to employment, occupation, *other earning activity or position*, including the conditions for job admission and the conditions and means of carrying out the job selection´. In addition, the Act on Volunteerism (Act No 406/2011 Coll. on Volunteerism and on Changing and Supplementing Other Laws (*zákon č. 406/2011 Z. z. o dobrovoľníctve a o zmene a doplnení niektorých zákonov*), regulating the legal status of volunteers and the legal relations stemming from voluntary activities, contains no equal treatment/anti-discrimination clause.

153 Section 4 of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)].

the **Netherlands**[154] it seems that unpaid workers have a right to reasonable accommodation. Similarly, in **Denmark**, national courts have adopted a broad interpretation of a 'worker with disabilities' or a 'disabled worker', and ruled that non-paid trainees shall be provided with reasonable accommodation.[155] In **Spain** unpaid workers and volunteers are not considered 'workers'. However, depending on the way in which they are regulated in each of the *comunidades autónomas* (i.e. regions), they might have the right to reasonable accommodation. In some of the countries examined (e.g. **Cyprus**, the **Czech Republic**, **Greece** and **Ireland**), there is still uncertainty on whether unpaid workers and volunteers are entitled to reasonable accommodation duties, because the law is silent or ambiguous, and there is no relevant case law which offers secure guidance in this respect.

Another issue on which there is some variation of approach at national level concerns the extension of the reasonable accommodation duty to people associated with a disabled person – in particular carers or family members. In **France**, such a right is granted by legislation to family members and carers of disabled people.[156] In **Croatia**, the Disability Ombudsman has recently ruled that reasonable accommodation duties operate in favour of people who are associated with disabled people.[157] By contrast, the Court of Appeal for England and Wales (**UK**) ruled in 2014 that people associated with a disabled person were not entitled to the reasonable accommodation duty[158] – and in December 2015 the Supreme Court refused permission to refer the case to the CJEU for a preliminary ruling, on the basis that Article 5 of the Directive operates to create reasonable accommodation duties in favour only of disabled people (and not those associated with them).[159] In many other countries, there is some ambiguity on this point.

In most countries there are no residence, citizenship or nationality requirements for protection under the relevant national laws transposing the Directive. As a consequence, citizenship and/or nationality are not relevant to claim rights to reasonable accommodation. In some Member States, however, where the right is linked to the recognition by a public authority of the status of being disabled or a certain percentage of disability, residence might be relevant. One example of this approach is **Germany**, where the regulations on the special protection of severely disabled people apply only to people who are legally resident or employed in **Germany**.[160] This issue was not addressed in the UN CRPD Committee's Concluding Observations on **Germany**. However, in its Concluding Observations on **Belgium**, the Committee stated that it remained 'concerned about the situation of foreign persons with disabilities living in **Belgium** who experience situations of discrimination'.[161]

(b) Disability (for purposes of reasonable accommodation entitlement)

With regards to the definition of disability, this section, while building upon the findings of the report written by Waddington and Lawson,[162] focuses specifically on the meaning of 'disability' for purposes of reasonable accommodation. In addition the emphasis here will be on post-2009 developments.

154 Kamerstukken II 1990/91, 22 014, no. 6, p. 79. For recent case-law, see inter alia NIHR 2014-158, para. 3.2; NIHR 2015-22 para. 3.3, both with further references.

155 See Eastern High Court judgment, printed in U.2000.2350Ø. This decision concerns discrimination on the ground of ethnic origin. However, it does establish that trainees are encompassed by the Act. Although it does not establish explicitly that non-paid trainees have a right to reasonable accommodation, it can be concluded from the case that non-paid trainees with a disability are encompassed by the Act. This case lead to affirm that non-paid trainees have a right to reasonable accommodation.

156 Article L3122-26 of the Labour Code.

157 Disability Ombudsperson's report for 2014, p. 31, available at: http://www.posi.hr/index.php?option=com_joomdoc&task=cat_view&gid=55&Itemid=98.

158 Hainsworth v Ministry of Defence [2014] EWCA Civ 763.

159 Hainsworth v Minostry of Defence UKSC 2014/0164 (1 December 2015).

160 Section 2.2 2 SGB IX.

161 UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Belgium, 12th Session, October 2013, para 11.

162 Above n 28.

As discussed in Chapter 1 above, the Employment Equality Directive does not include a definition of disability. The challenging task of determining the scope of this term has been deliberately left to national legislation and the CJEU. As mentioned above, since the *Ring and Werge* case,[163] the CJEU has explicitly aligned the definition of disability with the guidance set out in Article 1 of the CRPD.

Despite the recent guidance provided by the CJEU, at the national level the definition of disability remains very problematic. With particular reference to reasonable accommodation, the situation appears even more complex and results in a sort of patchwork because the definition of disability used for purposes of reasonable accommodation is often different from, and more limited than, that which applies to non-discrimination protection more generally.

Three main types of approach emerge. First, there is no legislative definition of disability, and its meaning is judicially elaborated for purposes of non-discrimination law. Secondly, the definition of disability is set out in anti-discrimination laws or borrowed from other legislation and applies generally to anti-discrimination protection including reasonable accommodation. Thirdly, the definition of disability for purposes of reasonable accommodation is different from (and narrower than) that used for purposes of non-discrimination law more generally. These will now be discussed in turn.

Turning to the first approach, a number of countries (including **Denmark** and **Finland**) do not have a definition of disability in their transposition legislation. However, the judicially elaborated definition of disability for purposes of claiming protection from discrimination in general is the same as for claiming reasonable accommodation. The absence of a legislative definition has left the way open for some national courts to embrace the definition of disability developed by the CJEU in *Ring and Werge*[164] and subsequent case law. This is the situation in **Denmark**, where the Danish Maritime and Commercial Court referred explicitly to *Ring and Werge* and defined disability as including a condition caused by an illness medically diagnosed as curable or incurable, if that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other employees, and the limitation is a long term one.[165]

The situation is slightly different in the **Netherlands**. Dutch equality law, in addition to 'disability' includes also 'chronic disease' as a ground of discrimination.[166] However, the distinction between disability and chronic disease is not spelled out, and neither term is defined.[167] Some guidelines can be drawn from the *travaux préparatoires* of the Disability Discrimination Act (DDA), and cases of the equality body. Criteria mentioned during the preparation of the Law included the long-term duration of the disability or chronic disease and the fact that – in the case of disability – the impairment is irreversible. This means that temporary disability, e.g. as a consequence of an accident, is excluded from protection from discrimination and arguably from reasonable accommodation.[168] However, the Dutch Government seems to have embraced a social model oriented vision of disability, paying attention to the physical and social environment that does or does not allow a person to participate on an equal footing. This vision has also been fully embraced by the NIHR which interprets the terms 'disability' and 'chronic disease' in an expansive way.[169]

163 CJEU, *HK Danmark,* above n 31.
164 CJEU, *HK Danmark,* above n 31.
165 The Maritime and Commercial Court, F-13-06 and F-19-06, judgments delivered on 31 January 2014. Judgment in F-19-06 was printed in U2014.1223S. See also The Maritime and Commercial Court, F-7-10, judgment delivered on 1 December 2014. Judgment printed in U2015.1041S.
166 Similarly, in Belgium, "State of health" is also included as a ground of discrimination.
167 The Dutch Government has deemed it unnecessary and undesirable to define disability. See the Explanatory Memorandum to the ADA, *Tweede Kamer*, 2001-2002, 28169, no. 3, p. 9 and p. 24 and no. 5, p. 16. See also ETC 2005-234.
168 Explanatory Memorandum to the DDA, *Tweede Kamer,* 2001-2002, 28 169, no. 3, p. 9.
169 See e.g. ETC 2005-234, 2006-227, 2007-25, 2009-62, 2009-102 and 2011-78.

Countries which adopt the second approach include **Austria**, **Belgium**, the **Czech Republic**, **Estonia**, **Greece**, **Ireland**, **Italy**, **Liechtenstein**, **Luxembourg**, **Poland**, **Portugal**, **Romania**, **Spain**, **Sweden** and the **UK**. In these countries the legislative definition of disability for purposes of claiming a reasonable accommodation is the same as the definition of disability for purposes of non-discrimination law or other legislation (e.g. social security legislation).

In most of these States (**Austria**, the **Czech Republic**, **Estonia**, **Italy**, **Latvia**, **Poland**, **Sweden** and the **UK**), legislative definitions of disability appear to be narrower than the concept of disability enunciated in the CRPD and adopted by the CJEU in *Ring and Werge*. As already noted by Waddington and Lawson,

> '[g]enerally these definitions of disability consist of three elements: firstly the requirement that an impairment exists, defined as some sort of restriction or limitation caused by a medical condition; secondly, the requirement that this impairment impacts on an individual's capacity to take part in employment, or in everyday life in general; and thirdly, the requirement that the impairment must be permanent or have lasted, or be likely to last, for a significant period of time. These three elements of the definition of disability can also be found in the ECJ's judgment in Chacón Navas, which refers to "physical, mental or psychological impairments" "which hinders the participation of the person concerned in professional life" and "it must be probable that [the limitation] will last for a long time".'[170]

For example, in the **Czech Republic**, disability for purposes of the reasonable accommodation duty is defined in Section 5(6) of the Anti-discrimination law as

> ´Physical, sensory, mental, psychological or other disability, which impedes or can impede the right to equal treatment of those persons. It must be long-term disability which lasts or is going to last according to the medical science for at least a year'.

Article 5 of the **Estonian** Law on Equal Treatment stipulates:

> 'For the purposes of this act, disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person which has a substantial and long-term adverse effect on the performance of everyday activities'.

In **Austria**, the Act on the Employment of People with Disabilities defines disability as the

> 'result of a deficiency of functions that is not just temporary and based on a physiological, mental, or psychological condition or an impairment of sensual functions which constitutes a possible complication for the participation in the labour market. Such a condition is not deemed temporary if it is likely to last for more than 6 months'[171]

In Great Britain (the **UK** excluding Northern **Ireland**), the Equality Act 2010 defines a person with a disability as 'a person who has a physical or mental impairment which has a substantial and long-term adverse effect on ability to carry out normal day-to-day activities'.[172] 'Long-term' means lasting or likely to last at least 12 months, or for the rest of the person's life.[173] In *Paterson v Commissioner of Police*

170 Above n 25.

171 A similar definition is offered by Paragraph 3 of the Federal Disability Equality Act [*Behindertengleichstellungsgesetz*]. Other analogous definition of disability are included in provincial legislation. For example, the Styrian Provincial Equal Treatment Act (*Steirisches Landes-Gleichbehandlunggsgesetz*), contains a definition of disability: "§ 4 (4) People with disabilities are persons whose corporal functions, mental ability or psychological condition will – presumably for a period longer than six months – diverge from a condition typical for their specific age; and whose participation at the life in society is therefore restricted."

172 EqA s6.

173 DDA Sch 1, paragraph 2.

for the Metropolis,[174] the EAT interpreted the definition of disability contained in the DDA in line with the approach adopted by the CJEU in the *Chacón Navas* case to rule that the concept of "day-to-day activities" must be given a meaning 'which encompasses the activities which are relevant to participation in professional life'. In addition to its core definition of 'disability', the Equality Act and its accompanying Regulations contain a number of exemptions from the meaning of 'disability', which have the effect of excluding certain categories of person from the possibility of bringing claims for disability discrimination (including through failures to provide reasonable accommodation).[175] These exemptions include visual impairments which are corrected by spectacles and a range of other types of anti-social behaviour which are excluded for public policy reasons (e.g. a tendency to physical abuse of others, a tendency to steal or to commit arson, and addiction to drugs or alcohol). The effect of these exclusions is illustrated by a 2015 education case,[176] in which a six-year old girl whose autism resulted in some violent behaviour to others, was unable to claim that her exclusion from school constituted disability discrimination (e.g. through failure to provide her with appropriate accommodations) because her 'tendency to physical abuse' placed her outside the scope of the meaning of 'disability'. Such exclusions are, it is suggested, problematic and potentially inconsistent with the Employment Equality Directive and the CRPD.

In some countries, the definition of disability within the field of non-discrimination (including reasonable accommodation) is still linked to recognition by the health service or a public body of a certain 'degree' or 'percentage' of disability. Notable examples in this respect are **Latvia** and **Luxembourg**. In **Luxembourg**, the Law on Disabled Persons of 12 September 2003 defines disability as a reduced working capacity, whether the cause is natural or accidental, due a work accident or war events, and gives the status of 'disabled worker' to individuals who have a physical, mental, sensory or psychological impairment and/or psychosocial difficulties aggravating this impairment where reductions in working capacity exceed 30%. It is up to an administrative body (e.g. a medical commission) to decide who might be attributed the status of a disabled person. Similarly, in **Latvia**, disability is defined as a long-term or non-transitional very severe, severe or moderate level limited functioning, which affects a person's mental or physical abilities, ability to work, self-care and integration into society.[177] Latvian law identifies three degrees of disability which are measured by reference to the 'loss of capacity to work' as assessed by a State Medical Commission for the Assessment of Health Condition and Working Ability. It is interesting to note that the amendment specifying the loss of capacity came into force on 1 January 2013, thus after the ratification of the CRPD. In both countries, in order to claim a reasonable accommodation, it is necessary to be officially recognised as disabled.[178] Arguably, these mechanisms for determining whether a person has an 'impairment' – a concept which features in Article 1 of the CRPD and the CJEU case-law on the definition in the Directive – are problematic. A judicial interpretation which extends reasonable accommodation to disabled individuals who are not 'officially disabled' is not beyond the realms of possibility, but it is difficult to predict whether and when it will happen. In **Poland** the situation is not dissimilar. According to the Polish Disabled Persons Act, disability is defined as a permanent or temporary inability to carry out social functions due to a permanent or long-term disturbance of performance of the human organism, in particular, resulting in incapacity to work.[179] There are three levels of disability: slight, moderate and severe.[180] In addition, this Act also stipulates that a disabled person is someone whose disability has been confirmed by a competent medical authority.[181]

As mentioned above, these definitions focus on the 'impairment' itself and on the health status of the individual – assuming that limitations in working capacity arise entirely from the impairment of the

174 [2007] ICR 1522, [2007] IRLR 763, http://www.bailii.org/uk/cases/UKEAT/2007/0635_06_2307.html (assessed 17 March 2015).
175 See Equality Act 2010 Schedule 1; and Equality Act 2010 (Disability) Regulations 2010.
176 *X v the Governing Body of a School* [2015] UKUT 0007 (AAC), 6 January 2015.
177 Article 5 (1) of the Disability Law (*Invaliditātes likums*) adopted on 25 May 2010.
178 Thus far a court case concerning the dismissal on grounds of disability where it was established that the employer had breached equality principle by failing to provide for reasonable accommodation), has concerned an employee who had been officially conferred the status of a disabled person. See case No. C40066110.
179 Article 2.10 Disabled Persons Act.
180 Article 3.1 Disabled Persons Act.
181 Article 1 Disabled Persons Act.

individual rather than from the exclusionary or disabling practices or systems of an employer. The definition of disability for these purposes, however, has recently been the subject of expansive judicial interpretation in a number of countries. Thus, in **Romania**, in a 2012 decision of the *Consiliul Național pentru Combaterea Discriminării* (the National Council for Combating Discrimination (NCCD)) it was held that the term disability must be conceived in an 'inclusive manner'.[182] In other cases courts have explicitly adopted the CRPD conceptualisation of disability. A notable example is **Italy**. Italian legislation adopts a definition of disability based on the medical model. In particular, Article 3(2), of the Act 104/1992 (Framework law on care, social integration and rights of disabled people),[183] states that '[a] disabled person 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'. However, several judicial decisions, in particular in the field of support administration (thus, outside the field of employment discrimination) have interpreted the concept of disability in light of the CRPD,[184] considerably widening the protection and enhancement of the rights of disabled people.[185]

In several of the States under examination (**Greece**, **Malta**, **Portugal**[186] and **Spain**) the legislation appears to set out a definition of disability which is more consistent with social model thinking, and with the *Ring and Werge* ruling. In some of these States the definition has been recently modified to comply with the CRPD: this is the case in **Greece**,[187] **Malta** and **Spain**. However, some inconsistencies still remain. For example, in **Spain**, Article 4 of the General Law on the Rights of Persons with Disabilities and their social inclusion[188] provides a very peculiar definition which contains two parts. The first part is fully in line with the CRPD and the social model:

> 'Persons with disabilities are those that have physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others...'

The second part, by contrast, states that 'for the purposes of this law, persons with a disability shall be deemed to be those with a recognised degree of impairment equal to or greater than 33 per cent'. This means that only people that have a minimum degree of 33% of disability are entitled to reasonable accommodation. This part of the definition is troubling and a cause of concern to the Committee on the Rights of Persons with Disabilities.[189]

The third grouping, as regards approaches to defining 'disability' for purposes of determining entitlement to reasonable accommodation, is characterised by the carving out from the definition of disability applicable to generic non-discrimination law, of a smaller group of disabled people who will be eligible for reasonable accommodation. This is evident in States such as **Croatia**, **France** and **Germany**. For example, in **Germany**, the General Law on Equal Treatment of 2006 (AGG), contains no definition of disability or any of the other protected characteristics. However, an explanatory report, which can be used to assist in the interpretation of the law, states that disability is to be understood in line with provisions in the Social Code IX[190] and the Law on Promoting the Equality of the Disabled,[191] which

182 NCCD Decision 509 from 26 November 2012 in the file no. 433/2012, *FEDRA v SC SECOM SRL*.
183 Framework Law 104 of 5 February 1992 on the care, social integration and rights of disabled persons, Supplement to OJ No. 39 of 17 February 1992.
184 Tribunale di Varese, decision of 3 October 2012; 'Tribunale di Varese decision of 6 October 2009.
185 See for a brief account Ferri D. (2014), 'Legal Scholarship and Disability in Italy. Recent Developments and New Perspectives'. *European Yearbook Of Disability Law*, pp. 129-150.
186 Article 2 Law 38/2004, of 18 August 2004.
187 After the adoption of the Law 4074 /2012 by the Greek Parliament (on 11 April 2012), the definition of disability that is included in the CRPD can be regarded as officially transposed into the Greek legal order (Law 4074/2012, OJ 88A /11.04.2012).
188 RDL 1/2013 of 29 November 2013, BOE, 3 December 2013.
189 Concern about this definition was expressed by the UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Spain, 6th Session, October 2011, para 11.
190 Section 2 Social Code IX.
191 Section 3 of the Law on Promoting the Equality of the Disabled.

provide a general legal definition of disability.[192] According to these provisions, people are disabled if their physical functions, intellectual abilities or mental health have a high probability of differing from the typical state for their age for longer than six months and if, as a consequence, their participation in society is impaired. This definition is close to the one adopted by the CJEU in *Chacón Navas*. However, in a recent decision, the Federal Labour Court (*Bundesarbeitsgericht*) decided that, to comply with EU Law, a wider concept of disability must be adopted. In particular, the Federal Labour Court affirmed that the concept of disability for purposes of anti-discrimination law is wider than the definition of Section 2 Social Code IX (SGB IX).[193] This wider judicial definition of disability, however, does not seem to apply in the context of reasonable accommodation, which appears to operate only in favour of severely disabled people as defined in the Social Code. Section 2(3) SGB states that people are considered severely disabled if their disability reduces their ability to participate in working life by at least 50%. People with a degree of disability of less than 50% but more than 30% are treated as severely disabled if they cannot find or maintain employment due to their disability.[194] The degree of disability is established by the relevant authorities,[195] applying standards defined by experts and the authorities, the details of which are contentious. A minimum impairment of 20% is necessary for a formal declaration of the degree of disability in this procedure by the authorities.[196] If the above-mentioned threshold of a 30% reduction in the ability to participate in working life is not reached, the individual cannot under any circumstances be classified as severely disabled. In its Concluding Observations on **Germany**, the CRPD Committee expressed concern that 'domestic law does not demonstrate a sufficient understanding of the concepts provided in articles 1 and 2 of the Convention, especially its translation into existing legal provisions using a human rights approach' and recommended that 'both the federal government and the Länder revise the legal definition of disability in laws and policies with a view to harmonising it with the general principles and provisions in the Convention, particularly in matters relating to non-discrimination and full transition to a human rights-based model'.[197]

In **France**, Law No. 2005-102 of 11 February 2005 for equal opportunities and integration of disabled persons[198] has revised the definition of disability at article L114 of the Code of social welfare (CSW). This definition applies for the purpose of implementing all relevant dispositions relating to equal opportunities for the disabled persons, and states:

> 'A person is deemed to be disabled if they face a complete limitation of activity or are restricted in the ability to participate in society in his or her environment by reason of a substantial, lasting or definitive alteration of one or more physical, sensory, mental, cognitive or psychological faculties, of multiple disabilities or of a disabling illness'.

192 See the Germany country-report. The Land disability laws mostly follow the definition of disability contained in Section 2 SGB IX. See for the standard formulation Section 3.1 North Rhine-Westfalia Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz Nordrhein Westfalen, BGG NRW*), of 16 December 2003 (GV.NRW 766), last amended on 18 November 2008 (GV.NRW 738)); Section 4 Berlin Land Equal Opportunities Act (*Landesgleichberechtigungsgesetz Berlin, LGBG Berlin*), of 17.05.1999 (GVBl. für Berlin No 42, 433), last amended on 15 December 2010 (GVBl. 560)); for a slightly different definition cf. Section 2.1 Saxony-Anhalt Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz Sachsen-Anhalt, BGG LSA*), of 16 December 2010 (GVBl. LSA 2010, 584): A person is considered disabled if they have physical, psychological or mental impairments or limitations which are not temporary (i.e. which last longer than six months) and who are subject to measures, circumstances or treatment by the state and society which limit or worsen their living situation.

193 BAG, 19 December 2013, 6 AZR 190/12, paragraph 43ff. The Court explicitly states – in the context of HIV infection without symptoms – that a disability can be created by social reactions to a long-term illness, thereby impairing a person's participation in society.

194 Section 2.3 SGB IX.

195 Section 69.1 SGB IX.

196 Section 69. 1 SGB IX. This has consequences for some benefits related to disability, e.g. in tax law: Section 33b Income Tax Law (*Einkommenssteuergesetz*, EStG), of 08 October 2009 (BGBl. I, 3366, 3862), last amended on 18 December 2013 (BGBl. I, 4318).

197 UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Germany, 13th Session, April 2015, paras 7-8.

198 See at: http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANX0300217L.

However, in order to claim reasonable accommodation a person must comply with the definition of 'workers with disability' in Article L5212-13 paragraph 1 of the Labour code – which requires a person to be officially recognised as disabled by the competent French authorities (AGEFIPH and FIPHFP).

A similar approach is evident in **Croatia**, where disability is defined both by the Social Care Act and Act on Professional Rehabilitation and Employment of Persons with Disability as

> 'a long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder a person's full and effective participation in society on an equal basis with others'.[199]

However, in order to benefit from reasonable accommodation duties (and for employers to be able to claim the costs of the accommodations), the disabled employee has to be registered in the Registry of employed disabled people.

2.4.4 Knowledge requirements

Both the CRPD and the Employment Equality Directive are silent about the degree of knowledge of a person's disability or their need for an accommodation which an employer must have before becoming subject to a reasonable accommodation duty. The laws of most of the countries studied (**Austria**, **Belgium**, **Croatia**, the **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **Germany**, **Greece**, **Hungary**, **Ireland**, **Italy**, **Latvia**, **Liechtenstein**, **Luxembourg**, **Malta**, **Slovenia** and **Sweden**) are also silent about this. In other countries (**Cyprus**, the **Netherlands**, **Poland** and **Spain**), even though legislation does not include any explicit provision in this respect, a reasonably clear approach emerges in practice. In **Great Britain** (Northern **Ireland** has separate legislation) the issue is expressly addressed by the Equality Act 2010 and the accompanying guidance in the Equality and Human Rights Commission's Code of Practice on Employment. On the basis of the information provided by the national experts, three main approaches may be identified. These will be discussed in more detail below but, for convenience, will be outlined in brief here.

First, the duty arises when the employer knows or ought to know about the disability of the employee. In this case, disabled employees (or prospective workers) would generally need to take steps to alert the employer to their disability and need for accommodations if their impairment were not apparent. Second, the duty is triggered by a specific request of the disabled person and thus arises only when the employer is informed about the disability and requested to provide an accommodation. Third, the duty arises when a competent public authority informs the employer. Arguably, only the first type of approach is consistent with Articles 2, 5 and 27 of the CRPD – although the issue is not explicitly addressed and has not yet been the subject of any of the Committee's Concluding Observations. Under the second and third approaches employers would escape liability even though they know or ought to have known that an applicant or employee was disabled and needed an adjustment.

(a) Employer knows or ought to know

In some States (**Austria**, the **Czech Republic**, **Denmark**, **Estonia**, **France**, **Ireland**, **Norway**, **Portugal**, **Sweden** and the **UK**) the duty to provide reasonable accommodation seems to arise when the employer knows or ought to know about the disability. Hence, when the disability is apparent, the employer is immediately subject to the duty. However, if there is no reason why the employer should have known of the disability, they will not be under a duty to make reasonable accommodations.

199 Article 4(1)(9) of the Social Care Act (Official Gazette 157/2013, 152/2014) and Article 3(1) of the Act on Professional Rehabilitation and Employment of Persons with Disability (Official Gazette 157/2013, 152/2014).

This matter is dealt with explicitly in the **UK**'s Equality Act 2010 (applicable only to Great Britain) and it is also addressed in an accompanying code of practice. According to Schedule 8, s 20(1) of the Equality Act 2010, an employer is

> 'not subject to a duty to make reasonable adjustments if [he/she] does not know, and could not reasonably be expected to know—
> (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
> (b) in any other case referred to in this Part of this Schedule, that an interested disabled person has a disability and is likely to be placed at the [relevant] disadvantage …'

The requirements are explained in the Equality and Human Rights Commission's Code of Practice on Employment which provides that:

> 'It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'. An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially'.

Interestingly, this Code also makes clear that any knowledge of disability held by an employer's occupational health adviser(s) will also be attributable to the employer, at least where the employee has agreed to this information being shared.

In the **Czech Republic** and **Denmark** this approach has been adopted by the anti-discrimination Bodies. The Czech Ombudsman, in a decision adopted in 2011, rejected the argument that a failure to make a reasonable accommodation amounted to discrimination, because the disability of the employee was not immediately evident and the employee did not explicitly request any accommodation from the employer.[200] In **Denmark**, in a recent case, the Board of Equal Treatment found that discrimination had not occurred[201] because the employer did not know of the complainant's disability (brain damage), and there was no reason the employer ought to have known about the disability of the complainant, which was not apparent.

In the **Netherlands** reasonable accommodation is to be provided when the employee has indicated their need to have such an accommodation. This stems from Article 2 of the Disability Discrimination Act, which provides that an accommodation has to be given 'according to the needs' of an employee, read in light of the *travaux préparatoires*. In the parliamentary debates before the approval of the Disability Discrimination Act, the Dutch Government affirmed that it was the responsibility of applicants and employees to inform the employer about their needs.[202] If they do not inform the employer, who correspondingly is unaware of the existence of the disability, no duty arises,[203] as employers are prohibited from asking for information about the physical and/or intellectual condition of an applicant during the selection procedure. However, if employers become aware of the disability or chronic illness of one of their employees, they are under

200 Ombudsman, Report from inquiry No. 85/2011/DIS/JŠK *(Zpráva veřejného ochránce práv o šetření, sp. zn.:* 85/2011/DIS/JŠK*)*, 11 October 2012, available at: http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Kauzy/prace/85-2011-DIS-JSK-1_-_Diskriminace_v_zamestnani_z_duvodu_zdravotniho_postizeni_prace.pdf.

201 Board of Equal Treatment, Decision No. 35/2015.

202 *Kamerstukken II* 2001/02, 28 169, no. 3, p. 26.

203 See A. Hendriks, *Rechtspraak Werken met een Handicap (WGBH/CZ)*, Deventer: Kluwer 2007, p. 56-57.

a best efforts obligation (*inspanningsverplichting*) to investigate the nature of the sickness absence of the disabled/chronically ill employee and to find out whether reasonable accommodations are needed.[204]

When the disability is not apparent, in some countries (e.g. **Estonia**) the claim for an accommodation must be supported by a medical certificate. In other words, when the disability is not evident, employers are deemed to know (and, are subject to the duty to provide reasonable accommodation), only if they are given notice through a medical certificate, or a written recommendation of a doctor or another medical expert.

(b) Specific request made by the disabled applicant or employee

In some countries, regardless of the type of disability (apparent or invisible), the duty seems to be triggered only where there is an express request by the employee. This is the situation in **Cyprus**, the **Netherlands**, **Poland** and **Spain**. The Cypriot law affirms that the reasonable accommodation duty arises 'according to the needs which appear in a specific situation'.[205] This wording is not unambiguous, but practice suggests that the reasonable accommodation duty arises when the worker informs the employer about his/her own disabilities and requests an accommodation. In **Spain**, it is explicitly provided that disabled people must notify their disability to the employer and request a reasonable accommodation.[206] Similarly, in **Poland**, Article 23a of the Disabled Persons Act defines reasonable accommodation as 'necessary changes and adjustments in line with the specific needs reported to the employer, stemming from somebody's disability'. It seems that, according to Polish law, disabled employees bear the duty to inform the employer about their special needs, and that, consequently, the duty arises when the employer receives a request.

(c) Notification from a competent public body

In few other countries, such as **Bulgaria** and **Luxembourg**, the duty arises when the employer is informed by the health services or public authorities about the health or medical condition of the disabled worker and their need to be provided with reasonable accommodation. Although the situation differs slightly from country to country, in general, the duty seems to be triggered by the notice of a public authority. Often, this approach goes hand in hand with a restricted personal scope of reasonable accommodation which operates only in favour of individuals whose disability has been officially recognised and assessed by a public body. For example, in **Bulgaria**, under the Labour Code, employers' duty to provide 'labour accommodation' arises only when they are served a written instruction to accommodate a worker/employee by the health authorities.[207] Where there is such an instruction, there is no need for the employee to notify the employer. Conversely, where there is no such instruction, whatever factual knowledge an employer has of a disabled person needing accommodation is irrelevant. Once an employer is served such an instruction, they have 7 to 10 days to comply with it. In **Luxembourg**, only people who have a 30% disability and have been officially recognised as such are entitled to claim reasonable accommodation. Thus, even though there is no explicit requirement for a notice from the public authority, some form of certification would seem to be required by an employer before they are subject to the duty.

2.4.5 Substance of the duty

As mentioned above, Article 5 of the Employment Equality Directive does not clearly elaborate on the meaning of 'reasonable accommodation', nor explain the term 'reasonable'. Recital 20 sets out a non-exhaustive list of measures which can entail an accommodation:

204 ETC 2005-133, para. 5.8, ETC 2007-27, para. 3.15-3.16, NIHR 2014-1, paragraph 3.16 and 2014-2, paragraph 3.15.
205 Cyprus, Law on persons with disability (Ο περί ατόμων με αναπηρίες νόμος) No. 127(I)/2000, article 5(1)A, available at http://www.cylaw.org/nomoi/enop/ind/2000_1_127/section-sc90aa9b9c-27d7-bb94-8bbe-61b5d5a55d27.html.
206 RDL 1/2013, Article 68.2.
207 Article 317 (3) LC; Article 85 (1) PSA.

> 'i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources'.

With regards to the term 'reasonable', it has been suggested that the accommodation must be effective in allowing an individual with a disability to participate in employment related activities whilst not resulting in an excessive burden for the employer. This interpretation could also be seen as in line with the CRPD.

In the majority of States under examination, the ambiguity of the directive is reflected in national laws. As noted by Waddington and Lawson,[208] in some States the term reasonable 'implies that an employer is only obliged to take action which does not result in excessive costs, difficulties or problems' – anything else would be "unreasonable" and would constitute a disproportionate burden, while in others the term reasonable refers to the 'effectiveness' of the accommodation (or, in others, is used to convey both meanings. Without repeating the analysis already carried out by Waddington and Lawson,[209] we focus on how the two constituents of the obligation to make a reasonable accommodation included in Article 5 of the Employment Equality Directive have been implemented at the national level.

(a) Accommodations as appropriate measures

Despite differences, in all the national laws considered the reasonable accommodation duty is formulated or interpreted so as to mean that the accommodation is any individualised adjustment that satisfies the needs of the person and helps them to exercise their right to work.

In some countries, emphasis is placed on the fact that the measure must be effective. For instance, as mentioned above, the Dutch provision Article 2 of the DDA employs the term 'effective' measures. In **Belgium**, the Cooperation Agreement concerning the concept of reasonable accommodation[210] defines the concept of reasonable accommodation as a 'concrete measure aimed to neutralise the limiting impact of an inappropriate environment on the participation of a person with disabilities'.

The fact that a measure must be appropriate does not mean that it must be the best possible. In the **Czech Republic**, the Ombudsman has clearly emphasised the need for an accommodation to be individualised.[211] In that case, however, the Ombudsman also affirmed that the accommodation has to reflect the character of the disability, but it does not have to be the best possible.

Accommodations must be adopted on a case-by-case basis and must be appropriate. However, a tricky point is what exactly constitutes an 'accommodation' within the realm of national law.

On occasion, following the wording of Recital 20, national laws provide examples of accommodations or include non-exhaustive lists of adjustments. This is the case for example, in **Hungary**,[212] **Ireland**, **Malta**, **Romania** and **Sweden**. In **Ireland**, Section 16(4) of the Employment Equality Act mentions 'adaptation of premises and equipment, patterns of working time, distribution of tasks or provision of training or integration resources'.[213] Similarly to the Irish provision, Article 7(5) of the Maltese Equal Opportunities (Persons with Disability) Act, 2000 as amended[214] affirms that reasonable accommodation is defined

208 Above n 25.
209 Above n 25.
210 OJ (*Moniteur belge*), 20 September 2007, p. 49653 – 49664 (available in Dutch, in French and in German). A Cooperation Agreement in Belgium is agreed between the federal state and regions/communities.
211 Ombudsman, Statement No. 217/2011/DIS *(Stanovisko veřejného ochránce práv č.* 217/2011/DIS*)*, 26 April 2012, available at: http://eso.ochrance.cz/Nalezene/Edit/2304.
212 Article 15 of Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities (RPD Act).
213 EEA Section 16(4).
214 ACT I of 2000, as amended by Legal Notice 426 of 2007; and Act II of 2012. See at https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=55768&p_country=MLT&p_count=323.

to include 'making existing facilities used by employees readily accessible to persons with disabilities', and 'restructuring jobs, instituting part-time or modified work schedules, reassigning vacant positions, acquiring or modifying equipment or devices, appropriately adjusting or modifying examinations, training materials or policies, providing qualified readers or interpreters, and making any other similar alterations' for a person with a disability. In **Sweden**, the following adaptation measures are mentioned in the legislative material accompanying the Discrimination Act: improvements related to physical accessibility, the acquisition of technical support, and changes in work tasks, time schedules or work methods.

In other countries, even though the provision addressing reasonable accommodation does not offer any example of accommodations, guidance is provided in other pieces of legislation, or bylaws, or soft law documents. In **Poland**, for example, Article 23a of the Act of 27 August 1997 on the Vocational and Social Rehabilitation and Employment of Disabled Persons simply states that accommodations are 'necessary changes and adjustments in line with the specific needs reported to the employer'.[215] However, the Ordinance of the Minister of Labour and Social Policy on general provisions on health and safety at work,[216] issued on the basis of the Labour Code,[217] specifies that 'workstations shall be organised according to the psychological and physical features of employees'[218] and that 'an employer who employs disabled people shall ensure the adjustment of workstations and routes to them in accordance with the needs and abilities of disabled employees, resulting from their reduced ability/mobility'.[219]

Two main types of accommodations may be identified – technical solutions and organisational arrangements.

Technical solutions include assistive devices or other adaptations of the workplace.[220] They may take the form of structural modifications of the enterprise's premises.

Accommodations can also include general adaptations or technical solutions, which are not 'specific' to disabled persons, but are essential to accommodate a particular need of a disabled person. This is illustrated by a recent decision of the **Greek** Ombudsman.[221] The Ombudsman was asked to intervene on the installation of an air conditioning system in teaching rooms of a private school where a teacher used to work. The employee claimed that, because of his disability (multiple sclerosis of nervous system), he needed to work in low temperatures. In particular, the employee claimed that the existing teaching rooms were not equipped with technical infrastructure (an air-conditioning system) that would help the teacher to perform his duty. The Ombudsman agreed that a reasonable accommodation was appropriate in this case, unless the school could prove that the financial burden was disproportionate.[222]

Accommodations falling into this description 'technical solutions' include transportation to reach the work place. This is well illustrated by a French decision of the Administrative Tribunal of Caen, which ruled that the obligation of the employer to take 'necessary measures to provide access to work' covered measures allowing the person to get to work, and granted the request.[223]

215 Article 23a of the Act of 27 August 1997 on the Vocational and Social Rehabilitation and Employment of Disabled Persons.
216 Ordinance of 26 September 1997, as amended. (*Rozporządzenie ministra pracy i polityki socjalnej z dnia 26 września 1997 r. w sprawie ogólnych przepisów bezpieczeństwa i higieny pracy*).
217 Article 237 (15), Labour Code.
218 Para. 45.1, Ordinance on general provisions on health and safety at work.
219 Para. 48, Ordinance on general provisions on health and safety at work.
220 See KMU Forschung Austria (2008), *Providing reasonable accommodation for persons with disabilities in the workplace in the EU – good practices and financing schemes – Contract VC/2007/0315*, Austrian Institute for SME Research, Vienna, available at: http://ec.europa.eu/social/BlobServlet?docId=1957&langId=en.
221 Case No 190405/2014 of on 25 February 2015.
222 At the time of the writing of this report, the decision of the school is pending.
223 T.A. Caen, 1st October 2009, no. 0802480.

The second type of accommodation, 'organisational arrangements', includes adjustment of working hours and re-distribution of duties,[224] teleworking arrangements, leave to carry out periodical rehabilitation,[225] extended or additional leave,[226] the provision of assistance (e.g. specialised work assistant or job coach who prepares the employee for their daily duties, etc.).[227]

The reduction of working hours is a form of accommodation which has been considered by several courts[228] and equality bodies. For instance, the **Cypriot** Equality Body stated that the reduction in teaching hours for a disabled teacher can constitute a reasonable accommodation measure, provided that the symptoms of the disability render teaching painful or exhausting.[229] Part-time work can also constitute an accommodation.[230] In this respect, in some countries such as **Germany**, the employers are under an additional duty to promote part-time work.[231]

In the **UK**, numerous reasonable accommodation cases have focused on the extent to which, if at all, standard sick leave schemes should be adjusted to accommodate the circumstances of disabled employees. There is long-standing authority to the effect that such adjustments constitute a form of accommodation which it may, on occasion, be reasonable to provide.[232] Recent cases, however, have continued to grapple with the prior question of whether a standard sick leave scheme (which applies to everybody) places disabled people at the disadvantage required to trigger the reasonable accommodation/adjustment duty.[233] A Court of Appeal judgement (on 10 December 2015) has settled this debate and made it clear that a disabled person may well be disadvantaged by the application to them of a standard sick leave scheme and that, in principal, an adjustment to that scheme could in some cases (depending on issues of reasonableness) be required by a reasonable accommodation duty.[234]

Organisational arrangements include the transfer to another department. This is well illustrated by a decision of the **Greek** Ombudsman, which examined the request of an assistant nurse to be transferred to another department of a public hospital, because, due to a long-term illness, she was not able to stand on her feet for long time or lift burdens. In order to find out if her claim for a reasonable accommodation was justified, the Ombudsman focused on the extent to which the existing staff plan of the specific organisation was covered by other employees, so that the hospital could function without operational

224 In one of its judgments, the Polish Supreme Court underlined that the obligation to provide reasonable accommodation should be interpreted in line with recital 20 of the preamble to Directive 2000/78/EC and extends beyond accommodating the premises or equipment but also covers accommodating working time and distribution of duties (Judgment of 12 May 2011 r.; II PK 276/10).

225 The Cyprus Equality Bodies affirmed that the revocation by the employer of the right initially granted to an employee with multiple sclerosis to take two afternoons off in order to undergo physiotherapy on the justification that the workload had increased was found to be discriminatory. The leave to attend the session of physiotherapy was considered reasonable accommodation. See: Cyprus, Equality Authority, Report No. Decision dated 04 September 2007, Ref. A.K.I. 65/2007.

226 Section 125 SGB IX.

227 KMU Forschung Austria (2008), *Providing reasonable accommodation for persons with disabilities in the workplace in the EU – good practices and financing schemes – Contract VC/2007/0315*, Austrian Institute for SME Research, Vienna, available at: http://ec.europa.eu/social/BlobServlet?docId=1957&langId=en.

228 Cf. Baden-Württemberg Land Labour Court (*Landesarbeitsgericht Baden-Württemberg, LAG Baden-Württemberg*), 22.06.2005, Az: 2 Sa 11/05 with further references. See also the decion of the Greek Ombudsman No. 142727/2011, issued on 5 December 2011.

229 Cyprus, Equality Authority, File A.I.T. 1/2009, 20 September 2009. A summary of the case in English is available at the Equality Authority's Annual Report for the year 2009, pp. 50-52, at: http://www.no-discrimination.ombudsman.gov.cy/sites/default/files/etesia_ekth_aim_2009_0.pdf. In that case, on the issue of the proportionality of the burden on the employer, the Equality Body pointed to the possibility of the state securing funding from the European Social Fund in order to finance such a measure.

230 E.g. Norwegian case – Agder court of Appeal, 28 June 2013 – LA-2013-45685 – RG-2013-880. See also Section 81.5 sent. 3 of the German SGB IX.

231 Section 81.5 SGB IX.

232 See e.g. *O'Hanlon v Commissioners of HM Revenue and Customs* [2006] IRLR 840 and [2007] EWCA Civ 283.

233 See e.g. Royal Bank of Scotland v Ashton UKEAT/0542/09 and 0306/10; Griffiths v Secretary of State for Work and Pensions [2014] All ER (D) 220 and, on appeal, Court of Appeal 10 December 2015 (not yet reported).

234 Ibid.

problems. Finally, the Ombudsman suggested that she was entitled to a transfer, and that transfer would constitute reasonable accommodation, but the decision of the hospital is still pending.[235]

Organisational arrangements also include re-location in a different office situated in a different premise. This is illustrated by an Irish case in which the respondent hotel appealed against an Equality Officer's finding that it had discriminated against the claimant on grounds of disability. The claimant, who suffered from mild osteoarthritis of the left knee, worked as a Sales Executive for only three days for the respondent before she left due to the difficulty of accessing her office, which was on an upper floor without lift access. The Court found that the claimant's disability was more than a trivial influence in the ending of her employment and that had an office in a different premise been made available, she would have been capable of doing the job.[236] Accordingly, there had been a failure to provide reasonable accommodation.

An organisational accommodation might also entail ensuring that a disabled employee remains in a certain location, instead of being relocated to another branch. This is illustrated by a decision of the **Greek** Ombudsman[237] which held that transferring an employee with a mobility impairment to a different (distant and not easily accessible) workplace constituted indirect discrimination and failure to provide reasonable accommodation.

In the context of dismissal, **Austrian** courts have clearly stated that dismissal must never be based solely on an employee's disability,[238] and that the disabled employee must be provided with reasonable accommodation, which includes assigning the employee to a different post if available, even if it results in them having an increased rate of pay.[239]

A challenging aspect of organisational arrangements is the boundary between an accommodation (that must be provided) and other organisational arrangements that might distort the nature of the job and which cannot therefore be considered accommodations. This issue is evident in a **Polish** case decided by the Supreme Court.[240] That case concerned the dismissal of junior prosecutor (assessor), who was deemed unable to perform all duties linked to the exercise of the work as prosecutor because of her disability. The Supreme Court confirmed the dismissal and affirmed that the assessment of whether a disabled prosecutor is able to perform the duties depends on the circumstances of the particular case, and that the 'degree of disability' is to be taken into consideration. In addition, the Court stated that relieving the junior prosecutor from activities demanding physical efforts and performed outside the office does not constitute a reasonable accommodation, as these activities and duties are ingrained in the profession of prosecutor. As a consequence the Court ruled that the impossibility to perform these activities amounted to the inability to perform the work of prosecutor. As the **UK** House of Lords case of *Archibold v Fife* Council illustrates, where an employee who has become disabled may no longer be able to perform their original job, the employer might be required by a reasonable accommodation duty to transfer them to a different job for which they are qualified – even if they are not the best person for that position.[241]

Interestingly, in **Slovenia** 94% of all reasonable accommodation measures taken by the employers are related to organisational solutions, such as transfers to other work posts or part time work. In addition, 5% of reasonable accommodation measures consist of rehabilitation and training, and less than 1% are technical accommodation measures.[242] It is not clear whether this pattern is reflected in other countries, since no data are available in this respect.

235 Case No 191907/2014, issued on 28 January 2015.
236 Irish case *A Hotel and A Worker* (Labour Court 2007, Determination No.EDA072, available at http://www.workplacerelations.ie/en/Cases/2007/December/EDA0721.html.
237 Case No. 189977/2014, issued on 20 May 2015.
238 *VwGH* 22/02/1990, 89/09/0147. [Administrative High Court Decisions].
239 *OGH* 29/04/1992, 9 ObA 18/92. [Supreme Court Decisions].
240 Judgement of 12 April 2012, II PK 218/11.
241 *Archibald v Fife Council* [2004] UKHL 32
242 Implementation of the concept of reasonable appropriate accommodation in the field of employment of persons with disabilities, University rehabilitation Institute Soča, 2009.

(b) Disproportionate Burden

The 'disproportionate burden' test is generally used to establish the limits of the obligation to make a reasonable accommodation. Even in those jurisdictions (**Romania** and the **UK**) in which the national law does not use or define the concept of 'disproportionate burden', the question whether any particular adjustment is 'reasonable' involves, in essence, the determination of whether the accommodation involves a disproportionate burden for the employer.

Reflecting the lack of detail on this issue in the Directive, the situation across the States considered varies. Nevertheless, the relevant criteria generally echo Recital 21 and/or Article 5 of the Directive. Of particular relevance are the costs of the accommodation and/or the subsidies available to cover those costs.

In some countries, such as **Austria**,[243] the **Czech Republic**,[244] **Estonia**,[245] **Finland**,[246] **Greece**,[247] **Ireland**,[248] **Luxembourg**,[249] **Spain**[250] and the **UK**[251] legislation sets out general criteria for the evaluation of what might be regarded as a 'disproportionate burden'. In some of these States (e.g. **Greece**, **Luxembourg**, **Portugal**),[252] a wording similar to that of Article 5 of the Directive is adopted. For instance, Article 10 of **Greek** Law 3304/2005 provides that the burden is not deemed disproportionate when it is sufficiently remedied by measures existing within the framework of disability policy. Article 8 of the **Luxembourg** Law of 12 September 2003, as amended, states that a 'burden shall not be disproportionate when it is sufficiently remedied by the measures contained in article 26 of the grand-ducal regulation of 7 October 2004', where the latter provision cited is that concerning financial measures to subsidise the cost of technical adjustments, for the purchase of professional equipment, and to reimburse transport costs to the work place. In other countries, such as **Estonia**, **Germany**,[253] **Ireland** and **Spain** relevant provisions echo Recital 21 of the Directive. For example, Article 11(3) of the Estonian Law on Equal Treatment states

> 'Upon determining whether the burden on the employer is disproportionate as specified in subsection 2, the financial and other costs of the employer, the size of the agency or enterprise and the possibilities to obtain public funding and funding from other sources shall also be taken into account'

Similarly, Section 16 of the **Irish** Employment Equality Act states that, in determining whether the measures would impose a disproportionate burden, account shall be taken of the financial and other costs entailed, the scale and financial resources of the employer's business, and the possibility of obtaining public funding or other assistance.

In some of the States under examination, such as **Austria**, the **Czech Republic**, **Malta**, **Norway**, **Slovakia** and **Slovenia**, national laws prescribe a more general evaluation to assess whether the accommodation entails a disproportionate burden. It appears that financial costs of accommodation should not be considered in isolation, but weighed in relation to other factors such as the activities of the undertaking, the benefit that the disabled person receives, as well as to the benefit that others receive. This approach seems more in line with Article 2 of the CRPD, as it includes a more comprehensive evaluation in which the right of the disabled person is central. For example, in the **Czech Republic**, beside costs and subsides

243 Section 7c of the Act on the Employment of People with Disabilities.
244 Section 3 of the Anti-discrimination law.
245 Article 11(3) of the Estonian Law on Equal Treatment.
246 Section 15(2) of the Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)].
247 Article 10 of Law 3304/2005.
248 EEA Section 16 (3)(b) and (c).
249 Article 8 of the law of 12 September 2003.
250 Article 40.2 of RDL 1/2013.
251 The Equality Act does not include a list list of factors which should be considered in determining whether in the particular circumstances it is reasonable for the employer to have to make a particular adjustment. However, the Disability Discrimination Act include a list of factors to be assessed in s18B(1).
252 Article 86(3) of the Labour Code.
253 Section 77.5, 102.3 SGB IX.

available, additional factors to be considered in order to evaluate whether the accommodation entails a disproportionate burden are: the extent to which the measure would accommodate the needs of the disabled person, any disruption to the natural or legal person's activities which the accommodation may cause, and the adequacy of other alternative provisions or arrangements to accommodate the needs of the disabled person. The commentary to the Czech Anti-Discrimination law also includes among the relevant factors the size of the employer, and affirms that providing the same reasonable accommodation for a company with high turnover can be considered as 'unreasonable burden' for a little sole-trader.[254] In **Norway**, in assessing whether the arrangement involves an undue burden, besides the costs of the actual accommodation and the resources of the enterprise, factors to be assessed include the effects that the dismantling of disabling barriers will have, and whether the accommodation can benefit other employees beside the disabled person. This provision seems to imply that an expensive accommodation is more likely to be required if it would lead to a significant advantage for a disabled individual, while also benefiting other people. In **Austria**, Article 7c of the Act on the Employment of People with Disabilities mentions (in addition to economic capacity of the employer and public financial assistance available) the 'necessary effort to eliminate the conditions constituting the disadvantage', and a temporal criteria ('the time span between the coming into force of this Act and the alleged discrimination'). In **Malta**, Article 7(4) of the Equal Opportunities (Persons with Disability) Act, 2000 the factors to be considered in determining whether providing alterations for an employee with a disability would unduly prejudice the operation of the trade or business run by the employer shall include (a) the nature and cost of the alterations; (b) the overall financial resources of the workplace involved in the making of the alterations; (c) the number of employees at the workplace requiring alterations; (d) the effect on expenses and resources and the impact of the required alterations upon the operation of the workplace; (e) the overall financial resources of the employer; (f) the overall size of the business of the employer including the number of employees, and the number, type and location of its workplaces; (g) the type of operation or operations of the employer, including the composition, structure and functions of the work-force; and (h) the availability of financial assistance from public funds to defray the expense of any alterations.[255] In **Slovakia**, to determine whether the measures give rise to a disproportionate burden, account shall be taken of the benefit that the adoption of the measure would mean for the person with a disability; the financial resources of the employer, including the possibility of obtaining funding or any other assistance for the adoption of the measure; and the possibility of attaining the purpose of the measure in an alternative manner.[256] The **Slovenian** Act on Equal Opportunities for People with Disabilities mentions as factors to be considered when assessing the accommodation, the size and sources of funding of the (public or private) entity that has this duty, its nature and the estimated expenses of the appropriate accommodation, possible benefits of improved access for disabled people. Interestingly, the Slovenian provision includes among the factors also the historical, cultural, artistic and architectural value of the building where the employment takes place.[257]

In addition, **Austrian**[258] and **Slovakian**[259] legislation affirms that an accommodation shall not be regarded as disproportionate if it is required under separate legislation, such as legislation relating to accessibility of (public) buildings.

254 The Czech Republic, Commentary to the Anti-discrimination law *(Komentář k zákonu č. 198/2009 Sb. o rovném zacházení a právních prostředcích ochrany před diskriminací),* 2010.

255 Of relevance it is also Article 20 of the Equal Opportunities (Persons with Disability) Act, 2000, which contains an illustrative list of those factors which are to be considered in determining whether an accommodation could be undertaken without unjustifiable hardship. Article 20(2) echoes Recital 21 of the Directive and include among the factors: the nature and cost of the actions in question; the overall financial resources of the person, body, authority or institution concerned and the effect on expenses and resources or the impact of such actions upon the operations of such person, body, authority or institution; and the availability of grants from public funds to defray the expense of the said actions.

256 Section 7(2) of the Anti-discrimination Act.

257 Article 8 Act on Equal Opportunities for People with Disabilities.

258 Section 7c of the Act on the Employment of People with Disabilities reads as follows: '…it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent they have been obeyed'.

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

In **Hungary**, the wording of Article 15(4) of Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities (RPD Act) as amended is slightly different. According to this provision, the burden shall be regarded as disproportionate if compliance with this obligation would make the continued operation of the employer impossible. It seems that this provision sets a far 'higher bar' than the Directive. In a similar vein, the **Cypriot** law seems more demanding to discharge the duty, as reasonable accommodation must be fulfilled to the maximum of available resources.[260]

In some States, such as **Croatia**, **Denmark**, **Italy** and the **Netherlands**, the law does not define what would be a disproportionate burden. In these countries, it is up to the courts to determine what factors are to be considered in deciding whether a burden is disproportionate. However, it is apparent that courts, when evaluating whether the burden placed on the employer is disproportionate, take into consideration the costs of the accommodation and subsides available, in line with the Directive. For example, in **Denmark**, even though there is no obligation on the employer to apply for public funding to cover the expenses related to the accommodation, in a discrimination case the employer might be considered guilty of indirect discrimination for failure to provide accommodation if possible funding has not been applied for.[261]

In all the countries considered, case law and decisions of equality bodies (although often scant) provide some indication on the standards upon which 'to measure' the burden imposed. Often they provide for additional criteria, different from those included in the legislation, or traditionally considered. Several courts carry out a sort of cost-benefit analysis. In **Germany**, for example, the Baden-Württemberg Land Labour Court[262] affirmed that a burden is deemed to be disproportionate if the measure demands significant financial investment, compared to the length of the work relationship in case of fixed-term contracts or age limits. The **Czech** Ombudsman, in a recent opinion,[263] affirmed that, when providing reasonable accommodation, a compromise between the highest effectiveness and lowest costs must be reached'. In this vein, the Belgian Inter-federal Centre for Equal Opportunities authorised a person with physical disability working in an administrative department of a city to carry out part of his work at home, but did not endorse the request of accommodations related to transport requested by the person and already denied by the administration.[264] **Austrian** courts have stated that the larger is the number of employees, the stricter is the employer's duty to make reasonable adjustments, including organisational arrangements.[265] However, Austrian courts have also established that the employer is not obliged to create a 'new' post in the company, specifically tailored to meet the needs of the employee.[266] A decision of the **Danish** Maritime and Commercial Court of 22 December 2014 reveals that the nature of the job can be particularly relevant, when considering whether the accommodation entails a disproportionate burden. The case dealt with a colour-blind seaman.[267] In compliance with Danish law, the seaman was not allowed to perform essential tasks on the ship he worked on because of his colour blindness and was therefore dismissed. The Court stated that the seaman had a disability and examined whether the employer should

260 Cypriot Law amending the Law on Persons with Disabilities No. 63(I)/2014, 23 May 2014, available at www.cylaw.org/nomoi/arith/2014_1_63.pdf.

261 Printed in U.2009.1948SH. In this case the court concluded that discrimination because of disability had taken place since the employer did not provide for reasonable accommodation. The case dealt with L who had severe permanent backaches. Due to L's illness the employer decided to terminate the training agreement. The employer had refused a proposal by the municipality concerning a personal assistant arrangement paid by the municipality, which presumably could have fulfilled L's need for compensation. Since the court found no reason to assume that the arrangement would impose a disproportionate burden on the employer, the court awarded 97.200 DKK (€ 13.050) in compensation.

262 *Landesarbeitsgericht Baden-Württemberg*, LAG Baden-Württemberg, 22 June 2005, Az: 2 Sa 11/05.

263 Ombudsman, Report from inquiry No. 93/2011/DIS/*AHŘ (Zpráva veřejného ochránce práv o šetření, sp. zn.: 93/2011/DIS/AHŘ)*, 2 January 2011, available at: http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Kauzy/prace/Diskriminace_v_zamestnani_z_duvodu_zdravotniho_postizeni__bossing_a_neprijeti_primerenych_opatreni_.pdf.

264 Instance reported on 20 September 2012 available at: www.diversite.be.

265 *OGH* 29/04/1992, 9 ObA 18/92. [Supreme Court Decisions].

266 See Administrative High Court VwGH Nr. 2006/12/0223, 17 December 2007. And if dismissal seems necessary to prevent the company's bankruptcy or other grave disturbances, the employee's interests are usually outweighed by the interests of the employer. See, e.g., *VwGH* 22/02/1990, 89/09/0147; *VwGH* 11/06/2000, 2000/11/0096; *VwGH* 04/10/2001, 97/08/0469. [Administrative High Court Decisions].

267 The Maritime and Commercial Court, Judgments No. F-2-13 of 22 December 2014. Printed in U2015.1053S.

have been provided with reasonable accommodation. The Court concluded that the only realistic option would be to hire an extra seaman during the two weeks when the seaman in question was at sea. Such a measure would be disproportionate for the employer, which was a small shipping company with few employees. The **Irish** Equality Tribunal in a case concerning a worker in a small fashion retail shop,[268] when evaluating the accommodation requested by the complainant (i.e. reduction of working hours and light tasks), in line with Section 16(3) of the Employment Equality Act considered the 'small scale and limited financial resources' of the business and the difficulty of securing another resource flexible enough to effectively support the disabled worker while not increasing the cost base of the business. The Equality Tribunal balancing the accommodation requested and the practical conditions of the business affirmed that the argument of 'disproportionate burden' had merit.

Interestingly, some national courts, when considering whether the accommodation entails a disproportionate burden, balance the needs of the disabled person with the rights of other employees. For example, a **German** court affirmed that, if the accommodation places an undue burden on other employees, it might be considered disproportionate.[269] In a similar vein, in **Sweden**, the Labour Court has tended to consider a disproportionate burden an accommodation which entails a permanent change of functions of the disabled employee in a way that create a prejudice to other workers and to the company. The relevant case concerned a bus driver who – due to a stroke – could not drive peak hours, early mornings and late evenings. Allowing him to work daytime and off-peak would have required others to work the morning peak and the afternoon peak with long breaks in between, creating a disproportionate burden on other workers.[270]

In **France**, case law has clarified that right to reasonable accommodation supersedes any 'interest of the service' in question. A relevant case in this respect is *Boutheiller v Minister of Education*. In this case the Rouen Administrative Tribunal was called to decide about the appointment of a disabled person in a post different from the one for which he had applied and for which he had been considered suitable, because only in that post accommodation was provided. In that case, the claimant, who was a wheelchair-user, entered a public competition to be appointed as General Secretary of the Regional Administration of Sports and Youths. His application was ranked in third place but the applicants in first and second place turned down the post. Despite this, the claimant was not appointed. He was instead offered a position in a secondary school, because that school already provided mobility-related accommodations for wheelchair users. The ministry argued that such an appointment was in the best interest of the public service. The court observed that the claimant's appointment in the secondary school was based solely on the fact that the workplace was already adjusted to the needs of a wheelchair user. The Court held that this did not comply with (and was not a correct application of) the duty to provide reasonable accommodation and that that duty superseded the notion of 'best interest of service'. The **French** court therefore ruled that the claimant had the right to be appointed to the post for which he applied as soon as the candidates ranked first and second had declined the offer. In this case, the dignity of disabled people as well as their will and preferences played a crucial role in the balancing test. The national court seems not to have engaged in any explicit analysis of the relationship between accessibility and reasonable accommodation. The essence of the ruling, however, is that the mere fact that one workplace is accessible cannot justify an employer's refusal to consider appointing a disabled person to a post in a different workplace which would require adjustments in order to make it accessible. The reasonable accommodation duty would require such an employer to take reasonable steps to remove the disadvantages which the disabled candidate or employee might otherwise experience because of the inaccessibility of the structures or systems associated with the post for which they have applied.

As noted by Waddington and Lawson, 'as a result of the Directive, there exist a set of core considerations, which are factors related to cost, which are to be taken into account in determining whether a

268 *A worker v An Employer*, DEC-E2015-058, 30 July 2015.

269 See Baden-Württemberg Land Labour Court (*Landesarbeitsgericht Baden-Württemberg, LAG Baden-Württemberg*), 22 June 2005, Az: 2 Sa 11/05 with further references.

270 Labour Court 2013 No. 78, *Equality Ombudsman v Veolia and the Swedish Bus and Coach Federation.*

disproportionate burden exists'.[271] Several States have developed additional criteria to be considered and weighted on a case-by-case basis.

(c) Additional excluding factors

In some countries other limits to the duty are included in the legislation. A notable example is **Italy**, where public employers must implement the duty 'without new or increased burdens on public finance and human resources, financial and available under current legislation'. The Delegation Law 124/2015 on the reorganization of public administration,[272] that entrusts the government to adopt law decree to reorganize the public administration and dictates the principles the government will have to respect when enacting the decrees, includes additional provisions on the duty of public employers. In particular, Article 17(1) lett. z) of the Delegation Law 124/2015 provides that, "in order to ensure the effective integration in the workplace of people with disabilities" public administrations with more than 200 employees appoint, without any new or increased burdens on public finance and human resources, within the financial and material limits provided into the current legislation, a person in charge of the integration processes. This person should be in charge of ensuring the integration of people with disabilities in the work place, including the provision of reasonable accommodation.

These provisions attempt to strike a balance between the need to comply to the Directive and the CRPD and the necessity to contain public expenditures, in a time of harsh economic crisis. It is doubtful that the wording of these provisions complies with the Directive and with the CRPD.[273] However, at present, there are no data on the implementation of these provisions, and it is not clear whether, in practice, the budget constraints will prevent public employers from adopting reasonable accommodations.

In the **Netherlands** Article 3(1) DDA[274] enshrines three general exceptions to the prohibition to discriminate (including the duty to make effective accommodations). These exceptions are: public security and health, supportive social policies and positive action measures. However, in accordance with what the Dutch Government has observed in its Explanatory Memorandum, only public security and health can be adequate reasons to exclude the duty to provide reasonable accommodation.[275]

2.4.6 Process of the duty

The procedural aspects of the reasonable accommodation duties (e.g. requirements to consult the disabled person concerned about what they would find an appropriate or effective measure, or mechanism for supporting employers and employees to identify appropriate and non-burdensome measures, duty to consult other institutions…) are not set out in the Employment Equality Directive. The CRPD is also silent on these aspects. Nevertheless, as mentioned above, from the spirit of the Convention, and reading Articles 2 and 27 CRPD in conjunction with Articles 3 and 4, it appears that the disabled employee would need to be consulted with regards to the accommodation and has the right to participate in the decision concerning the accommodation to be adopted.

271 Above n 25.

272 Law 7 August 2015, n. 124 Delegation to the Government on the reorganization of public administrations, O.J. n. 187 of 13 August 2015.

273 Cimaglia affirms that "the wording of the provision is different from article 5 of the Directive and the requirement for public employers to not incur in spending increases would seem to restrict its scope" (Cimaglia, M.C. (2013) 'L'adattamento ragionevole nel diritto al lavoro delle persone con disabilità' at http://www.leggioggi.it/2013/09/04/ladattamento-ragionevole-nel-diritto-al-lavoro-delle-persone-con-disabilita-la-novita-del-decreto-lavoro-dopo-la-condanna-dellitalia/). Degennaro affirms that the transposition of Art. 5 "remains still inadequate given that the national legislature it is limited to reproduction in the arrangement of the general principle" (P. Degennaro (2015), 'Il licenziamento del lavoratore disabile tra modifiche normative e riscontri giurisprudenziali', *Il lavoro nella giurisprudenza* n. 8-9/2015, 859-864).

274 Article 3(2), moreover, stipulates that indirect distinction can be objectively justified.

275 Explanatory Memorandum to the DDA *Tweede Kamer*, 2001-2002, 28 169, no. 3, p. 33.

Similarly, national legislation does not explicitly regulate procedural aspects of the reasonable accommodation duties, and case law is largely silent or of little help. The matter is mostly unregulated. Nevertheless, on the basis of national reports, different patterns are identifiable in practice, in particular with regards to the duty to consult the disabled worker and the duty to consult other bodies or institutions. These trends and patterns are examined in the sections below.

(a) Duty to consult the disabled worker

In the majority of the States considered (**Austria**, **Croatia**, **Cyprus**, the **Czech Republic**, **Estonia**, **Finland**, **Greece**, **Ireland**, **Italy**, **Latvia**, **Liechtenstein**, **Luxembourg**, **Malta**, the **Netherlands**, **Poland**, **Romania**, **Slovakia** and **Slovenia**) there is no explicit legislative provision concerning a duty to enquire or consult the disabled worker. Case law is silent on this aspect. However, employers are not prevented from consulting, and might choose to consult, the person with a disability. In some of these countries, such as **Denmark**, **Norway,**[276] and the **UK** they are expected to do so. In **Denmark**, case law reveals that employers have an independent obligation to examine whether an applicant/employee needs accommodation and to examine what kind of accommodation should be established for the applicant/employee to be able to function in the job. This implicitly involves that employer are expected to consult the applicant/employee.[277] In general, failure to consult does not entail legal consequence. However, in some countries, such as **Denmark**, a failure to consult may quite likely result in a failure to provide reasonable accommodation (which will amount to indirect discrimination). Similarly, in the **UK**, the best first step to making reasonable adjustments is generally accepted as being consultation with the disabled worker about what the worker wants by way of adjustment[278] and (according to case law)[279] failure to do so is likely to undermine claims by the employer that they have implemented accommodations which are 'reasonable' in the sense of effective.

In **Norway**, the employee has a corresponding duty to collaborate and suggest solutions.[280] In some States (e.g. the **Netherlands** and the **UK**), whether or not the employer has consulted the disabled person concerned (or an occupational health expert) is a factor which might be taken into account when assessing whether the duty has been breached.

In many civil law systems (such as **Germany**), even though procedural aspects are not explicitly regulated, general contractual rules, including a general duty to act in good faith, apply. From this general duty, it is possible to infer that both the employer and the employee have to collaborate, and behave honestly in the performance of the duty.

By contrast, in a few countries (such as **Belgium**, **Cyprus**, **Hungary**, **Ireland** and **Spain**) there appears to be a duty to consult the disabled employee about the accommodation to be implemented. However, it is not clear whether the failure to consult the disabled person concerned constitutes a breach of the reasonable accommodation obligation. In some countries, such a duty can be inferred from general provisions establishing a mutual duty to inform each other about relevant conditions or jointly decide about working adjustments. For example, in **Spain** the Law 31/1995, of 8 November 1995 (on prevention of occupational risks) provides for

276 Decision of the Equality and anti-discrimination tribunal case 21/2007.
277 See Board of Equal Treatment, Decision No. 67/2013.
278 The Equality and Human Rights Commission's Code of Practice on Employment provides that: "It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made" (Section 6.32).
279 See e.g. *Project Management Institute v Latif* [2007] *Industrial Relations Law Reports* 579.
280 As per the preparatory works to the AAA; Ot.prpr nr 44 (2007-2008) p 181. In a number of decisions of the Equality and anti-discrimination tribunal, the worker did not fulfil his duty to collaborate. See cases 04/2012, 50/2012 and 11/2013.

> 'the participation of employers and workers, through the most representative employers and labour organisations, in the planning, programming, organisation and management control related to the improvement of working conditions and the protection of health and safety of workers at work'.[281]

This provision seems to imply that workers must be involved and consulted in processes for determining working conditions, including reasonable accommodations. Similarly, in **Hungary** a duty for the employer to consult the employee (and the reciprocal duty of the employee to make the employer aware of their needs) can be inferred from the provision which prescribes that all persons falling under the scope of the Labour Code shall be obliged to inform each other about all facts, data, circumstances, and the changes thereof, which are relevant from the point of view of the establishment of employment and of the exercise of rights and the fulfilment of obligations.[282]

In **Ireland** there is a precedent establishing a duty to consult – although its focus appears to be on issues of capacity, more than the appropriateness of adjustments. In *A Health and Fitness Club v A Worker*,[283] the Labour Court held that the burden was on the employer to ensure that an employee is fully capable of performing the duties for which they are employed by making 'adequate enquiries so as to establish fully the factual position in relation to the employee's capacity'. A recent decision of the Equality Tribunal,[284] making reference to authoritative scholarship, confirmed that the employer must be 'proactive in considering the forms of suitable reasonable accommodation which could apply to employees or potential employees', must carry out a full assessment of the need of the person with the disability and consult with the person with a disability throughout the process and becomes aware of the individual needs of the employee and what is required by way of medical or occupational assessment (including taking account of the findings of this assessment)'.[285]

In **Belgium**, in the absence of a specific provision in national law, a duty to consult is established in practice, and the failure to consult the disabled person might entail that the employer has not discharged their reasonable accommodation obligation.

(b) Duty to consult third parties

In the majority of the countries considered (i.e. **Austria**, **Croatia**, **Cyprus**, the **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **Germany**, **Greece**, **Hungary**, **Latvia**, **Liechtenstein**, **Norway**, **Poland**, **Romania**, **Slovenia**, **Spain** and the **UK**), relevant legislation does not include an explicit duty to consult other institutions or bodies or medical experts with regards to the reasonable accommodation. However, employers are not prevented from and often are expected to consult medical experts or labour inspectorates. Practice reveals that, in fact, they often do so, even though there are no legal consequences attached to the failure to enquire or consult. For example, in **Estonia**, employers are supposed to consult the Labour Inspectorate regarding the application of labour law, including the provision of reasonable accommodation. In **Latvia**, practice reveals that employers consult the State Employment Agency and a therapist employed by the agency will contact the disabled person and assess their needs for reasonable accommodation in relation to the specific workplace. In particular, employers consult the agency if they participate in a State subsidised scheme for creating a position specifically for a (disabled) person who was previously unemployed. In **Norway**, employers usually consult both occupational health experts and the local welfare service (NAV) for appropriate solutions. The latter body may even provide funding for reasonable accommodation to be installed. In **Belgium**, depending on the circumstances of the case, an

281 Article 12 Law 31/1995, of 8 November 1995.

282 Article 6(4) of the Hungarian Labour Code. In addition, such a duty can be inferred from the general obligation of cooperation and acting in good faith, as well as the employer's specific obligation to equitably take into account the interests of the employee.

283 *A health and fitness club – and – a worker*, 2003, Labour Court Determination No. EED037. http://www.workplacerelations.ie/en/Cases/2003/February/EED037.html.

284 *A Nurse v Health Service Executive*, DEC-E2013-111, 12 September 2013. See also *A worker v An Employer*, DEC-E2015-058, 30 July 2015.

285 Bolger M., Bruton C. and Kimber C. (2012*) Employment Equality Law*, para 7-112.

employer might be expected to consult occupational doctors, health experts, trade unions representatives, or a regional fund. In **Spain** employers can consult entities specialising in services of prevention of occupational risks, who are duly knowledgeable about what accommodations would be helpful or appropriate.[286] Consultation might be needed when there is disagreement between the employer and the disabled person. This can be inferred from the legislation which mentions possible 'discrepancies' between the disabled worker and the employer. These discrepancies can be resolved through the arbitration system, which is voluntary.[287]

In **Denmark**, practice reveals that disability organisations are also consulted, besides doctors, the municipality and other experts.

In **Cyprus**, the Equality Body is often asked by employers to advise on the type of accommodation measures which must be adopted in order to meet the requirements of the law.

In **Bulgaria** the situation differs slightly.[288] As mentioned above, employers are to follow governmental health experts' instructions about what accommodation to provide.[289] Therefore, an employer is required to abide to the health authorities, not to consult them.[290]

In other countries related duties to consult public authorities or other bodies can be found in other legislation, usually labour law or regulations concerning health and safety in the workplace. This is the case for countries such as **Estonia**, **France** and **Slovakia**. In **Estonia**, according to Article 10(1) of the Law on Occupational Health and Safety,[291] an employer shall create suitable working and rest conditions for disabled workers (as well as for minors). Furthermore, '[t]he work, work equipment and workplace of a disabled worker shall be adapted to his or her physical and mental abilities' (Article 10 (4)). A special working environment council[292] shall assist in the creation of suitable working conditions and work organisation for female workers, minors and disabled workers (Article 18 (6) 5 of the Law on Occupational Health and Safety). Relevant provisions were to transpose the requirements of point 20 of Annex I of the Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace[293] and there is no direct link with reasonable accommodation duties provided for in the Law on Equal Treatment. In **France**, consultation of the health and safety doctor is an obligation of every employer towards every employee (article L4624-1 LC). In **Slovakia**, while the Anti-discrimination Act does not contain any provision that would oblige an employer to consult a person with a disability or anyone else about what accommodations would be helpful or appropriate, Section 159(4) of the Labour Code stipulates that an employer shall discuss with representatives of employees measures for creating adequate conditions for employees with disabilities and "substantive issues of care for these employees". However, the definition of a disabled worker for the purpose of the Labour code is quite limited,[294] and it is questionable whether this provision applies to workers not officially recognised as disabled. Moreover, Section 159(4) of the Labour Code does not require an employer to come to an agreement with representatives of employees on the types of measures to be adopted, nor is there any direct sanction that would follow from not meeting the obligation to consult.

286 Articles 23-28 RD 39/1997.
287 Article 66.2 RDL 1/2013. But the submission to arbitration system is voluntary (RDL 1/2013, Article 74.2).
288 Article 5(6) of the Law 46/2006.
289 Article 25(2.3).
290 Article 1(4) of the Labour Accommodation Ordinance (LAO).
291 Estonia, Law on Occupational Health and Safety (*Töötervishoiu ja tööohutuse seadus*), RT I 1999, 60, 616.
292 A working environment council is a body for co-operation between an employer and the workers' representatives which resolves occupational health and safety issues in the enterprise (Law on Occupational Health and Safety, Article 18 (1)).
293 See Explanatory note attached to the Draft no. 975 SE (10th *Riigikogu*); available at http://www.riigikogu.ee.
294 Section 40(8) of the Labour Code.

2.4.7 Guidance and awareness raising

Lack of awareness or understanding of reasonable accommodation duties in employment (as well as other) contexts is an issue that has received specific comment in several of the CRPD Committee's Concluding Observations on countries included in this study. Thus, in relation to **Croatia**, the Committee expresses concern about a general lack of understanding of what reasonable accommodation means.[295] In relation to **Spain**, it recommends that 'guidance, awareness-raising and training should be given to ensure a better comprehension by all stakeholders, including persons with disabilities, of the concept of reasonable accommodation'[296]; and, in relation to **Germany**, that 'systematic training on reasonable accommodation … across all sectors' is undertaken[297] – a recommendation which also appears in relation to the EU.[298] These comments plainly indicate a concern that levels of awareness and understanding of reasonable accommodation duties are not sufficiently high and that more could be done to address this problem.

Turning to information gathered as part of this study about developments in the different countries, binding official guidance from public authorities is provided in only a few countries (e.g. **Denmark**[299] and **Belgium).**[300] The most notable example is probably the Belgian 'Cooperation Agreement concerning the concept of reasonable accommodation',[301] issued in 2007. Due to the fact that the concept of reasonable accommodation appears in different pieces of legislation, the Federal Government, the Regions and the Communities have sought to reach a common understanding of this notion, in order to ensure its uniform implementation throughout the country, whatever the legal basis on which the disabled person may seek to rely. This Cooperation Agreement is binding in effect. It gives examples and further explanations. This binding guidance is supplemented by a number of information booklets targeting employers and business leaders.[302]

In the **UK**, statutory codes of practice have been an important part of equality and non-discrimination law. Thus, e.g., the EHRC's Statutory Code of Practice on Employment[303] must be taken into account by all judges to the extent that it is relevant to a case based on the Equality Act 2010. Similarly, a Code of Conduct, issued by the Cypriot Equality Body[304] focuses on disability discrimination at the workplace, and includes a section on reasonable accommodation. Although this body has the power to publish codes which impose specific duties on persons in the public or private sector,[305] this would require approval

295 UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Croatia, 13th Session, April 2015, para 5
296 UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Spain, 6th Session, September 2011, para 20.
297 UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Germany, 13th Session, April 2015, para 14.
298 UN Committee on the Rights of Persons with Disabilities, Concluding Observations on the European Union, 14th Session, Sept 2015, para 65.
299 Act on the Prohibition of Discrimination in the Labour Market etc. issued by the Ministry of Labour in 2005 (*Beskæftigelsesministeriet, Vejledning om forskelsbehandlingsloven 2005*) available at: http://bm.dk/da/Aktuelt/Publikationer/Arkiv/2006/Vejledning%20om%20forskelsbehandlingsloven%202005.aspx.
300 Cooperation Agreement, OJ (*Moniteur belge*), 20 September 2007, pp. 49653-49664 (available in Dutch, French and German).
301 See supra ft. 296.
302 E.g. 'Welcoming and integration of an employee with a disability or a chronic illness. Advice and contacts', issued in 2010 by the Federal Public Service 'Personnel and Organisation'. Another document was issued by the Inter-federal Centre for Equal Opportunities (ICEO), in 2009. The less recent, but still relevant, document is the booklet issued by the Federal Public Service in collaboration with the Centre for Equal Opportunities, 'Keys for reasonable accommodation for disabled people at work'.
303 Available at: http://www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/employercode.pdf.
304 Cyprus, Equality Authority (2010), Code of good practice regarding discrimination in employment on the ground of disability, available at: http://www.no-discrimination.ombudsman.gov.cy/sites/default/files/kodikas_gia_diakriseis_logo_anapirias_ergasia.pdf.
305 Cyprus, Law on Combating Racial and other Forms of Discrimination (Commissioner) of 2004 (Ο Περί Καταπολέμησης των Φυλετικών και Ορισμένων Άλλων Διακρίσεων (Επίτροπος) Νόμος του 2004) No. 42(I)/2004, article 40. Available at www.cylaw.org/nomoi/enop/ind/2004_1_42/section-sce220abc3-c0c8-c38b-6534-cc2265a17e12.html.

from the Council of Ministers – and this was not secured in the case of the Code of Practice on Disability Discrimination, with the result that it is non-binding.

In several other countries, non-binding guidance is provided in documents/booklets published by equality bodies, disability commissions, or other public services. They are primarily intended to provide practical guidance to employers and disabled people. For example, information booklets have been published by the Irish Equality Authority,[306] the Maltese Commission for Persons with a Disability,[307] The **Netherlands** Institute for Human Rights,[308] and the Norwegian Ombudsman.[309]

In addition, NGOs and representative organisations of disabled people often provide important guidance on reasonable accommodation and contribute to raising awareness of this duty among disabled people and also employers. In the **Czech Republic** an unofficial guidebook on employment of disabled people persons was issued by the platform ´Business for society´,[310] which offers an employer a manual for integrating disabled people into the working process. It includes advice on the admission of a disabled person, how to make reasonable accommodation and how to motivate disabled employees. Another unofficial document is 'Employment of disabled people and transformation of social services',[311] which provides a summary of practice concerning disabled employees in the **Czech Republic**, as well as international framework, statistics and recommendations for the future. In **Greece**, the Greek Confederation of People with Disabilities has delivered a "Manual on discrimination and reasonable accommodation for workers with disabilities".[312] The Manual was designed to provide the Hellenic Labour Inspectorate staff with the necessary knowledge on issues of discrimination and reasonable accommodation, so as to improve the application of the provisions of Law 3996/2011 "Reform of the Hellenic Labour Inspectorate, social insurance regulation and other provisions", which apply to workers with disabilities. The Manual contains a list of recommendations on specific reasonable accommodation based on specific disabilities.

Another important form of guidance used in some countries is contained in collective agreements. In **Germany**, for instance, public and private employers can (and should) conclude integration agreements with the representatives of disabled employees for enterprises and authorities with regard to working conditions and other issues of integration of severely disabled people.[313] In particular, the Equal Opportunities for Disabled People Act provides that organisations that are recognized by public authorities as acting with the aim of promoting the interests of disabled people (Art. 5 in conjunction with Art. 13.3 BGG) and social partners should conclude agreements (*Zielvereinbarungen*) which can specify what kind of measures for reasonable accommodation are to be provided, as well as measures to enhance accessibility.[314]

The information provided here has focused primarily on general awareness-raising initiatives and measures designed to provide interpretative guidance for use in adjudicative procedures. Information was

306 Guide to the Employment Equality Acts 1998 – 2008, available at: http://www.ihrec.ie/.

307 The publication is entitled Equal Opportunities (Persons with Disability) Act, 2000, available at: http://www.knpd.org/pubs/pdf/loi_bklt_e.pdf.

308 See http://www.wervingenselectiegids.nl/discriminatie-thema-s/aanpassingen.

309 *Forbudet mot diskriminering på grunn av nedsatt funksjonsevne. Rett til individuell tilrettelegging for arbeidstakere og arbeidssøkere med nedsatt funksjonsevne – en oppsummering*, available at http://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/diverse-pdf1/diverse-pdf/oppsummering-individuell-tilrettelegging-270314.pdf.

310 Business for society, Employment of persons with disabilities *(Zaměstnávání osob se zdravotním postižením*), 2012, available at http://www.nfozp.cz/.

311 The League of Human Rights, Employment of disabled people and transformation of social services *(Zaměstnávání lidí s postižením a transformace sociálních služeb),* April 2012, http://llp.cz/publikace/zamestnavani-lidi-s-postizenim-a-transformace-socialnich-sluzeb/.

312 Manual on discrimination and reasonable accommodation for workers with disabilities, Athens, December 2012 (Εγχειρίδιο σε θέματα διάκρισης και εύλογων προσαρμογών για εργαζόμενους με αναπηρία), available in Greek at http://www.esaea.gr/publications/books-studies/851-egxeiridio-se-themata-diakrisis-kai-eylogon-prosarmogon-gia-ergazomenoys-me-anapiria.

313 Section 83 SGB IX.

314 Section 5 Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*). This may concern a variety of accessibility issues – from buses to buildings.

not available on the effectiveness or impact of these initiatives and this might helpfully be the focus of another study – as well as of enhanced efforts to collect data on an ongoing basis about implementation of the CRPD across the EU. It should also be noted that the provision of training, whilst a key issue for the CRPD Committee, is one which falls largely outside the scope of the present analysis. However, the training of members of the legal profession in disability equality matters (including reasonable accommodation) will be addressed briefly in the next section.

2.4.8 Classification and enforcement

This section focuses on the way in which reasonable accommodation duties are classified (i.e. whether or not they are classified as a form of non-discrimination duty) and on their legal enforcement. These issues have been grouped together because of their close connection – whether or not a failure to comply with reasonable accommodation duties is classified as a form of discrimination has significant implications for who can enforce the duty and through which process and for the nature of remedies available for breach.

(a) Classification

As explained in Sections 2.2 and 2.3 above, a failure to provide reasonable accommodation is clearly treated, by the CRPD, as a form of disability discrimination – whereas the Employment Equality Directive contains no such explicit classification. In its Concluding Observations on countries included in this study, the CRPD Committee has frequently stressed the importance of a clear legal recognition that a failure to comply with reasonable accommodation duties constitutes discrimination and urged particular States to ensure that failures to do this are addressed.[315] This provides an important backdrop to the present analysis.

In the majority of the countries considered, failure to provide reasonable accommodation now appears to be classified as a form of discrimination. In particular, in some countries (**Croatia**,[316] **Finland**,[317] **France**, **Germany**,[318] **Ireland**,[319] **Liechtenstein**, the **Netherlands**, **Norway**, **Slovakia**,[320] **Spain**,[321] **Sweden** and the **UK**) failure to provide reasonable accommodation is treated as a distinct form of discrimination in its own right (rather than as a means of establishing some other wider form of discrimination – e.g. direct or indirect discrimination).[322] In some of these countries, e.g. **Croatia**, **Finland**, **Ireland**, **Spain** and the **UK** this is explicitly established in anti-discrimination legislation.

A number of other countries, while classifying failures to comply with reasonable accommodation as discrimination, do not treat it so clearly as a separate and distinct cause of action. Thus Article 63 of **Spain**'s General Law on the Rights of Persons with Disabilities and their social inclusion states that 'It is understood that the right to equality of opportunity for people with disabilities is violated (...) when by reason of disability, [there is a] breach of the requirements of accessibility and of reasonable accommodation'.

315 See e.g. UN Committee on the Rights of Persons with Disabilities, Concluding Observations – on Denmark, 12th Session, October 2014, paras 15 and 56-57; on Germany, 13th Session, April 2015, para 13; on Hungary, 8th Session, September 2012, paras 15-16; and on Spain, 6th Session, September 2011, para 20.

316 Art.4/2 of the Anti-discrimination Act.

317 The Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], Section 8.

318 BVerfG 96, 288. This judgement is not limited to severely disabled people. See also BAG, 19.12.2013, 6 AZR 190/12 paragraph 50ff.

319 *A Complainant v Bus Éireann* DEC E2003-04. See also A Worker v A company (in receivership and represented by Holmes O'Malley Sexton Solicitors), EE/2011/795, 26 September 2014.

320 In Slovakia, refusing or omitting to adopt reasonable accommodation measures on the side of the employer constitutes violation of the principle of equal treatment on the ground of disability (and this is stipulated directly by the Anti-discrimination Act – Section 7(4)). In Slovakian law, violation of the principle of equal treatment is a broader concept that also encompasses the duty to adopt measures to prevent discrimination.

321 RDL 1/2013 of 29 November 2013, BOE, 3 December 2013.

322 In the UK and in Sweden it is a free-standing form of discrimination rather than an example of direct or indirect discrimination.

Similarly, in **Poland**, the failure to provide necessary reasonable accommodation is deemed to be an infringement of the principle of equal treatment in employment within the meaning of Article 183a § 2-5 of the Labour Code[323] (which prohibits and defines direct discrimination, indirect discrimination, harassment and instructions to discriminate). In **Greece**[324] and in **Malta**, failure to comply with the duty of reasonable accommodation is explicitly classified as direct discrimination. In a number of States, such as **Austria**, the **Czech Republic**, and **Denmark**, failure to provide reasonable accommodation is deemed to constitute indirect discrimination on the ground of disability.

Reasonable accommodation is not explicitly classified as a form of discrimination duty in **Cyprus**, **Hungary** and **Slovenia**,[325] – the relevant legislation (like the Employment Equality Directive) being silent on this point. However, it would appear that the relevant legislation is generally interpreted in such a way as to recognise that failure to provide reasonable accommodation is treated as a form of discrimination. This is also the case for **Italy**, where a legislative reasonable accommodation duty was introduced as recently as 2013, but included no explicit classification of failure to comply as discrimination. The duty is explicitly stated to be a means of respecting the principle of equality of treatment for disabled people, but there is no other specific reference to the prohibition of discrimination – nor is there any specific sanction for failure to comply with the duty. However, the legislation does contain a reference to the CRPD, and this suggests that a failure to provide reasonable accommodation constitutes discrimination. Any clarification through caselaw is therefore extremely important – and such caselaw is now beginning to emerge. In a judgment of the Tribunal of Bologna of 18 June 2013, a health service was held to be liable for failure to provide a reasonable accommodation to a disabled fixed-time employee and defined the behaviour of the health service as discriminatory.[326] This approach appears to be confirmed by a decision of the Tribunal of Pisa (on 16 April 2015)[327] that the dismissal of a disabled person was discriminatory because the employer had breached the reasonable accommodation duty.

In a small number of countries (e.g. **Estonia** and **Latvia**), however, it seems clear that a failure to provide reasonable accommodation does not amount to discrimination. This is clearly inconsistent with the CRPD and (if the Directive is interpreted in line with the CRPD) will also be inconsistent with the Directive.

(b) Remedies

The nature of the remedies available to disabled people for breach of reasonable accommodation duties is another issue which has featured in several of the Concluding Observations of the CRPD Committee on countries included in this study. In its Concluding Observations on **Austria**, for instance, the Committee expressed concern that (outside employment contexts) the only remedy for disability discrimination (including breach of reasonable accommodation duties) was damages. In the employment context, by contrast, potential remedies included the ordering of training and improvements in the workplace. The Committee was clearly of the view that restricting remedies for disability discrimination to damages was unacceptable. It urged **Austria** to strengthen its discrimination laws by 'broadening the scope of available remedies to include other remedies that require a change in the behaviour of people who discriminate against persons with disabilities, such as injunctive powers'.[328] Similarly, in its Concluding Observations on **Belgium**, the Committee urges that 'the State party review the remedies provided for by this law to ensure that complainants are able to seek injunctions and can receive damages once their claims

323 Article 23.a.3 Disabled Persons Act.
324 Single-Member First Instance Court of Athens, Case 2048/2008, ΕΕρΔ *2008*, 1514 (hereinafter Judgement 2048/2008).
325 In Slovenia, the fact that a failure to meet the duty of reasonable accommodation constitutes discrimination (even though this is not explicitly written in the law) is reflected in the two opinions of the Advocate of the Principle of Equality No. UEM – 0921-1/2008-2 (disability) and No. UEM – 0921-10/2008-3 (religion).
326 Tribunal of Bologna of 18 June 2013 N R.G. Lav 171/2013.
327 Tribunal of Pisa (*Ordinanza del Giudice del Lavoro presso il Tribunale di Pisa*) of 16 April 2015, available at non official website http://www.questionegiustizia.it/doc/Tribunale_Pisa_ordinanza_16_aprile-2015.pdf.
328 UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Austria, 10th Session, September 2013, Paras 12-13.

for discrimination have been proven in court'.[329] Concerns about the availability of remedies for breach of Convention rights more generally are expressed in its Concluding Observations on **Denmark**[330] and **Germany**.[331]

The emphasis placed by the CRPD Committee on the availability of injunctive as well as financial remedies for victims of disability discrimination is interesting. It exceeds the requirements of the Employment Equality Directive – Article 17 of which requires States to 'lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied'. Article 17 specifies that these sanctions must be 'effective, proportionate and dissuasive' and, although it states that they may include 'the payment of compensation to the victim', does not require them to include injunctive relief.

At the national level, in countries where failure to provide reasonable accommodation is a form of discrimination, the remedies for breach are the same as those available for breach of other forms of prohibited discrimination. In a number of countries (e.g. **Bulgaria**,[332] **Cyprus**,[333] **Denmark**,[334] **Finland**,[335] **Poland**[336] and the **UK**) the failure to provide reasonable accommodation gives rise only to the right to obtain financial compensation and courts cannot order the employer to take actions such as implementing specific accommodations. The idea underpinning this approach is freedom of contract and a reluctance to interfere in the operation of businesses and other employment relationships. Compensation usually includes material and non-material (non-pecuniary or moral) damages.

In several other countries (e.g. **Belgium**, **Croatia**,[337] the **Czech Republic**, **Estonia**, **Germany**, **Greece**,[338] **Hungary**, **Italy**, **Liechtenstein**,[339] **Malta**, the **Netherlands**, **Norway**, **Portugal**, **Romania** and **Spain**)[340] courts can either award compensation, and/or order the employer to adopt or implement a certain accommodation. In **Hungary**, the courts' power to order accommodations is not expressly authorised by statute, but derives from the inherent power of the courts to "order the termination of the injurious situation" in question. The national reports, however, contain no examples of cases in which courts have to date ordered the carrying out of specific reasonable accommodations.

As regards levels of compensation, beyond recovery for material loss, no clear pattern emerged as to the amount of damages recoverable or as to the methods for assessing damage (e.g. for injury to feelings). In the **Czech Republic**, Section 10(2) of the Anti-discrimination law limits the right to non-material damages to cases where discrimination 'considerably degrades the reputation or dignity of a person or its respect in the society'. In countries such as the **UK**, however, damages for injury to feeling are more readily available to victims of disability discrimination.

In some countries, the employer can be subject to administrative sanctions. In **Greece**, for instance, employers failing to provide reasonable accommodation (i.e. guilty of discrimination) can be fined, and the fine ranges from 150 to 10 000 Euros and a temporary interruption of its business for three days.[341] In the **Czech Republic**, administrative bodies, such as Labour Inspectorates or Trade Inspectorates, have

329 12th Session, October 2014, para 12.
330 12th Session, October 2014, para 14.
331 13th Session, April 2015, para 11.
332 This is due to the role that Courts in Bulgaria play. Courts cannot, in general, make decisions based on expediency.
333 The law does not foresee such a sanction but the Equality Body often requires specific measures to be taken in its mediation initiatives.
334 Section 7 of the Act on the Prohibition of Discrimination in the Labour Market.
335 The Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], Section 28.
336 Article 18[3d] of the Labour Code.
337 Article 17(1) of the Anti-discrimination Act.
338 In Greece there is no clear provision entitling Courts to order employers to carry out specific accommodations. The possibility that they may do so, however, cannot be ruled out.
339 Art. 23 §1 of the AEPD.
340 RDL 1/2013, Article 75.2.
341 Law 2639/1998 (art.16).

power to impose sanctions for prohibited activities and violations of obligations. For instance, according to Section 24(1)(b) of the Law on labour inspection,[342] discrimination against employees contrary to Section 16 of Labour Code[343] is considered to be an administration offence with a sanction of up to 36 724 Euros (1 000 000 CZK). In **Spain**, breach of reasonable accommodation duties is considered a serious offence and the Public Administration may punish the perpetrator with a penalty which can go up to 90,000 euros.[344] If the company persists in the breach, the infringement can be regarded as very serious and, consequently, sanctions may be higher (to a maximum of 1 million Euros).[345] In **Croatia**, the breach of a reasonable accommodation duty is a misdemeanour[346] regulated by the Act on Professional Rehabilitation and Employment of Persons with Disabilities. A fine is imposed on private individuals, responsible persons in legal entities, craftsmen and persons performing independent business activities and legal persons, while different levels of fine are set for different categories (from 133 to 4 000 Euros).

(c) Enforcement processes

The CRPD Committee has voiced a number of concerns about barriers which disabled people in EU countries face in connection with enforcing their right to be free from discrimination (including by receiving reasonable accommodations) and, more broadly, when attempting to use the legal system. Barriers to accessing justice themselves raise human rights concerns – Article 13 of the CRPD providing a particularly powerful articulation of the right to access justice. The Committee's concerns about the situation in EU countries will again be presented at the outset of this discussion as they provide a helpful context for the analysis which follows.

Some of the Committee's concerns about access to justice issues have been directed specifically at the enforcement of rights to be free from disability discrimination (including denials of reasonable accommodation). Thus, in its Concluding Observations on **Spain**, while welcoming the creation of the Permanent Specialized Office to arbitrate on discrimination claims, the Committee stated that it was 'concerned by the slow development and lack of promotion of this arbitration system at the regional government level,... [and by] the overall effectiveness of the system'.[347] To address these concerns, it recommended that **Spain** 'raise awareness among persons with disabilities about the system of arbitration, increase the level of free legal aid, and ensure the regulation of offences and sanctions at the regional government level'.[348] Similarly, in its Concluding Observations on the **Czech Republic**, the Committee noted that it was 'concerned at admitted absence of case law relating to judicial protection from disability-based discrimination' and urged the Czech government to

> 'take all necessary measures, including training of the judiciary, strengthening of independent human rights bodies and capacity- building of persons with disabilities and their organizations, to foster the use of available legal remedies by persons with disabilities facing ... discrimination and inequality'.[349]

Elsewhere in its Concluding Observations, the CRPD Committee engages with access to justice issues which, although not confined to people wishing to bring discrimination claims, clearly have relevance in this context. A key concern is the inaccessibility of court and judicial proceedings and the absence of reasonable accommodations made for disabled people. Thus, in its Concluding Observations on the **Czech Republic**, the Committee 'notes with concern the lack of access for blind persons, persons with

342 The Czech Republic, Law. No. 251/2005 Coll., on labour inspection *(Zákon č. 251/2005 Sb., o inspekci práce),* 3 May 2005.
343 The Czech Republic, Law No. 262/2006 Coll., Labour code *(Zákon č. 262/2006 Sb., zákoník práce),* 21 April 2006.
344 RDL 1/2013, Article 83.3.
345 RDL 1/2013, Article 81.4.
346 Misdemeanours are minor offences, most often prosecuted ex officio, by an administrative body competent for implementation of certain law, in this case by the labour inspectorate, in the proceedings similar to criminal proceedings before specialized – misdemeanour courts.
347 6th Session, September 2011, para 13.
348 Ibid, para 14.
349 13th Session, April 2015, paras 11-12.

intellectual and psycho-social disabilities to judicial and administrative proceedings' and 'urges the State party to ensure availability of documents in accessible formats to all persons with disabilities who need them' as well as the provision of 'training of judges and other personnel in the justice system'.[350] Similarly, in its Concluding Observations on **Germany**, it expressed its concern 'about: a) the lack of structures and procedural accommodation within the justice sector specifically designed to provide assistance to persons with disabilities, ...; b) the inaccessibility of judicial facilities and lack of understanding of legal professionals with regard to access to justice; c) the lack of implementation and enforcement by the judiciary of the standards of the Convention in the national legal system and within court rulings'.[351] It recommended that **Germany**

> '(a) Introduce targeted measures to improve the physical and communicative accessibility of courts, judicial authorities and other bodies involved in administering the law; (b) Introduce legislative reforms so that the national criminal, civil, labour and administrative procedures include the requirement to ensure procedural accommodations for persons with disabilities, taking into particular account persons with intellectual disabilities, or psychosocial disabilities, deafblind persons, and children with disabilities; (c) Ensure effective training of personnel in the justice, police and prison system on the application of human rights standards to promote and protect the rights of persons with disabilities.'[352]

These issues also featured in the Committee's Concluding Observations on the EU itself. The Committee there stated that it was 'concerned about the discrimination persons with disabilities face in accessing justice due to lack of procedural accommodation in European Union Member States' and recommended that 'the European Union take appropriate action to combat discrimination persons with disabilities face in accessing justice by providing full procedural accommodation within its Member States, and the provision of funding for training of justice personnel on the Convention'.[353]

Whilst these comments apply to the whole of the justice system, Article 9 of the Employment Equality Directive provides a useful mechanism through which the Commission might exert leverage and gather information about what is happening in Member States as regards access to justice for disabled people seeking to enforce their rights to be free from discrimination under the Employment Equality Directive itself. According to this Article (which reflects similar provisions in other EU non-discrimination directives),[354] Member States must 'ensure that judicial and/or administrative procedures (...) for the enforcement of obligations under [the] Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them'.[355]

From the reports prepared for this study, it appears that certain barriers are commonly faced by potential discrimination claimants. Significant obstacles to rights enforcement in the context of reasonable accommodation (as well as other issues) are created by the cost of legal proceedings. According to the **Czech** Ombudsman, the present court fee for filing a discrimination complaint is one of the reasons victims seldom turn to civil courts.[356] In the **UK**, the problem has been intensified by recent measures

350 13th Session, April 2015, paras 24-25.
351 13th Session, April 2015, para 27.
352 Ibid, para 28.
353 14th Session, September 2015, paras 37-38.
354 See e.g. Article 7 of Directive 2000/43/EC; and Article 17 of Directive 2006/54/EC.
355 Employment Equality Directive, Article 9(1).
356 The court fee, for an application to initiate proceedings seeking monetary compensation for non-material damages, amounts to EUR 73 (CZK 2,000). If a victim of discrimination claims monetary compensation in excess of EUR 7,273 (CZK 200,000), the fee amounts to 1% of the amount claimed. If the victim includes other claims, for instance the termination of discriminatory conduct, he or she will also be required to pay an extra EUR 73 (CZK 2,000). The Czech Ombudsman suggested that the amount of court fee for filing a discrimination application with courts is modified so that it no longer includes a percentage amount of the monetary compensation claimed for non-material harm, and the flat court fees is reduced to EUR 37 (CZK 1,000). Office of the Public Defender of Rights (2012), *Annual Report on the Activities of the Public Defender of Rights in 2012*, p. 18, available at http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Reports/Annual_2012.pdf.

associated with the austerity agenda. Since 29 July 2013, people lodging a claim with an employment tribunal in England and Wales have had to pay a fee. Disability discrimination claims brought to the employment tribunal fell by 63% between the first quarter of 2013/14 (when there were no fees) and the first quarter of 2014/15. Further, changes to the legal aid system introduced by the Legal Aid Sentencing and Punishment of Offenders Act 2012 have led to a widespread (although mistaken) belief that legal aid is no longer available for disability discrimination cases in employment – and a new telephone-based application system for claiming legal aid (which may well be deterring disabled people from applying).[357]

Other barriers include: the need for expert legal assistance[358] (which is usually very expensive),[359] the length and the uncertainty of the proceedings, as well as procedural barriers such as time limits for bringing actions. In **France**, the insufficient legal expertise of disability NGOs and anti-discrimination NGOs is also identified as a barrier.

In addition, disabled people frequently face accessibility-related barriers to seeking legal redress. In several countries, (e.g. the **Czech Republic**, **Latvia**, **Poland**, **Slovakia** and the **UK**) some courts and tribunals remain physically inaccessible. In **Slovenia**, in 2008 the Constitutional Court declared the Civil Procedure Act unconstitutional to the extent that it did not provide for people with visual impairments to access court files and court writings in an accessible format and ordered the legislature to amend the law in one year.[360] However, the **Slovenian** legislative body has not yet amended the Civil Procedure Act accordingly. In **Luxembourg**, there is currently no obligation for public authorities to make public buildings fully accessible to disabled people and there are no binding rules relating to the adoption of measures such as sign language interpretation or information in Braille. Only newly built or refurbished buildings have to be made accessible according the law of 29 March 2001 on spaces open to the public.

Alongside examples of on-going difficulties experienced by disabled litigants,[361] however, there are also examples of good practice. What emerges clearly from the country reports on these matters is that there is very little consistent monitoring or data collection on which to draw.

2.4.9 Financial assistance for employers for accommodations

The final issue to be explored in this chapter is the relationship between reasonable accommodation duties in employment settings and state funded schemes designed to promote the employment of disabled people in the open labour market by contributing to the cost of adjustments that remove barriers or other disadvantage that disabled people would otherwise experience. A range of schemes operate in the countries in question. Through these State funding is made available to cover (in part or in full) the cost of the accommodation and/or other forms of additional cost associated with the employment of disabled people.

In most of the countries considered (i.e. **Austria**, **Belgium**, **Denmark**, **Estonia**, **Finland**, **France**, **Germany**, **Ireland**, **Latvia**, **Luxembourg**, **Malta**, **Norway**, **Slovenia**, **Sweden** and the **UK**) specific State schemes subsidise the costs of accommodations. Interestingly, in Great Britain (**UK**) which operates the Access to Work Scheme, whilst employers are required to carry out their reasonable 'adjustment' duties (including ones which require an outlay of money) and whilst larger employers are required to continue making contributions to disability-related adjustments which cost up to £10 000, the State subsidy has

357 For an excellent overview of the equality impact of recent changes to legal aid and the justice system, see H. Anthony and S. Crilly, 'Equality, Human Rights and Access to Civil Law Justice: A Literature Review' (Equality and Human Rights Commission, October 2015).

358 Often the assistance of a lawyer is not compulsory. However, practice reveals that litigants without a lawyer would be at a disadvantage in court where proceedings are complicated and formal (see e.g. Bulgaria, Denmark, and Austria).

359 Usually, however, the claimants might have available free legal aid.

360 Ruling no. U-I-146/07-34 of 13 November 2008.

361 On barriers faced by litigants with disabilities see Ortoleva, S. (2011), 'Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System', *ILSA Journal of International & Comparative Law* Vol. 17, pp. 281-320.

until recently not been subject to a specific limit or cap. In May 2015, however, the **UK** Government proposed introducing a cap on Access to Work payments in any individual case.[362] This takes effect for new applicants from 1 October 2015 and is currently set at £40 800 per year (one and a half times the average national salary). According to guidance on the operation of this scheme, by Disability Rights **UK**:

> 'Access to Work will pay 100 per cent of the approved costs, subject to a cap, for travel to work, a support worker/reader or a communicator for support at job interviews if you are;
> – unemployed and starting a new job;
> – working for an employer and have been in the job for less than six weeks;
> – self-employed; or
> – setting up your own business through the new enterprise allowance (NEA).
> If you have been in your job for 6 weeks or more when you first apply for help, Access to Work will pay a proportion of the costs of support as follows:
> – Employers with less than 50 staff – Access to Work can pay 100% of the approved costs.
> – Employers with 50 to 249 staff – employer will have to pay the first £500 and Access to Work can then pay 80% of the approved costs up to £10,000.
> – Large employers with 250 or more staff – employer will have to pay the first £1,000 and Access to Work can then pay 80% of the approved costs up to £10,000.
> – Access to work would normally cover all additional costs over £10,000, subject to a cap.'[363]

Such subsidies are based on the overall savings to the State of enabling disabled people to work. A **UK** 2011 report estimated that for every £1 paid by the **UK** government to the Access to Work scheme, it received £1.48 back and that 'the social return on the investment is even higher'.[364] However, upper limits, or 'caps' (such as the one now adopted in Great Britain), do generally limit the amount of subsidy available.

In other States, national laws fix a maximum amount of the subsidy available. For example, in **Finland**, subsidy for arranging working conditions can be used for changing the working environment or obtaining help from another employee, but to a maximum of 4000 euros. When the accommodation takes the form of personal assistance in the workplace, the maximum subsidy is 20 euros per hour (for a maximum of 20 hours/month for 18 months). In **Latvia**, according to the Cabinet of Ministers Regulations No. 75, the costs of providing reasonable accommodation for employers (economic operators, self-employed persons, NGOs) who create workplaces for unemployed disabled people co-subsidised by the state, can be reimbursed up to 711 euros.[365]

In several countries, such as **Estonia**, **Malta**,[366] and **Romania**,[367] beside direct subsidies, tax incentives are also available to the employer. For example, the Estonian Law on Income Tax[368] provides that income tax is not charged on medical devices which are granted by an employer to an employed person whose loss of capacity for work has been established to be 40% or more (in the case of an auditory disability,

362 Department for Work and Pensions, 'Equality Analysis for the Future of Access to Work' (May 2015) available at https://www.gov.uk/government/publications/future-of-access-to-work.

363 Disability Rights UK, 'Access to Work, Disability Rights UK Fact Sheet F27', available at http://www.disabilityrightsuk.org/access-work (last accessed 1 November 2015).

364 Sayce, L. 'Getting In, Staying In and Getting On: Disability Employment Support Fit for the Future' (Department for Work and Pensions, 2011) p. 7, available at https://www.gov.uk/government/publications/specialist-disability-employment-support.

365 Latvia, Cabinet of Ministers (*Ministru kabinets*), Regulations No. 75 on the procedure of the organisation and financing of active employment measures and preventive activities reducing unemployment and selection principles of measure implementers. 25.01.2011. Earlier regulations in force from 26 March 2008 until February 9 2011 foresaw a one-time subsidy in the amount of 1,400 EUR (1,000 LVL) for reimbursing the costs related to the accommodation of the workplace for persons with disability (see Latvia, Cabinet of Ministers (*Ministru kabinets*), Regulations Nr 166 on the procedure of the organisation and financing of active employment measures and preventive activities reducing unemployment and selection principles of measure implementers, 10.03.2008).

366 Income Tax Act (Cap. 123), the Deduction (Workplace Accessibility) Rules, 2010.

367 Art.84 of Romanian Law 448/2006on the Protection and Promotion of the Rights of Persons with a Handicap (06 December 2006).

368 Estonia, Law on Income Tax *(Tulumaksuseadus)*, RT I, 19 November 2010, 7.

decrease of auditory ability of 30 decibels and more) and the value of which does not exceed 50% of the total size of payments subject to social tax made to the employee or public servant during one calendar year.

With regards to the public authority awarding the funding, it is worth noting that sometimes (e.g. in **Bulgaria**, **Germany**, **Latvia** and **Portugal**), subsidies might be given to employers by state agencies. For example, in **Bulgaria** the employer might receive funding from the Persons with Disabilities Agency (PDA). In **Portugal**, the Employment and Vocational Training Institute (IEFP – *Instituto do Emprego e Formação Profissional*) finances enterprises to provide reasonable accommodation for disabled employees. In **Germany**, according to Section 81.4 sentence 2 Social Code IX (SGB IX) the Federal Agency for Employment (*Bundesagentur für Arbeit*) and the Agencies for Integration (*Integrationsämter*) provide financial support for burdens incurred due to measures of reasonable accommodation in employment. This may include subsidies for special equipment, for technical aids or assistance. In addition, financial assistance can be provided to the employer for costs such as training and education, equipment and costs relating to integration.[369] In several compound (i.e. regional or federal) states, such as **Belgium** and **Spain**, funding for accommodations is mostly dealt with at the sub-national (e.g. regional) level. For instance, in **Belgium** the Regions and Communities across the country have adopted a series of measures and incentives to facilitate the recruitment and the employment of disabled workers and to reduce any possible additional disability-related costs. Furthermore, the Collective Labour Agreement No. 26 of 15 October 1975 guaranteeing equal pay to disabled workers[370] provides for the financial intervention of public bodies to offset any cost resulting from reduced productivity.

In some countries, such as the **Czech Republic**, **Hungary**, **Liechtenstein** and **Poland**, there is no specific financial support expressly dedicated to accommodation costs. However, there are general financial incentives aimed at fostering the employment of disabled people which, among other things, can cover costs of accommodations. In the **Czech Republic** Section 78 of the Law on employment enables any employer to gain special contribution for a 'protected work post' (chráněné pracovní místo) created exclusively for a disabled person. In **Hungary**, Article 25 of Act CXCI of 2011 on the Allowances for Employees with Altered Labour Suitability envisages support for workplace reconstruction with the aim of rehabilitation only for accredited employers. In **Poland**, employers who, for at least 36 months, employ disabled people (who were unemployed or seeking work while not holding a job) may receive from the National Disabled Rehabilitation Fund (*Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych*) reimbursement for adapting existing workstations to the needs of disabled people and creating new workstations, for adapting or buying equipment to facilitate the functioning of a disabled person in the workplace, and for the identification by occupational health services of the relevant needs of disabled people.

Finally, it should be noted that this sort of funding scheme does not play a major part in the disability employment policy of all 31 of the countries studied. Thus, in **Cyprus** no such funding is available. In **Greece**, it is relatively limited – perhaps due to the harsh economic crisis which has hit the country in the last few years, and the need to cut public spending.

369 Section 34 SGB IX.

370 This Convention was replaced by the Collective Convention No. 99 of 20 February 2009 concerning the level of salary of workers with a disability, except for its provision related to the financial intervention of public bodies to offset the cost of a lower performance (Art. 5 of the Convention No. 99).

3. Accessibility-enhancing legal requirements and their relationship with reasonable accommodation in employment

3.1 Introduction

This chapter moves away from the exclusive focus on reasonable accommodation which has shaped earlier parts of this report. The focus of this chapter is legal mechanisms by which the accessibility of workplaces and systems are enhanced. Reasonable accommodation duties are important examples of such mechanisms and they will therefore feature in the present discussion – but only in so far as they operate to enhance accessibility.

Section 3.2 below will reflect on the concept of accessibility and the way in which it is understood in the CRPD and interpreted by the CRPD Committee. As part of that discussion, the relationship between accessibility and discrimination (in particular reasonable accommodation) will be examined. Section 3.3 will focus on the extent to which EU law currently requires or encourages accessibility in workplaces. Section 3.4 will focus on accessibility obligations in national laws and their relationship with national non-discrimination frameworks.

3.2 Accessibility in the CRPD

3.2.1 Accessibility as a CRPD general principle

'Accessibility' is one of the general principles set out in Article 3 of the CRPD. It is thus one of the considerations and values to which regard must be had in all interpretations of CRPD Articles. This pivotal positioning of 'accessibility' in the treaty reflects its fundamental importance to the CRPD's mission – of ensuring that all human rights can be enjoyed by disabled people on an equal basis with everybody else. Without accessibility, that mission would be doomed to failure.

Accessibility barriers will inevitably limit the extent to which other human rights are available to disabled people. For instance, inaccessible workplaces and systems will put disabled people at a disadvantage compared with their non-disabled peers. If a disabled person is granted a position (or permitted to retain it after the onset of an impairment) reasonable accommodation obligations may provide a mechanism for tackling and removing the barriers – a point discussed more fully in Section 3.2.4 below.

Importantly, the employment prospects of disabled people are affected, not only by the inaccessibility of workplaces themselves, but also by the inaccessibility of housing (which may make it impossible to live in locations convenient for a preferred workplace) and by inaccessible transport and built environment (which may prevent a disabled person travelling to and from work).[371] Accessibility is a gateway or 'precondition'[372] for the enjoyment of other human rights (including the right to work under Article 27). Its significance is neatly captured in the following words of Ron McCallum (the former Chair of the CRPD Committee):

> 'We cannot think of anything more crucial for persons with disabilities than accessibility'.[373]

In addition to its appearance in Article 3, accessibility obligations appear elsewhere in the Convention. For instance, they are firmly embedded in the Article 21 obligations concerning freedom of communication

371 This point is made by the UN Committee on the Rights of Persons with Disabilities, General Comment No 2, (2014), paras 7 and 41.

372 Tromel S. (2009), 'A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities' *European Yearbook of Disability Law* 115, 118.

373 McCallum R. (2010), Opening remarks at the General Day of Discussion on Accessibility of the Committee on the Rights of Persons with Disabilities, Geneva, 7 October 2010.

and expression. For employment purposes, however, the most significant provision is Article 9, the title of which is 'accessibility'. This Article and its implications will be considered in more depth in Section 3.2.2 below. Before closing this discussion, however, mention should be made of the allied general obligation, set out in Article 4(1)(f), relating to universal design. According to this:

> 'To undertake or promote research and development of universally designed goods, services, equipment and facilities, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines.'

3.2.2 Employment-related accessibility rights and obligations in the CRPD

(a) Origins of Article 9

Article 9 of the CRPD is an innovative provision which articulates, for the first time in a UN human rights treaty, a series of accessibility-related obligations and entitlements. It is the subject of General Comment No 2 of the CRPD Committee, according to which 'Accessibility should be viewed as a disability-specific reaffirmation of the social aspect of the right of access'[374] – that 'right of access' having been established by pre-existing UN human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR).[375]

(b) Employment-related material scope of Article 9

Article 9(1) requires States Parties to take 'appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas'.[376] It goes on to specify that these measures should apply to '(a) Buildings, roads, transportation and other indoor and outdoor facilities, including … workplaces'.

The CRPD Committee's vision of the demands of the accessibility obligation in the employment context is set out in its General Comment No 2 on Article 9. According to this:

> 'Workplaces therefore have to be accessible, as is explicitly indicated in article 9, paragraph 1 (a). … Besides the physical accessibility of the workplace, persons with disabilities need accessible transport and support services to get to their workplaces. All information pertaining to work, advertisements of job offers, selection processes and communication at the workplace that is part of the work process must be accessible through sign language, Braille, accessible electronic formats, alternative script, and augmentative and alternative modes, means and formats of communication. All trade union and labour rights must also be accessible, as must training opportunities and job qualifications. For example, foreign language or computer courses for employees and trainees must be conducted in an accessible environment in accessible forms, modes, means and formats.'[377]

There is no indication in the General Comment that lesser duties are applicable to private sector employers than public sector employers – although the nature of the measures which States will need to adopt to ensure accessibility in the private sector might differ (in some respects) from those for the public sector.

374 UN Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014), para 4.
375 See generally Lord J (2010), 'Accessibility and Human Rights Fusion in the CRPD: Assessing the Scope and Content of the Accessibility Principle and Duty under the CRPD', (General Day of Discussion on Accessibility, Committee on the Rights of Persons with Disabilities, Geneva, 2010).
376 Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007), Article 9(1).
377 UN Committee on the Rights of Persons with Disabilities, General Comment No. 2, para 41.

(c) Measures required by Article 9

A range of different types of measure which should be taken by States Parties when implementing Article 9 emerges from the Article itself and General Comment No 2. First, according to Article 9(1), these measures 'shall include the identification and elimination of obstacles and barriers to accessibility'. This obligation would seem impossible to discharge without the full involvement of disabled people and their representative organisations – in line with Article 4(3). Without their input, it would be extremely difficult to identify (and develop ways of eliminating) barriers to accessibility, including those relating to the workplace.

A range of more specific obligations relating to the accessibility of services and facilities offered to the public are set out in Article 9(2)(a)-(e). Although these are not primarily targeted at employers, many employers will operate facilities or services which are open to the public. Importantly, accessibility is group-oriented (for disabled people generally) and not focused on finding individual-oriented solutions. Accordingly, measures which enhance accessibility for customers or other members of the public are also likely to enhance accessibility for (potential) disabled staff. Accordingly, paragraphs (a)-(e) of Article 9(2) may have relevance here.

One of the most important measures listed in these paragraphs is contained in Article 9(2)(a). According to this, States should

> 'Develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public'.

The General Comment urges States to ensure that those standards are 'in accordance with the standards of other States parties in order to ensure interoperability with regard to free movement within the framework of liberty of movement and nationality (art. 18) of persons with disabilities.'[378] Article 9(2)(f) and (g) go on to impose obligations on States Parties to promote the access of disabled people to information and to new information and communication technologies (ICTs);[379] while paragraph (h) requires them to promote the design, development, production and distribution of accessible ICTs.[380]

In addition, although not mentioned in Article 9, the General Comment encourages States to use non-discrimination law to require enhancements of accessibility.[381] As will be seen in Section 3.4 below, the non-discrimination laws of a number of Member States have been specifically designed with a view to enhancing accessibility and, even where that is not the case, concepts such as indirect discrimination and reasonable accommodation often prove valuable in challenging accessibility barriers and driving systemic change. The rather confused relationship between accessibility and discrimination will now be explored.

3.2.3 Relationship between accessibility, discrimination and reasonable accommodation

As has been explained in Chapter 2, the CRPD makes it very clear that a failure to provide reasonable accommodation will constitute discrimination on the basis of disability. A failure to provide accessibility, however, is not defined as discrimination on the basis of disability. Despite this, it is self-evident that accessibility barriers will on occasion cause a disadvantage to a disabled person of a type that will found a discrimination action – most commonly for a failure to make reasonable accommodations or for indirect discrimination.

378 UN Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014), para 18.
379 Related obligations are imposed by Article 21.
380 Related obligations are imposed by Article 4(1)(f) and (g).
381 See e.g. UN Committee on the Rights of persons with Disabilities (2014), *General Comment on Article 9 of the Convention*, available at http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx, para 23.

What also seems beyond doubt is that it should not be possible for all accessibility barriers to be challenged through claims for discrimination. Such a result would leave no room whatsoever for the progressive realisation of accessibility obligations. As stressed by Janet Lord, while Article 9 gives rise to various obligations on States Parties to take immediate steps, it also imposes obligations on them which 'will require resources and extensive systemic change'.[382] In short, there seems little doubt that, on the one hand, Article 9 creates rights the fulfilment of which should be implemented progressively and, on the other, that accessibility barriers will often create a form of disadvantage or less favourable treatment that should come within the scope of Article 5 prohibitions of disability discrimination.

General Comment No 2 does not appear to take a consistent approach to the relationship between accessibility and discrimination. On the one hand, it recognises that accessibility obligations require 'gradual' implementation, observing for instance that:

> 'Barriers to access … shall be removed gradually in a systematic and, more importantly, continuously monitored manner, with the aim of achieving full accessibility'[383]

and that:

> 'States parties are obliged to ensure that persons with disabilities have access to the existing physical environment, transportation, information and communication and services open to the general public. However, as this obligation is to be implemented gradually, States parties should establish definite time frames and allocate adequate resources for the removal of existing barriers.'[384]

On the other hand, however, General Comment No 2 contains frequent assertions that all accessibility barriers constitute discrimination. Thus, it states that 'denial of access should be considered to constitute a discriminatory act, regardless of whether the perpetrator is a public or private entity',[385] and that:

> 'accessibility should be encompassed in general and specific laws on equal opportunities, equality and participation in the context of the prohibition of disability-based discrimination. Denial of access should be clearly defined as a prohibited act of discrimination. Persons with disabilities who have been denied access to the physical environment, transportation, information and communication, or services open to the public should have effective legal remedies at their disposal'[386]

Nevertheless, it does include a paragraph which sets out clear advice to States about when accessibility barriers should be actionable as discrimination. According to this:

> 'When reviewing their accessibility legislation, States parties must consider and, where necessary, amend their laws to prohibit discrimination on the basis of disability. As a minimum, the following situations in which lack of accessibility has prevented a person with disabilities from accessing a service or facility open to the public should be considered as prohibited acts of disability-based discrimination:
> (a) Where the service or facility was established after relevant accessibility standards were introduced;

382 Lord J (2010), 'Accessibility and Human Rights Fusion in the CRPD: Assessing the Scope and Content of the Accessibility Principle and Duty under the CRPD', (General Day of Discussion on Accessibility, Committee on the Rights of Persons with Disabilities, Geneva, 2010).
383 UN Committee on the Rights of persons with Disabilities (2014), *General Comment on Article 9 of the Convention*, available at http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx, para 14.
384 Ibid, para 24.
385 Ibid, para 13.
386 Ibid, para 29.

(b) Where access could have been granted to the facility or service (when it came into existence) through reasonable accommodation'.[387]

Thus, the General Comment does not unequivocally resolve questions about the extent of the overlap between accessibility and non-discrimination. Its apparent acknowledgement that any form of accessibility barrier constitutes discrimination, although contradicted by other parts of the General Comment, create (or perpetuate) unfortunate confusion and uncertainty. The General Comment, however, is more helpful on other aspects of the relationship between accessibility obligations and reasonable accommodation obligations. It identifies a number of important differences between them.

The first difference between accessibility and reasonable accommodation identified in General Comment No 2 is that accessibility obligations are anticipatory in nature whereas reasonable accommodation duties are reactive or responsive. In its words:

> 'Accessibility is related to groups, whereas reasonable accommodation is related to individuals. This means that the duty to provide accessibility is an ex ante duty. States parties therefore have the duty to provide accessibility before receiving an individual request to enter or use a place or service. (...) Accessibility standards must be broad and standardized.'[388]

By contrast, the reasonable accommodation duty is described as an '*ex nunc* duty', enforceable only 'from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis in a particular context'.[389] Unlike the group-oriented accessibility obligation, the reasonable accommodation obligation shines a spotlight on the particular individual in question, taking into account their 'dignity, autonomy and choices'.[390]

A second key difference between these two forms of obligation identified in General Comment No 2 is that reasonable accommodation obligations, unlike accessibility obligations, are subject to the limit of 'undue' or 'disproportionate' burden. In the words of the General Comment:

> 'The obligation to implement accessibility is unconditional, i.e. the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities. The duty of reasonable accommodation, contrarily, exists only if implementation constitutes no undue burden on the entity.'[391]

The case of *Jungelin v Sweden*[392] illustrates this point very nicely. The case arose out of a challenge brought by a person with visual impairments against an employer whose intranet system was inaccessible to visually impaired people including herself. The employer refused to take the steps required to make it accessible, thereby making it impossible for her to work there. Her claim that this amounted to a failure on the part of the employer to comply with its reasonable accommodation duties was rejected by the domestic courts, which took the view that the expense of doing so would have imposed an undue burden on the employer. The CRPD Committee refused to find that this ruling meant that **Sweden** was falling short of its obligations under Article 5 of the CRPD. The result is that reasonable accommodation duties were powerless to challenge the disadvantageous impact of a system which was acknowledged to be inaccessible.

387 Ibid, para 31.
388 General Comment No 2, para 25.
389 Ibid, para 26.
390 Ibid.
391 Ibid para 25.
392 Communication No 5/2011; views adopted by the Committee on the Rights of Persons with Disabilities at its 12th Session, August-September 2014.

Article 9 was not argued in the *Jungelin* case. This is a pity as such arguments would have focused attention on the steps which the CRPD Committee expects governments to take in order to encourage (or require) employers to ensure that their structures and systems are accessible. It is clear from the Committee's views in *Nyusti and Takács v Hungary*[393] that it has high expectations of what governments should do to encourage and require banks to ensure that their services are accessible to disabled customers (including services delivered through ICT to blind customers). It therefore remains unclear whether the Committee's expectations of government action to enhance accessibility in the employment context are different from their expectations in the banking or service-provision context.

Finally, before leaving the relationship between reasonable accommodation and accessibility,[394] it is worth reflecting on the way they work alongside each other in the real world. The more accessible an environment or organisation is, the less likely it is that aspects of its structure or functioning will place a disabled person at a disadvantage which calls for reasonable accommodation. For example, a person with mobility impairments who is disadvantaged by an inaccessible physical structure or building at work will need reasonable accommodation – a need which would not have arisen had the structure or building been accessible. In addition, it should be remembered that in some reasonable accommodation cases, the accommodation provided might take the form of one which enhances accessibility to a building or information system and which thus opens up access to others as well as the individual for whom the adjustment was originally made. Any benefit of this enhanced accessibility to the employer is a factor which clearly has relevance to any assessment of 'undue' or 'disproportionate' burden.

3.3 Accessibility-enhancing obligations in EU law

The Employment Equality Directive itself creates no explicit requirement on Member States to impose accessibility-enhancing obligations on employers. Reasonable accommodation measures, indirect discrimination and direct discrimination may all have the effect of enhancing accessibility in particular cases but there will be many other cases in which there will be little or no impact beyond a particular individual claimant. Several countries have chosen to shape their non-discrimination law in ways that exceed the minimal threshold laid down by the Directive, as will be discussed in Section 3.4 below.

Before leaving EU law, however, it is important to note several initiatives which may already have the effect of encouraging enhanced accessibility in employment and which could potentially be developed so as to have a greater impact on accessibility in the future. These initiatives concern health and safety and public procurement.

Turning first to health and safety, EU legislation has been used as a means of requiring work environments to be made more accessible. Directive 89/654/EEC concerning the minimum safety and health requirements for the workplace (the Minimum Safety and Health Requirements Directive)[395] requires that workplaces must be organised to take account of 'handicapped workers', as regards 'doors, passageways, staircases, washbasins, lavatories and workstations used or occupied directly or used by' them.[396] There seems to

393 Communication 1/2010, Views adopted by the UN Committee on the Rights of Persons with Disabilities at its 9th Session, April 2013. See for further discussion, Lawson, A. "Accessibility Obligations in the UN Convention on the Rights of Persons with Disabilities" (2014) 30 (2) *South African Journal on Human Rights* 380.

394 See further Lawson, A., (2011) 'Reasonable Accommodation and Accessibility Obligations: Towards a More Unified European Approach?', *European Anti-Discrimination Law Review* 11, (2011), pp. 11-21.

395 OJ L 393, 30.12.1989, pp. 1-12, annex 1, paragraph 20.

396 Identical provisions are contained in Council Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile constructions sites (eighth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 245, 26.8.1992, p 6-22; Council Directive 92/91/EEC concerning the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through drilling (eleventh individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 348, 28.11.1992, pp. 9-24, annex, paragraph 20; and (other than that 'handicapped' is replaced by 'disabled') Council Directive 92/104/EEC on the minimum requirements for improving the safety and health protection of workers in the surface and underground mineral-extracting industries (twelfth individual Directive within the meaning of article 16(1) of Directive 89/391/EEC), OJ L 404, 31.12.1992, pp. 10-25, Annex, paragraph 18.

be potential to use health and safety law as the basis for stronger and more extensive accessibility-enhancing obligations which are not dependent on a disabled person actually working on the premises.

EU law on public procurement also provides a potential mechanism through which to encourage the enhancement of workplace accessibility. In the words of the EU Initial Report to the CRPD Committee, public procurement directives adopted in 2014 'make the inclusion of accessibility criteria in the technical specifications of procurement procedures obligatory.'[397] It should be stressed, however, that the accessibility considerations mentioned here relate to the product or service to be provided by the tenderer. Accessibility considerations relating to the workplace and work practices of the tenderer have had a much lower profile in EU public procurement law – the disability-related emphasis of which has been on favouring workplaces where a high percentage of the employees are disabled instead of an emphasis on favouring workplaces and practices which are accessible.

Before leaving EU measures which encourage and support Member State initiatives to enhance the accessibility of workplaces, it is also important to mention developments in the field of State aid. On State aid, the new Regulation (EU) N°651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty – the General Block Exemption Regulation (GBER) – sets out the categories of aid and the conditions under which aid measures can receive the benefit of an exemption from notification; defines eligible beneficiaries; and specifies the maximum proportion of the eligible costs and eligible expenses. It significantly increases the possibilities for Member States to grant disability-related aid. Like its predecessor, it includes articles on aid for the employment of disabled workers. According to Article 34, aid is exempted where it funds the costs of adapting premises and employing staff solely to assist the disabled worker; and the costs of adapting or acquiring and/or validating specific equipment and software. In addition, the new Regulation includes the costs of training staff to assist disabled workers, costs directly linked to work-related transport for disabled workers and wage costs for the hours spent by a disabled worker on rehabilitation. One of the effects of these provisions might well be to encourage Member States to assist employers with the costs of making accessibility-related adjustments to the workplace.

3.4 Accessibility-enhancing legal obligations in national law

This section begins with a brief discussion of the profile of duties and debates concerning accessibility in employment contexts. It then moves on, in Section 3.3.2 to examine the extent to which accessibility barriers in the employment context can be challenged using principles of discrimination law. It then discusses the extent to which landlords of employers are required to consent to requests by their employer tenants to make the premises more accessible. Finally, it focuses on other accessibility-related duties that the employer bears and that might be regarded as complementary to the duty to provide reasonable accommodation.

3.4.1 Accessibility obligations in employment: a relatively low profile?

At the EU level, the topic of accessibility is one that has generated considerable debate and activity over recent years. This is no doubt due in part to the Commission's commitment, in the European Disability Strategy 2010-2020,[398] to considering whether to propose an Accessibility Act to enhance efforts to remove accessibility barriers (including conflicting standards) in the internal market for goods and services. The accessibility of workplaces has not featured prominently in these debates because employers and workplaces would not be the principal focus of any proposals that might emerge. However, any initiatives to enhance the accessibility of the built environment, of ICT, websites and transport services would inevitably have a significant impact on the accessibility of workplaces (and systems).

397 EU Initial Report to the UN Committee on the Rights of Persons with Disabilities, para 48.
398 COM(2010) 636 Final, para 2.1.1.

Because the principal focus of accessibility debates at the EU level has not been employment, there is less relevant data and analysis on which to draw than there is in fields such as goods and services. Thus, the three reports drawn up by the Academic Network of European Disability experts (ANED) in 2012, 2013 and 2014 focus respectively on the impact and effectiveness of accessibility measures in the goods and services context, accessibility in the context of political participation and accessibility in the context of healthcare[399] – but not on employment. This notwithstanding, the 2012 report (on the impact and effectiveness of accessibility measures in the goods and services context) does contain information which is relevant to employment as well as to goods and services and is therefore drawn upon at various points of this discussion.

At the national level, as well as at the EU level, it also appears that accessibility debates have tended to focus on sectors other than employment. Whilst the authors of the country reports prepared for the ANED accessibility synthesis report in 2012 were asked to focus on non-employment areas, the information they provide nevertheless suggests that the accessibility plans and strategies of Member States have focused primarily on areas other than employment.[400] This is, on occasion, reflected in the nature of legal obligations. Thus, in the **UK**, whilst the Equality Act 2010 imposes an 'anticipatory' reasonable adjustment duty in non-employment contexts, requiring service providers to take steps to identify and remove accessibility barriers in advance of complaints by particular disabled people, the duty it imposes in the employment context is entirely reactive, not being triggered until a particular disabled applicant or employee is placed at a disadvantage.

3.4.2 Accessibility obligations through non-discrimination

Generally in the States under consideration, national laws require services available to the public, buildings and infrastructure to be accessible. Only in relatively few (**Austria**, **Bulgaria**, **Hungary**, **Italy**, **Liechtenstein**, **Sweden**, **Spain** and the **UK**), however, the lack of accessibility constitutes a form of discrimination. Even in these countries, prohibitions of discrimination in the employment context are sometimes framed more narrowly than prohibitions of discrimination in the provision of services – with a reduced emphasis on tackling accessibility barriers. Thus, in Great Britain (**UK**), for example, an anticipatory reasonable adjustment duty requires service providers to anticipate and take reasonable steps to remove accessibility barriers affecting groups of disabled people – but, employers are not placed under any such anticipatory duty, being required only to focus on providing reasonable adjustments for a particular individual disabled applicant or worker.

In **Bulgaria** failure to provide accessible services and environments has been qualified as a form of discrimination since 2003, due to national NGOs' efforts.

In **Italy**, the prohibition of accessibility-related discrimination is due to ratification of the CRPD and the principle of consistent interpretation which applies by virtue of Article 117 Const. In the 'Programme of action on disability' accessibility is linked to the principle of non-discrimination.[401] In **Hungary**, Guideline No. 309/1/2011 of the Equal Treatment Advisory Board established that 'the failure to guarantee accessibility of buildings and equal access to public services amounts to a breach of the requirement of equal treatment', and that 'failure to guarantee accessibility shall be regarded as direct discrimination

399 These reports are Lawson, A. (2012) "Maximising the Impact and Effectiveness of Accessibility Measures for Goods and Services: Learning from National Experiences", (Academic Network of European Disability experts, 2012); Lawson, A. and Waddington, L. "Access to and Accessibility of Citizenship & Political Participation of People With Disabilities in Europe", Academic Network of European Disability experts 2013; and Loja, E. and Lawson, A. "Accessibility of Healthcare for People with Disabilities in Europe: A Comparative Study", Academic Network of European Disability experts, 2014.

400 See Lawson, A. (2012) "Maximising the Impact and Effectiveness of Accessibility Measures for Goods and Services", ibid, section 2.

401 Available at: http://www.gazzettaufficiale.it/eli/id/2013/12/28/13A10469/sg.

(….) because as a result of this failure, persons with disabilities are treated less favourably than people without disabilities in their movement, and access to services.'[402]

In **Sweden**, due to an amendment that came into force in 2015, lack of accessibility became a new discrimination ground in contexts which explicitly include employment.[403] In **Finland**, the situation appears more blurred. On the one hand, the Non-Discrimination Act does not contain a general duty to provide accessibility by anticipation for disabled people, on the other hand, in individual cases, it is possible that failure to comply with the 'Land Use and Building Act' (which provides for accessibility requirements) constitute discrimination.

In Great Britain (**UK**), as mentioned above, the Equality Act 2010 imposes a duty generally referred to as the 'anticipatory reasonable adjustment' duty in all areas of the Act except employment and housing. Essentially, this duty (which applies, for example, to service providers) requires reasonable steps to be taken to anticipate and remove accessibility barriers.[404] Arguments that this duty should be extended to the employment area by the Equality Act were rejected. However, that Act did introduce a prohibition of indirect disability discrimination to the employment area.[405]

With regards to the employment context, it is not entirely clear how accessibility laws are enforced and/or applied. Even in those countries in which lack of accessibility is deemed to be a form of discrimination, it often remains ambiguous which exact duties public and private employers bear, and what they are actually obliged to do in practice. In the majority of States considered, accessibility obligations seem to extend to private employers.

Typical of the accessibility-enhancing duties considered here is the fact that they impose a requirement to remove barriers without a request being made by the disabled person. Thus, a disabled worker employed in a non-accessible context, or who cannot perform their work because of lack of accessibility, might be able to bring a claim for indirect discrimination without advancing any previous request of adjustment. In this case, courts should be required to consider the extent to which the employer has complied with any legislation prescribing access standards. A non-discrimination claim thus offers a potentially influential tool to challenge inaccessible workplaces and practices which contribute to enhance lack of accessibility.

As mentioned above, **Austrian**[406] and **Slovakian**[407] legislation only affirms that an accommodation shall not be regarded as disproportionate if it is required under separate legislation, such as legislation relating to accessibility of (public) buildings. In **France**, inaccessible premises can give rise to a claim of indirect discrimination in access to employment,[408] but a refusal to implement the necessary adaptations, e.g. allowing access to a building, may well be considered to constitute a failure to provide reasonable accommodation.

In some States, national legislation provides that a failure to ensure accessibility can never be justified. A notable example of this approach is **Bulgaria**, where the statutory duties to ensure accessibility are absolute and consistent case law has held the Government, local councils and private parties liable for discrimination against disabled people because of lack of accessibility of urban environment and

402 Available at: http://www.egyenlobanasmod.hu/article/view/a-tan%C3%A1csad%C3%B3-test%C3%BClet-309-1-2011-ii-11-tt-sz-%C3%A1ll%C3%A1sfoglal%C3%A1sa-az-akad%C3%A1lymentes%C3%ADt%C3%A9si-k%C3%B6telezettsz%C3%A9gr%C5%91l.

403 Act (2014:958) changing the Discrimination Act (2008:567).

404 S20 EqA, read with Sch 2 (services and public functions) and s29.

405 S19 EqA.

406 Section 7c of the Act on the Employment of People with Disabilities reads as follows: '…it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent they have been obeyed'.

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

408 Article L1132-1 LC and Article 2 of the Law no 2008-496 of 27 May 2008.

transportation.[409] The Bulgarian Protection Against Discrimination Commission has ruled that a lack of financial resources is not a justification for inaccessibility.[410] By contrast, in some countries specific restrictions to the non-discrimination principle apply. For example, the **Austrian** Federal Disability Equality Act provides that until December 31st 2015 a physical barrier in a building or rail vehicle will not constitute discrimination if the building or facility was constructed in compliance with a permission issued before 1 January 2006. A recent Federal Law[411] stated that all federal ministries, the presidents of the Constitutional Court, the Administrative High Court, the Court of Auditors, the National Council, the Federal Council (*Bundesrat*) as well as the National Ombudsman Institution have to publish their plans for improvement of accessibility on their respective websites. Physical barriers, which the plans commit to removing, will be actionable as indirect discrimination if not removed by December 31st 2019. In **Slovenia**, there is a duty of accessibility for goods and services applicable to public, public educational institutions, public buildings, means of public transport as well as public cultural events, is defined in the 2010 Act on Equal Opportunities of People with Disabilities. Echoing what is provided for reasonable accommodation, failure to ensure accessibility can be justified if the burden on the responsible entity would be unreasonable. Similarly, **Maltese** legislation contains a general duty to provide accessibility by anticipation for disabled people and obliges everybody to ensure that access to property is available to all. However, where such property or facilities are designed or constructed in such a way as to render them inaccessible and any alteration of such property or facilities would be unreasonable in the circumstances, discrimination does not occur. Both **Slovenian** and **Maltese** legislation are not clear on how reasonableness and unreasonableness are assessed. It might be argued that a test similar to that applied in case of 'reasonable accommodations' is applied. These provisions make it very difficult to gauge the extent to which they add value to reasonable accommodation duties in an employment context.

3.4.3 Duties of employers' landlords

On the basis of the national expert reports prepared for this study, it is not possible to identify any consistent or clear pattern in the interrelation between reasonable accommodation duties of employers and duties of their landlords to consent to physical alterations.

In **Austria**, **Belgium**, **Croatia**, the **Czech Republic**, **Estonia**, **Finland**, **Germany**,[412] **Greece**, **Italy**, **Latvia**, **Liechtenstein**, **Luxembourg**, the **Netherlands**, **Romania**, **Slovakia** and **Spain** there is no explicit provision compelling landlords to carry out (or agree to) alterations to their premises, in order to enable their tenants to fulfil their reasonable accommodation duties. Case law does not offer specific guidance in this respect. In some States, such as **Austria**, **Finland** and **Spain**, landlords (whose consent is essential) are entitled to refuse requests from their tenants to make changes to the leased premises, even though the tenants are employers who have reasonable accommodation obligations to remove physical barriers. In **Finland**, the Government Proposal for Non-Discrimination Act, states that an accommodation might be refused by the employer when the landlord does not accept the accommodation measures.[413] In **Cyprus**, given the restriction that the reasonable accommodation measures must not entail a disproportionate burden, it is unlikely that an employer's duty would require structural changes that would necessitate permission from the landlord.

409 Decision No. 1301 in civil case No. 5117/2007. Decision No. 556 in civil case No. 1514/2007; Decision No. 589 in civil case No. 1728/2007; Decision No. 1158 in civil case No. 5162/2007; Decision No. 1286 in civil case No. 3371/2007. A recent example: Supreme Administrative Court, Decision No. 158 of 08 January 2015 in case No. 7092/2014.

410 Decision No. 60 of 08 April 2008.

411 Gazette I No. 111/2010 an addition to § 8/2 was enacted (which entered into force on January 1st 2011).

412 According to Section 554a Civil Code (BGB), a disabled person has the right to demand consent to changes in rented property which are necessary for his or her adequate use. The landlord can refuse consent if their interest in the unchanged status of the property carries more weight than the interest of the disabled person. This rule does not, however, extend to the case referred to above.

413 Page 82, Government's Proposal on Non-Discrimination Act 19/2014 [*Hallituksen esitys yhdenvertaisuuslaiksi* 19/2014 vp] http://www.finlex.fi/fi/esitykset/he/2014/20140019.

By contrast the Great Britain (**UK**) Equality Act 2010, in Schedule 21, provides that, where a person (for example, an employer) is placed under a duty to make reasonable adjustments but that person requires the consent of a third party (the landlord) to make such adjustments (i.e. in the form of alterations to premises), it is 'always reasonable' for the employer 'to have to take steps to obtain the consent', though 'never reasonable' to make the alteration without it. In addition, Schedule 21(3) requires landlords not to withhold consent unreasonably. In **Malta** and **Norway**, landlords would also be legally bound to agree to requests from their tenants to make changes to the leased premises where the tenants are employers who have reasonable accommodation obligations to remove physical barriers

3.4.4 Other positive duties to enhance accessibility

(a) Accessibility requirements

Employers may, on occasion, be placed under explicit accessibility duties unrelated to discrimination law – e.g. as part of planning or other legislation. In **Greece**, for example, according to the Article 24 of the Ministerial Decision 3046/304/1988, all the pavements in front of every building should be constructed, reconstructed, repaired and conserved in a way that facilitates a constant and secure circulation of disabled pedestrians, unless the morphology of the territory does not allow it. In addition, according to the Article 32 of the above Decision, 10% of the number of mailboxes in every building should be put in a position accessible by disabled persons.

(b) Health and safety duties

In several countries public and private employers are required to provide a healthy and safe working environment, and this often implies accessibility duties. In particular, in **Denmark**, an executive order establishes that consideration must be shown to disabled employees, when it comes to traffic routes, doors, spacious décor, toilets and bathrooms within the workplace.[414] The Danish Working Environment Authority oversees the rules in the executive order and may issue enforcement notices and injunctions. An employer who violates the executive order or who does not comply with notices or injunctions from the Danish Working Environment Authority may be punished with a fine or mitigated imprisonment. Similarly, in **Norway**, enterprises are required according to have a systematic health, environment and safety work. Additionally, there is a tripartite agreement between the government, trade unions and employers organisations called the Agreement on a more Inclusive Working Environment (*IA-avtalen*), in which member enterprises may apply specifically for both preventative measures and concrete accommodation measures, financed by the Norwegian Welfare Directorate (NAV) for disabled workers.

(c) Proactive equality duties

The 2012 ANED report on the impact and effectiveness of accessibility measures for goods and services drew attention to the potential of these duties for enhancing accessibility in the goods and services context.[415] Such duties also have potential to enhance accessibility in the employment context – although generally such duties operate in public and not private sectors.

414 Section 18 of Executive order No. 96 of 13 February 2001 with later amendments on the décor of permanent workplaces.
415 Lawson, A. "Maximising the Impact and Effectiveness of Accessibility Measures for Goods and Services" above n 405.

4. Conclusion

This report has explored employment-related reasonable accommodation and accessibility obligations in UN and EU law, as well as in the national law of 31 European countries. The UN Convention on the Rights of Persons with Disabilities (CRPD) provides an important source of inspiration for developments both at the EU and national level. The CRPD has been ratified by the EU itself as well as by 26 of the countries studied here. The EU Employment Equality Directive has also had a tremendously important role to play in this area. It has been the major catalyst for legislative action by Member States on disabled people and reasonable accommodation in the field of employment and occupation, and it continues to exercise a powerful role in shaping national law and policy in this field.

The UN CRPD and the EU Employment Equality Directive provide the evaluative framework which underpins the analysis which has been carried out in this report. That analysis suggests that there are several respects in which EU and national law may be falling short of the CRPD. In addition, it suggests that the laws adopted in some of the countries studied appear to be falling short of EU law – i.e. for present purposes, the Employment Equality Directive.

The analysis of the 31 countries included in this study has focused on developments concerning the content or substance of laws relating to reasonable accommodation and accessibility. Attempts have been made to gather data about their impact and about their practical operation. It appears, however, that information of this nature is extremely limited. This lack of data and monitoring has been noted as a cause for concern by the CRPD Committee which has, in its Concluding Observations on most of the EU countries it has examined to date, included strong recommendations for strengthened mechanisms for monitoring (disaggregated by gender) of levels of disability and intersectional discrimination and of the use of the justice system to uphold rights to be free from discrimination. This issue will therefore feature in the discussion and recommendations below.

This concluding chapter will begin by setting out the concerns which have been identified throughout the report about the consistency of various aspects of EU and national law with the UN CRPD. It will then set out separately concerns about the consistency of national law with the EU Employment Equality Directive. The chapter will then draw on other parts of the preceding analysis to identify aspects of reasonable accommodation in employment on which the Directive and the CRPD are both silent, and on which there is currently no guidance from the CJEU or the CRPD Committee, and on which there currently appears to be a wide variation in approach at national level. These are issues on which EU-level guidance is likely to prove extremely helpful in on-going efforts to implement rights to reasonable accommodation in employment. The chapter will then reflect on implementation and enforcement issues before moving on to the current state of affairs as regards accessibility-enhancing obligations in employment settings. It will conclude by making a number of recommendations for EU action in this area.

4.1 Apparent inconsistency with UN and/or EU standards

4.1.1 Apparent inconsistency with the CRPD

(a) Defining the disability threshold

The most troublesome and troubling of the disability-related aspects of EU law discussed in this report is the way in which 'disability' is defined for purposes of the Employment Equality Directive. The Directive itself is silent on this matter, containing no definition of 'disability'. Consequently, the CJEU has had to step into the breach.

Recent judgements demonstrate a commitment by the CJEU to interpret the term 'disability' in a manner that is consistent with the CRPD. However, whilst the Court has used Article 1 of that Convention to move

away from its much-criticised *Chacón Navas* ruling and to shape a new EU approach to the definition of disability, it has been argued above that the new approach is also problematic. Unlike the CRPD, the CJEU's new approach requires claimants to have an impairment which, in interaction with social barriers, hinders their participation in 'professional' life. This focus on 'professional' life seems to restrict the class of 'persons with disabilities' covered by the Directive to a narrower class of people than that which is envisaged in Article 1 of the CRPD – there being no mention of 'professional' life in Article 1. This would seem to represent a clear shortfall between the protection against disability-based discrimination afforded by EU law and that which is expected by the CRPD. However, it was not mentioned in the CRPD Committee's 2015 Concluding Observations on the EU.[416] The only concern expressed by the Committee about the personal scope of EU prohibitions of disability discrimination concerned its failure to address multiple and intersectional discrimination.[417]

The failure of the CJEU to adopt what has been argued here to be a fully CRPD-compliant approach to the definition of disability has obvious knock-on effects on the consistency of several national level definitions of 'disability' with the CRPD. As the discussion above demonstrates,[418] the CJEU's interpretation of disability has been used to shape disability non-discrimination law in many Member States. The 'hindrance on professional life' requirement is thus already beginning to creep into the domestic laws of a number of countries. Whilst this ensures consistency with the CJEU's approach, and thus is in line with the Employment Equality Directive as currently understood, it creates the same apparent tension with Article 1 of the CRPD as has just been outlined in connection with the CJEU's recent judgements.

The definitions of disability adopted in some other countries are problematic and appear to be inconsistent with the CRPD. However, these will be discussed in Section 4.1.2 below as they also appear to fall short of the Employment Equality directive.

(b) No explicit reasonable accommodation duties

An obvious example of a failure to comply with the reasonable accommodation duty of the CRPD would be the absence of a clearly articulated reasonable accommodation duty. Indeed, this would also amount to a breach of the Directive – and was the basis of the Commission's recent infringement proceedings against **Italy**.[419] It is also a matter on which the CRPD Committee expressed concern in its Concluding Observations on **Denmark**[420] and **Germany**.[421] However, it appears from the analysis of the reports received for this study that all EU Member States do now have clearly articulated reasonable accommodation duties. The only countries which did not meet this requirement were **Iceland** and **Liechtenstein**.[422] It is perhaps significant that neither are EU Member States and neither have ratified the CRPD.

(c) Classification of reasonable accommodation duties

In some countries (e.g. **Estonia** and **Latvia**) failure to provide reasonable accommodation is not classified as discrimination. This is clearly inconsistent with the CRPD. It would also be inconsistent with the Directive, assuming that the CJEU adheres to its commitment to interpreting EU secondary legislation consistently with the CRPD. The importance of this inconsistency depends, to some extent, on the consequences in national law of classifying a claim as one for discrimination – for instance whether there are implications for the type of remedy available, or for the support and involvement of equality bodies.

416 CommRPD, Concluding Observations on the Initial Report of the European Union, above n 52.
417 Ibid, para 19.
418 See above Section 2.4.3(b).
419 *European Commission v Republic of Italy* Case Case C-312/11.
420 UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Denmark, 12th Session, October 2014, para 56.
421 UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Germany, 13th Session, April 2015, para 13.
422 See above Section 2.4.1(a).

(d) Remedies for breach of reasonable accommodation duties

As explained in Section 2.4.8(b) above, the CRPD Committee is interpreting the CRPD to require a range of remedies to be available for breach of reasonable accommodation duties, including remedies which entail a change in the behaviour of the discriminator. However, it appears that in a number of EU Member States (**Bulgaria**, **Cyprus**, **Denmark**, **Finland**, **Poland**, and the **UK**) only damages are available in employment discrimination claims (including ones for denials of reasonable accommodation).

(e) (Information about) access to justice for victims of breaches of the reasonable accommodation duty

It is clear from the analysis in Section 2.4.8(c) above that the CRPD Committee has concerns about the enforcement mechanisms available to disabled people who have been denied rights to reasonable accommodation or been otherwise discriminated against. It is an irony that disabled people wishing to challenge discrimination they have encountered in employment may be unable to do so because of discrimination or lack of accessibility in the justice system. Access to justice rights are articulated clearly in Article 13 of the CRPD. Lack of data on this point makes it difficult to evaluate the extent to which disabled people experience access to justice barriers, including ones which may themselves amount to discrimination. This lack of data about the operation and effectiveness of judicial and other procedures for challenging disability discrimination is another cause for concern, commented on by the CRPD Committee, and potentially inconsistent with Article 31 of the CRPD.

(f) Reasonable accommodation obligations in the armed forces

a final concern about the consistency of the laws of some countries with the CRPD relates to the scope of the disability discrimination prohibition and the armed forces. The Employment Equality Directive permits Member States to opt not to prohibit disability discrimination (nor to require reasonable accommodation) within the armed forces. There are explicit exemptions from the scope of non-discrimination law for the armed forces in **Cyprus**, the **Czech Republic**, **Denmark**, **France**, **Germany**, **Greece**, **Ireland**, **Italy**, **Malta**, **Slovakia**, **Spain** and the **UK**; and implicit ones in **Croatia**, **Estonia**, **Hungary**, **Latvia**, **Norway**, **Poland**, **Portugal**, and **Romania**. Although the vast majority of these countries have ratified the CRPD, only **Cyprus**, **Greece** and the **UK** have entered reservations against Article 27 in respect of the armed forces. It therefore seems that the armed forces exemptions in the other countries are inconsistent with the obligations of those countries as States Parties to the CRPD.

4.1.2 Apparent inconsistency with EU standards

(a) Definition of disability

Several countries define disability in employment-related non-discrimination law differently from the way it is now understood by the CJEU for purposes of the Directive. Some of these approaches appear to fall short of the minimum standard the Directive (as interpreted by the CJEU) requires Countries such as **Austria**, the **Czech Republic**, **Estonia**, **Italy**, **Latvia**, **Poland**, **Sweden** and the **UK** have legislative definitions of disability which adopt the same sort of approach as that which was adopted by the CJEU in *Chacón Navas* and which has now been rejected by that Court. Typically, these national level definitions contain the three elements identified in *Chacón Navas* – (1) the existence of an 'impairment', (2) which hinders professional or day-to-day life and (3) which is long-term. As already noted, the CJEU has now rejected this approach as inconsistent with the CRPD, which suggests that (at least in the view of the CJEU) these national laws are consistent with neither the Directive nor the CRPD. In addition, in some countries (such as the **UK**) there are additional problematic exclusions of particular groups of people, which operate to deny them any possibility of bringing claims for disability discrimination or reasonable accommodation.

In addition, some countries appear to restrict reasonable accommodation duties to only a subset of disabled people. Thus in **Croatia**, **France** and **Germany**, the protection afforded by reasonable accommodation duties is owed to a subset of those entitled to claim protection from other forms of disability discrimination. In **Germany**, for instance, reasonable accommodation duties are owed only to 'severely disabled' people – defined in terms of percentage work incapacity (a minimum of 30% being required).

Many other countries restrict reasonable accommodation duties to operate in favour only of people who have been officially certified by a state authority to have more than a specified percentage or degree of 'disability'. For example, in **Luxembourg**, a reduced working capacity of more than 30% is required; and in **Spain** an impairment of 33% or more is required. Arguably, these national provisions provide a mechanism for determining whether a person has an 'impairment' – a concept which features in Article 1 of the CRPD. Accordingly, at face value, such approaches would appear to be consistent with the Directive and the CRPD. However, if the relevant classification procedures are slow, costly or set an inappropriately high qualifying threshold, they will prevent disabled people accessing reasonable accommodations either altogether or in a timely workable manner. In such an event, they would almost certainly be inconsistent with both the Directive and the CRPD.

(b) Restrictions on reasonable accommodation duties

Explicit restrictions on the operation of reasonable accommodation duties are rare. However, the specification in the **Italian** legislation that public employers must implement reasonable accommodation duties 'without new or increased burdens on public finance and human resources'[423] is perplexing and does, at face value, appear to impose a limitation on the operation of reasonable accommodation duties which is inconsistent with the Directive and also the CRPD. Due to lack of data about the practical operation of this duty, however, the extent to which it operates in practice to limit the types of accommodations afforded to disabled applicants and employees is not yet clear.

(c) Access to justice for victims of breaches of the reasonable accommodation duty

As explained in 4.1.1(e) above, there are concerns that disabled people may face discrimination and accessibility barriers in the judicial and administrative mechanisms for challenging breaches of reasonable accommodation duties in employment. Such barriers in enforcing their rights would appear to be inconsistent with Article 9 of the Employment Equality Directive.

Whilst it seems likely that disabled people also encounter barriers to accessing justice in the contexts of challenging forms of discrimination not based on disability (e.g. sex and race discrimination in employment), this was an issue which fell outside the scope of this report and on which evidence was therefore not collected.

4.2 Lack of clarity in EU and UN standards

Turning now to the second main topic for discussion in this chapter, there are a number of important reasonable accommodation issues on which the Directive and CRPD are silent and on which there appears to be significant variation of approach at national level. An attempt will be made here to pull together, and reflect on, a number of such issues discussed at various parts of the report.

423 Law decree 28 June 2013 No. 76, OJ No. 150 of 28 June 2013, then converted into Law 9 August 2013, No. 99, OJ No. 196 of 22 August 2013, page 1, concerning 'Preliminary Urgent Measures for the promotion of employment, in particular of youngsters, of social cohesion and other Urgent financial measures'.

(a) Employers' knowledge requirements for triggering reasonable accommodation duties

A useful starting-point is the degree of knowledge which an employer is required to have before the reasonable adjustment duty will be triggered. Only the **UK** addresses this matter explicitly in legislation and it is the subject of some vagueness and confusion in many of the countries studied. However, three main approaches were identified in the analysis above. First, some countries require that employers know or ought to know that the person in question was disabled. Second, the duty is triggered only where a disabled person has specifically asked their employer for accommodations. Third, the duty will be triggered only when the employer has been informed of the need to make an accommodation by a competent public authority. Despite the silence of the Directive and the CRPD on this issue, there are serious concerns that neither the second nor the third of these three approaches capture the spirit of the reasonable accommodation duties created by these two instruments.[424]

(b) Consultation about accommodations

Another issue on which there is no guidance in the Directive concerns the process of reasonable accommodation duties and the existence of any requirement or expectation on employers to consult the disabled person concerned in decisions about what accommodations to make. Explicit requirements to consult the disabled person are rare in national law, but very many of them appear to include expectations of such consultation. Only **Norway** has an explicit duty on employees to engage in a dialogue about accommodations and suggest solutions. There are no requirements to consult third parties (such as organisations with technological expertise and which focus on providing advice about employment-related adjustments) but in practice reference is frequently made to them.

(c) Duties of employers' landlords to consent to requests to make physical alterations

Another reasonable accommodation related issue on which there is no guidance in the Directive or CRPD concerns the extent to which landlords of employers are required to consent to requests (made by their employer tenants) to adapt the property in order to make reasonable accommodations for disabled employees. There is considerable variation of approach on this in the different countries studied. In some countries (e.g. **Austria**, **Belgium**, **Finland**, and **Spain**) landlords are entitled to refuse requests from their tenants to make such alterations – even where the tenants are employers who have reasonable accommodation obligations to remove physical barriers. In other countries (e.g. the **UK**), landlords are required not to withhold consent unreasonably and in others (e.g. **Malta** and **Norway**) landlords are required to give consent to such requests. In countries where landlords are entitled to refuse to consent to such requests, it is possible that this issue presents a significant barrier to the implementation of reasonable accommodation duties – and to making accommodations which would have the effect of enhancing the physical accessibility of workplaces. However, precise data are lacking and without further research, it is impossible to gauge the extent of the problem in practice. It is an issue on which more research would prove extremely helpful.

(d) Reasonable accommodation duties for workers who are self-employed or unpaid

The final issue to be discussed in this second part of the conclusion concerns the type of work and worker that falls within the scope of the Directive. There is no clear guidance on this in the Directive, although Article 27(1)(f) of the CRPD does require States Parties to "Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business".

National laws adopt a range of different approaches to self-employment and unpaid work. In most of the countries studied, self-employment is not covered by the disability non-discrimination laws and reasonable accommodation duties do not arise in favour of self-employed workers. However, many

424 See generally Section 2.4.4 above.

types of self-employment are covered by disability discrimination legislation which includes reasonable accommodation duties, in **Denmark**, **France** and the **UK**. There is also considerable variation of national approach as regards unpaid work. In some countries (e.g. **Austria**, **Bulgaria**, **Estonia**,[425] **Germany**, **Hungary**,[426] **Latvia**, **Norway**, **Portugal**, **Slovakia**,[427] **Slovenia** and the **UK**), volunteers and unpaid workers are not considered workers and not entitled to the protection of employment-related reasonable accommodation duties. By contrast, in **Finland**, **France**, the **Netherlands** and **Spain**, it seems that unpaid workers or volunteers have a right to reasonable accommodation. In other countries (e.g. **Cyprus**, **Czech Republic**, **Greece** and **Ireland**), the issue remains unclear. Clarification, at the EU level, would be helpful and would have relevance to characteristics other than disability.

4.3 Implementation, promotion and guidance

Article 5(3) of the CRPD requires State Parties to actively promote reasonable accommodation and Article 8 requires them to raise awareness of the rights of disabled people. The Directive contains no specific requirement to issue official guidance on reasonable accommodation duties. Nevertheless, in several countries, influential guidance is published in documents/booklets released by equality bodies, or disability commissions, or by other public services and in others (e.g. **Germany**) some guidance is given through collective agreements. In **Germany**, public and private employers can (and should) conclude integration agreements with the representatives of disabled employees for enterprises and authorities with regard to working conditions and other issues of integration of disabled people.[428]

Subsidies, paid by the government towards the costs of reasonable accommodations, play an important part in enhancing the effectiveness and impact of reasonable accommodation duties in most of the countries studied. In **Austria**, **Belgium**, **Denmark**, **Estonia**, **Finland**, **France**, **Germany**, **Ireland**, **Latvia**, **Luxembourg**, **Malta**, **Norway**, **Slovenia**, **Sweden** and the **UK**, such schemes operate. Interestingly, in some of these countries (e.g. **Finland** and **Latvia**), there are clearly specified maximum amounts and sometimes also maximum durations for these subsidies. In others (such as the **UK**) however, the State subsidy has (until recently) been unlimited. This approach is based on the overall savings to the State of enabling disabled people to work.

In the majority of countries considered, the failure to provide reasonable accommodation gives rise only to the right to obtain financial compensation, and courts cannot issue injunctive orders requiring the employer to make specific accommodations. This approach is linked to the idea of "freedom to contract" and to a minimal interference with this freedom. In a few countries (e.g. **Belgium**, **Croatia**, **Estonia**, **Greece**, **Hungary**, **Liechtenstein**, **Malta**, the **Netherlands**, **Norway**, **Portugal**, **Spain**, and **Romania**), however, courts have the power to award compensation and/or to order the employer to make specified accommodations.

It should also be noted that, for the vast majority of the countries studied (i.e. **Austria**, **Belgium**, **Cyprus**, the **Czech Republic**, **Denmark**, **France**, **Greece**, **Hungary**, **Italy**, **Latvia**, **Liechtenstein**, **Luxembourg**, **Malta**, **Norway**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Spain** and **Sweden**) no statistics were

425 Estonian Law on Equal Treatment (*Võrdse kohtlemise seadus*), RT I 2008, 56, 315.

426 Article 8 Paragraph (1) of Act LXXXVIII of 2005 on Public Interest Voluntary Activities, which lists the obligations of the hosting organisation (guaranteeing the conditions of a safe working environment, providing the necessary recreational time, providing the necessary instructions and information) is silent about reasonable accommodation.

427 This line of argument (i.e. that the duty to provide reasonable accommodation does not extend to volunteers and unpaid workers) is also supported by the wording of Section 6(1)(a) of the Anti-discrimination Act, which stipulates that the principle of equal treatment applies only in connection with rights of persons stipulated by special laws mainly in the field of (apart from other fields) `access to employment, occupation, *other earning activity or position*, including the conditions for job admission and the conditions and means of carrying out the job selection´. In addition, the Act on Volunteerism (Act No 406/2011 Coll. on Volunteerism and on Changing and Supplementing Other Laws (*zákon č. 406/2011 Z. z. o dobrovoľníctve a o zmene a doplnení niektorých zákonov*), regulating the legal status of volunteers and the legal relations stemming from voluntary activities, contains no equal treatment/anti-discrimination clause.

428 Section 83 SGB IX.

available on the number of discrimination cases brought to trial. Even where there were such statistics, they were often not comprehensive (e.g. in **Bulgaria**, **Finland** and **Germany**). Consequently, it is not possible to ascertain the number of reasonable accommodation cases brought or the nature of the remedies awarded.

4.4 Accessibility enhancing obligations and employment

It is clear from Article 9 of the CRPD, and its accompanying General Comment No 2, that States Parties are expected to take steps to ensure that workplaces are accessible to people with all sorts of impairments (sensory, cognitive and psychosocial as well as physical). The Directive, however, contains no provision on this Indirect discrimination and reasonable accommodation as well as, in some cases, direct discrimination may have the effect of enhancing accessibility in some instances, but there will be many other instances in which they do not and their primary emphasis is not on the removal of accessibility barriers.

As argued in Chapter 3 above, perhaps because of the low profile of accessibility considerations in the Employment Equality Directive and the low profile of employment in debates about a possible European Accessibility Act, accessibility has received less attention, and been tackled more tentatively, in the employment context than it has been in the context of service provision. Clearly, many service providers will also be employers, so there is no clear-cut divide and the enhanced accessibility of services will have an impact on the accessibility of at least some workplaces.

In relation specifically to employment, however, some of the measures discussed earlier in this chapter have obvious accessibility-enhancing potential. For example, measures requiring landlords to consent to requests from their tenants (who are employers) to make alterations to the leased property in fulfilment of reasonable accommodation duties would reduce the risk of accessibility barriers remaining in place because landlords refuse to agree to their removal. In addition, State subsidies for the costs of reasonable accommodations make it much more likely that alterations can be made which will remove accessibility barriers. Employers may be given additional incentives to investigate and apply for such subsidies by approaches such as that in **Denmark** whereby failure to apply for such a subsidy may render an employer liable for indirect discrimination.

A number of countries have integrated accessibility considerations into their reasonable accommodation duties. Thus, **Austrian**[429] and **Slovakian**[430] legislation affirm that an accommodation shall not be regarded as disproportionate if it is required under separate legislation, such as legal requirements concerning the accessibility of buildings. In **Hungary**, disability rights legislation sets a very high bar for the 'undue' or 'disproportionate' hardship element of reasonable accommodation, providing that the burden of a reasonable accommodation shall be regarded as disproportionate only if it would make the continued operation of the employer impossible.

It is worth noting that some countries have chosen to impose extensive accessibility-related obligations on employers. The new **Swedish** Discrimination Act[431] is particularly interesting as it treats as unlawful discrimination an employer's failure to remove an accessibility barrier. It is too early as yet to assess the impact and effect of this piece of legislation, but it has significant potential and would merit on-going scrutiny.

429 Section 7c of the Act on the Employment of People with Disabilities reads as follows: '…it has to be taken into account whether relevant legislation exists in regard to accessibility and to what extent they have been obeyed'.

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

431 Act 2014 (958) changing the Discrimination Act. Government bill 2013/14:198.

Finally, accessibility in employment may be stimulated and supported through other forms of legislative intervention. These include broad duties to promote disability equality (or accessibility); health and safety law; and also, potentially, procurement law.

4.5 Recommendations

4.5.1 Court of Justice of the EU and the meaning of 'disability'

For the reasons explained above, it is recommended that the CJEU revisit its approach to the meaning of 'disability' and refine it so that claimants do not need to demonstrate the impact of an impairment (in interaction with social factors) on 'professional life'. Removing reference to 'professional life' would better fulfil the commitment of this Court to consistency with Article 1 of the CRPD.

4.5.2 EU health and safety and procurement legislation

It is recommended that the European Commission consider ways in which health and safety law and public procurement law could be used as the basis for proposing legislative requirements that would build upon current EU legislation to strengthen requirements to enhance the accessibility of workplaces and practices.

4.5.3 Dialogue about domestic reasonable accommodation duties and potential infringement proceedings

The stringent restriction placed on reasonable accommodation by the **Italian** law, discussed in Section 4.1.3 above, would seem to merit further investigation by the Commission as a possible failure to transpose the Employment Equality Directive into domestic law. A number of other concerns about the transposition of the Directive into domestic law were identified in Section 4.1.2 concerning the definition of disability. Clearly, in making further inquiries about the consistency of domestic law with the Directive, the Commission would need to demonstrate sensitivity to the potential confusion caused by the various approaches of the CJEU to this matter. However, there do appear to be clear shortfalls from the standards which the CJEU has developed.

In addition, in Section 4.1.2, concerns were identified about the appropriateness and inclusiveness of procedures established by Member States for the enforcement of rights under the Directive (including procedures for applying for legal aid) by disabled people. More information about the situation in Member States is urgently needed and would provide the basis for important dialogue with Member States about consistency with Article 9 of the Directive. EU-level action to enhance access to justice for disabled people was also recommended by the CRPD Committee in its Concluding Observations on the EU.

4.5.4 Guidance and training

The CRPD Committee, in its Concluding Observations on the EU, observed (with reference to disabled people) that:

> 'The Committee recommends that the European Union take effective actions … to increase their employment rate in open labour market, including by providing training for Member States on reasonable accommodation and accessibility in the context of employment.'[432]

This would appear to call for the Commission's continued support of initiatives to enhance training of relevant Member State actors in the CRPD and the disability-related elements of the Employment

432 CommRPD, Concluding Observations on the Initial Report of the European Union, above n 52 para 65.

Equality Directive (e.g. through the Progress Programme). It is important, however, that methods are found by which to highlight the importance of accessibility (and not just reasonable accommodation) in employment-related training.

In addition, it is recommended that the Commission publishes guidance to clarify aspects of the Directive's reasonable accommodation duty which are currently unclear and on which there is currently considerable uncertainty and divergence of approach at national level. Important issues to be addressed in any such guidance are discussed in Section 4.2 above. Other issues, such as the definition of disability, and suggestions for policies to enhance workplace accessibility might also helpfully be included.

Such guidance would provide a rich context for training initiatives and provide a powerful stimulus to the development of legal and policy initiatives which would help to enhance the potential impact of reasonable accommodation duties. It should be compiled in collaboration with the European Disability Forum and be based on a process which draws upon existing guidance and good practice at national level.

4.5.5 Greater emphasis on reasonable accommodation and accessibility in EU 2020 processes

It is suggested that it would be helpful if the accessibility of workplaces and effective implementation of reasonable accommodation duties were given a heightened profile in EU 2020 processes – in connection with strategies to enhance the employment rates of disabled people on the open labour market. A consistent theme of the CRPD Committee's Concluding Observations on EU countries has been concern about low rates of employment on the open labour market. Robust reasonable accommodation duties are clearly viewed by the Committee as a key element of any initiative to secure the employment rights of disabled people and increase their employment rate in open labour market settings.[433]

4.5.6 Research

Finally, this report has explored issues concerning the operation of reasonable accommodation duties in, and the accessibility of, employment which have not previously been explored in depth at a European level. Whilst it has yielded sufficient information to demonstrate that there are inconsistencies of approach and potential barriers to the effective implementation of reasonable accommodation, some of these issues merit further research and attention. Prime examples are:

- the situations in which reasonable accommodation duties will be triggered (e.g. whether there is a requirement that the employer knows or ought to know that an applicant or employee is disabled);
- the potential problems created if a landlord's consent is required before reasonable accommodations can be made and mechanisms for tackling this;
- the extent to which reasonable accommodation duties require or encourage consultation and dialogue, particularly with the disabled person;
- the justice system barriers experienced by individuals who seek to enforce their rights to have a reasonable accommodation made in their favour; and
- accessibility barriers to application and recruitment processes (e.g. inaccessible online application systems) which prevent disabled people from entering even the first stage of engaging with potential employment – an issue which raises important reasonable accommodation and accessibility considerations.

433 See e.g. the emphasis placed on reasonable accommodation as a means of boosting employment rates in the open labour market in its Concluding Observations on Denmark, 12th Session, October 2014, para 56.

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Belgium
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Bulgaria
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- Integration of Persons with Disabilities Act (Закон за интеграция на хората с увреждания);
- Labour Code;
- Healthy and Safe Work Conditions Act.

Cyprus
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- Rules on Incentives for Employment of Persons with Disability, Official Gazette 44/2014, 2/2015 and 13/2015;
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- Law on Occupational Health and Safety (*Töötervishoiu ja tööohutuse seadus*), RT I 1999, 60, 616;
- Law on Income Tax *(Tulumaksuseadus)*, RT I, 19.11.2010, 7.

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Hungary

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- Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities (RPD Act);
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Latvia

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Lithuania

- Law on Equal Treatment.

Luxembourg

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Iceland

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Ireland

- Employment Equality Act 1998-2004.

Italy

- Law 7 August 2015, n. 124 Delegation to the Government on the reorganization of public administrations, O.J. No. 187 of 13 August 2015;
- Law Decree 28 June 2013 No. 76, OJ No. 150 of 28 June 2013, then converted into Law 9 August 2013, No. 99, OJ No. 196 of 22 August 2013, 1, concerning 'Preliminary Urgent Measures for the promotion of employment, in particular of youngsters, of social cohesion and on and other Urgent financial measures';
- Framework Law 104 of 5 February 1992 on the care, social integration and rights of disabled persons, Supplement to OJ No. 39 of 17 February 1992.

Malta

- Equal Opportunities (Persons with Disability) Act 2000 ACT I of 2000, as amended by Legal Notice 426 of 2007; and Act II of 2012.

Norway

- Anti-Discrimination and Accessibility Act (AAA) of 21. June 2013 No 61;
- Working Environment Act (WEA) og 17 June 2005 No 62.

Poland

- Act of 27 August 1997 on the Vocational and Social Rehabilitation and Employment of Disabled Persons (*Ustawa z 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*);

- Act of 03 December 2010 on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (*Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*);
- Ordinance of 26 September 1997, as amended. (*Rozporządzenie ministra pracy i polityki socjalnej z dnia 26 września 1997 r. w sprawie ogólnych przepisów bezpieczeństwa i higieny pracy*).

Portugal

- Law 38/2004 of 18 August 2004 (hereafter 'Law 38/2004'), defining the general legal basis for prevention of the causes of disability, and the training, rehabilitation and participation of people with disabilities;
- Decree-law 163/2006 of 8 August 2006 approves the standards and rules governing physical access to buildings and public spaces.

Romania

- Disability Act, Law 448/2006 on the protection and promotion of the rights of persons with a handicap, adopted on 6 December 2006.

Slovakia

- Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination and on Changing and Supplementing Other Laws (Anti-discrimination Act) (*zákon č. 365/2004 Z. z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon*)), in effect from 1 July 2004, Sections 7 and 2(3));
- Act No 311/2001 Coll. Labour Code, as amended (*zákon č. 311/2001 Z. z. Zákonník práce v znení neskorších predpisov*), in effect from 1 April 2002.

Slovenia

- Vocational Rehabilitation and Employment of Persons with Disabilities Act (*Zakon o zaposlitveni rehabilitaciji in zaposlovanju invalidov*), Official Journal of the Republic of Slovenia, No. 63/2004. Date of adoption: 21 May 2004. Entry into force: 25 June 2004. Latest amendments: 19 October 2011. Relevant articles: Article 37;
- Act on Equal Opportunities of People with Disabilities (*Zakon o uresničevanju načela enakega obravnavanja – uradno prečiščeno besedilo*), Official Journal of the Republic of Slovenia, No. 93/07. First adopted on 22 April 2004, entered into force on 7 May 2004, date of latest amendment: 22 June 2007. Relevant article: Article 3, § 3;
- Employment Relationship Act (*Zakon o delovnih razmerjih*), Official Journal of the Republic of Slovenia, No. 21/13 and 78/13. Adopted on 5 March 2013, entered into force 12 April 2013. Relevant Articles: Article 196.

Spain

- RDL 1/2013, of 29 November 2013, General Law on the Rights of Persons with Disabilities and their social inclusion (BOE, 3 December 2013);
- Law 31/1995, of 8 November 1995, on prevention of occupational risks (BOE, 10 November 1995);
- Royal Decree 39/1997, of 17 January, on Regulation of Prevention Services (BOE, 31 January 1997).

Sweden

- The Discrimination Act (2008:567);
- The Employment Protection Act (1982:80);
- Social Security Code (2010:110);
- Work Environment Act (1977:1160).

The Netherlands

- Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease (*Wet van 3 april 2003 tot vaststelling van de Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte*), Staatsblad 2003, 206.

The UK

- Equality Act 2010.

6.2 Bylaws, policy documents and soft law

6.2.1 EU documents

- European Commission (2003), 'Equal opportunities for people with disabilities: A European Action Plan', COM (2003) 650, Brussels, 30 October 2003;
- European Commission (2008), Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 def;
- European Commission (2010), *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, COM (2010) 636 final, Brussels, 15 November 2010;
- European Commission (2014), *Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive')* COM(2014) 2 final, Brussels, 17 January 2014, available at: http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf.
- European Commission (2014), *Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union*, SWD(2014) 182 final, Brussels, 5 June 2014.

6.2.2 National Documents

Belgium

- 'Cooperation Agreement concerning the concept of reasonable accommodation' OJ (*Moniteur belge*), 20 September 2007, pp. 49653–49664.

Cyprus

- Equality Authority, Code of good practice regarding discrimination in employment on the ground of disability, available at: http://www.no-discrimination.ombudsman.gov.cy/sites/default/files/kodikas_gia_diakriseis_logo_anapirias_ergasia.pdf.

Croatia

- Disability Ombudsperson's report for 2014, p. 31, available at: http://www.posi.hr/index.php?option=com_joomdoc&task=cat_view&gid=55&Itemid=98.

Czech Republic

- Commentary to the Anti-discrimination law *(Komentář k zákonu č. 198/2009 Sb. o rovném zacházení a právních prostředcích ochrany před diskriminací),* 2010.

Estonia

- Explanatory note attached to the Draft no. 975 SE (10th *Riigikogu*); available at http://www.riigikogu.ee.

Finland

- Government Proposal on Non-Discrimination Act 19/2014 [*Hallituksen esitys yhdenvertaisuuslaiksi* 19/2014 vp] available at: http://www.finlex.fi/fi/esitykset/he/2014/20140019.

Liechtenstein

- By-law of the Act on Equality of People with Disabilities (*Behindertengleichstellungsverordnung*), AEPDR/BGlV, 19 December 2006.

The Netherlands

- Explanatory Memorandum to the DDA, *Tweede Kamer*, 2001-2002, 28 169, No. 3, p. 25;
- *Kamerstukken* II 1990/91, 22 014, no. 6, p. 79.

6.3 Case law

6.3.1 Decisions of the Committee on the Rights of Persons with Disabilities

- Committee on the Rights of Persons with Disabilities, *Jungelin v Sweden* – Communication No. 5/2011 (CRPD/C/12/D/5/2011) available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD-C-12-D-5-2011&Lang=en.
- Committee on the Rights of Persons with Disabilities, *H.M. v Sweden* – Communication No. 3/2011 (CRPD/C/7/D/3/2011) available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f7%2fD%2f3%2f2011&Lang=en.

6.3.2 EU case law

- CJEU, Case 66/85, *Lawrie-Blum*, [1986] E.C.R. I-2121;
- CJEU, Case C-357/89, *Raulin*, [1992] E.C.R. I-01027;
- CJEU, Case C-138/02, *Collins*, [2004] E.C.R. I-02703
- CJEU, Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd,* [1987] E.C.R. 3719;
- CJEU, Case C-53/96, *Hermés International v FHT Marketing*, [1998] E.C.R. I-3603;
- CJEU, Case C-61/94, *Commission v Germany,* [1996] E.C.R. I-3989;
- CJEU, Case C-239/03, *Etang de Berre*, [2004] E.C.R. I-07357;
- CJEU, Case C-13/05, *Sonia Chacón Navas v Eurest Colectividades SA* [2006] E.C.R. I-6467;
- CJEU, Case C- 303/06, *S. Coleman* v. *Attridge Law and Steve Law* [2008] E.C.R. I-5603;
- CJEU, Case C-312/11 *European Commission v Italian Republic*, 4 July 2013, not yet published;
- CJEU, Joined cases C- 335/11 and C- 337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab* (C-335/11) and *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidatio*n (C-337/11) 11 April 2013, not yet published;
- CJEU, Case C-363/12 *Z.* v *A Government Department and The Board of management of a community school,* not yet published;
- CJEU, Case C-354/13, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund,* 18 December 2014, not yet published;
- CJEU, Case C-356/12, *Wolfgang Glatzel v Freistaat Bayern* of 22 May 2014, not yet published.

6.3.3 National caselaw and decisions of equality bodies

Austria

- *VwGH* 22/02/1990, 89/09/0147. [Administrative High Court Decisions];
- *OGH* 29/04/1992, 9 ObA 18/92. [Supreme Court Decisions];
- *OGH* 29/04/1992, 9 ObA 18/92. [Supreme Court Decisions];
- Administrative High Court VwGH Nr. 2006/12/0223, 17 December 2007;
- *VwGH* 22/02/1990, 89/09/0147; *VwGH* 11/06/2000, 2000/11/0096; *VwGH* 04/10/2001, 97/08/0469. [Administrative High Court Decisions].

Czech Republic

- Ombudsman, Report from inquiry No. 85/2011/DIS/JŠK *(Zpráva veřejného ochránce práv o šetření, sp. zn.:* 85/2011/DIS/JŠK*)*, 11 October 2012, available at: http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Kauzy/prace/85-2011-DIS-JSK-1_-_Diskriminace_v_zamestnani_z_duvodu_zdravotniho_postizeni_prace.pdf.
- Ombudsman, Report from inquiry No. 93/2011/DIS/*AHŘ (Zpráva veřejného ochránce práv o šetření, sp. zn.: 93/2011/DIS/AHŘ)*, 2 January 2011, available at: http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Kauzy/prace/Diskriminace_v_zamestnani_z_duvodu_zdravotniho_postizeni__bossing_a_neprijeti_primerenych_opatreni_.pdf.

Cyprus

– Equality Authority, Report No. Decision dated 04.09.2007, Ref. A.K.I. 65/2007.

France

– *Conseil d'Etat*, 30 October 2010, no 301572;
– T.A. Caen, 1st October 2009, no. 0802480.

Denmark

– Eastern High Court judgment, printed in U.2000.2350Ø;
– Maritime and Commercial Court, F-13-06 and F-19-06, judgments delivered on 31 January 2014 U2014.1223S;
– Maritime and Commercial Court, F-7-10, judgment delivered on 1 December 2014. Judgment printed in U2015.1041S;
– Maritime and Commercial Court, Judgments No. F-2-13 of 22 December 2014. Printed in U2015.1053S;
– Board of Equal Treatment, Decision No. 35/2015.

Germany

– Federal Labour Court (*Bundesarbeitsgericht)* Decision of 19.12.2013, 6 AZR 190/12;
– Federal Labour Court (*Bundesarbeitsgericht,* Decision of 18.09.2014, 8 AZR 759/13.
– Baden-Württemberg Land Labour Court (*Landesarbeitsgericht Baden-Württemberg, LAG Baden-Württemberg*), Decision of 22.06.2005, Az: 2 Sa 11/05.

Greece

– Single-Member First Instance Court of Athens, Case 2048/2008, *ΕΕρΔ 2008*, 1514;
– Ombudsman Case No 190405/2014 of on 25 February 2015;
– Ombudsman Case No 191907/2014, issued on 28 January 2015;
– Ombudsman Case No. 189977/2014, issued on 20 May 2015.

Italy

– Tribunal of Bologna of 18 June 2013 N R.G. Lav 171/2013;
– Tribunal of Pisa (*Ordinanza del Giudice del Lavoro presso il Tribunale di Pisa*) of 16 April 2015.

Ireland

– *A Hotel and A Worker,*Labour Court 2007, Determination No.EDA072;
– *A health and fitness club – and – a worker*, 2003, Labour Court Determination No. EED037;
– *A Complainant v Bus* Éireann DEC E2003-04;
– *A Nurse v Health Service Executive*, DEC-E2013-111;
– *A Worker v A company* EE/2011/795;
– *A worker v An Employer*, DEC-E2015-058.

Norway

– Agder court of Appeal, 28. June 2013 – LA-2013-45685 – RG-2013-880;
– Decision of the Equality and anti-discrimination tribunal case 21/2007.

Poland

– Judgment of 12 May 2011 r. II PK 276/10.

Romania

– *Consiliul Național pentru Combaterea Discriminării* [the National Council for Combating Discrimination (NCCD)] Decision 509 from 26.11.2012 in the file no. 433/2012, FEDRA v SC SECOM SRL.

Slovenia

– Constitutional Court Ruling No. U-I-146/07-34 of 13 November 2008.

Sweden

– Labor Court 2013 No. 78, *Equality Ombudsman v Veolia and the Swedish Bus and Coach Federation.*

The UK

– *Archibald v Fife Council [2004] UKHL 32;*
– *Griffiths v Secretary of State for Work and Pensions [2014] All ER (D) 220;*
– *Hainsworth v Ministry of Defence [2014] EWCA Civ 763;*
– *Hainsworth v Ministry of Defence UKSC 2014/0164 (1 December 2015);*
– *O'Hanlon v Commissioners of HM Revenue and Customs [2006] IRLR 840 and [2007] EWCA Civ 283;*
– *Paterson v Commissioner of Police for the Metropolis*[2007] ICR 1522, [2007] IRLR 763;

- *Project Management Institute v Latif* [2007] *Industrial Relations Law Reports 579;*
- *Royal Bank of Scotland v Ashton* UKEAT/0542/09 and 0306/10;
- Board of Equal Treatment, Decision No. 67/2013.

ANNEX OF COUNTRY SPECIFIC INFORMATION

Reasonable accommodation and accessibility obligations in employment

Country fiche

AUSTRIA

Dieter Schindlauer

Reasonable accommodation for disabled people in employment contexts is required by:

- §§ 6, 7c/4-7, Act on the Employment of People with Disabilities
  Abbreviation: BEinstG
  Date of adoption: 10 August 2005
  Entry into force: 11 August 2005
  Latest amendments: BGBl I Nr. 57/2015

For the purposes of the reasonable accommodation duty, "disability" is defined as, 'The result of a deficiency of functions that is not just temporary and is based on a physiological, mental, or psychological condition or an impairment of sensory functions which constitutes a possible barrier to participation in the labour market. Such a condition is not deemed temporary if it is likely to last for more than six months.' (§ 3, Act on the Employment of People with Disabilities)

Within the employment context...	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability	x		There has been no case so far where this question could have been clarified. The law just deals with the existence of a certain disability.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed	x		
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	The law does not state expectations.
Employers are **required** to consult others about what accommodations might be helpful		x*	
Employers are **expected** to consult others about what accommodations might be helpful		x	The law does not state expectations.
State funding is available to assist employers with the costs of accommodations	x		

Within the employment context…	Yes	No	Additional clarification
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others	x		
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable		x	

* Only applicable for the purpose of obtaining state funding for the accommodation: § 6/5 BEeinstG requires that a defined team of experts from various institutions and social partners must be consulted.

Country fiche

BELGIUM

Emmanuelle Bribosia and Isabelle Rorive

Reasonable accommodation for disabled people in employment contexts is required by:

- **Federal act pertaining to the fight against certain forms of discrimination**
  Date of adoption: 10 May 2007
  Entry into force: 9 June 2007
  Latest amendments: 17 August 2013
  Article 4, 12° and Article 14

- **Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region)**
  Date of adoption: 10 July 2008
  Entry into force: 3 October 2008
  Latest amendments: 28 March 2014
  Article 15, 6° and Article 19

- **Decree of 8 May 2002 on proportionate participation in the employment market (Flemish Community/Region)**
  Date of adoption: 8 May 2002
  Entry into force: 26 July 2002
  Latest amendments: 10 December 2012
  Article 5, § 4

- **Decree on the fight against certain forms of discrimination (French Community)**
  Date of adoption: 12 December 2008
  Entry into force: 23 January 2009
  Latest amendments: 5 December 2013
  Article 3, 9° and Article 5, 4°

- **Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of the economy, employment and vocational training (Walloon Region)**
  Date of adoption: 6 November 2008
  Entry into force: 30 December 2008
  Latest amendments: 12 January 2012
  Article 13 and Article 15, 6°

- **Decree aimed at fighting certain forms of discrimination (German-speaking Community)**
  Date of adoption: 19 March 2012
  Entry into force: 15 June 2012
  Latest amendments: /
  Article 3, 9° and Article 5, 5°

- **Ordinance related to the fight against discrimination and equal treatment in the employment field (Region of Brussels-Capital)**
  Date of adoption: 4 September 2008
  Entry into force: 26 September 2008
  Latest amendments: 14 July 2011
  Article 4, 8° and Article 14

- **Ordinance related to the promotion of diversity and the fight against discrimination in the civil service of the Region of Brussels-Capital**
  Date of adoption: 4 September 2008
  Entry into force: 26 September 2008
  Latest amendments: /
  Article 4, 12° and Article 8

- **Decree on equal treatment between persons in vocational training (*Commission communautaire française [Cocof]*)**
  Date of adoption: 22 March 2007
  Entry into force: 24 January 2008
  Latest amendments: 5 July 2012
  Article 7

- **Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (*Commission communautaire française [Cocof]*)**
  Date of adoption: 9 July 2010
  Entry into force: 3 September 2010
  Latest amendments: /
  Article 5, 8° and Article 9

For the purposes of the reasonable accommodation duty, "disability" is not defined in the Equal Treatment legislation adopted at both federal and regional/community levels. The explanatory memorandum[1] accompanying the Cooperation Agreement of 19 July 2007 relating to the concept of reasonable accommodation[2] explains that, 'by analogy with the General Federal Anti-discrimination Act, the choice has been made not to include a definition [of disability] in the Protocol. By doing so, it is intended to avoid any restrictive interpretation of the concept of disability and to make it possible for the definition of "disabled person" to evolve. In any case, it is necessary to understand the notion of disability as any lasting and important limitation of a person's participation, due to the dynamic interaction between 1) intellectual, physical, psychological or sensory impairments; 2) limitations during the execution of activities and 3) personal and environmental contextual factors (...). Any person whose participation in social or professional life is hindered or impeded, and not only the people recognised as being disabled by law, is to be regarded as a disabled person within the meaning of the present protocol.'

1 The memorandum is a comment that does not have a binding value but that the courts are likely to consider as a source of inspiration when interpreting anti-discrimination concepts.

2 *Protocole du 19 juillet 2007 entre l'État fédéral, la Communauté flamande, la Communauté française, la Communauté germanophone, la Région wallonne, la Région de Bruxelles-Capitale, la Commission communautaire commune, la Commission communautaire française en faveur des personnes en situation de handicap*, OJ (*Moniteur belge*), 20 September 2007.

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability		x	Apart from in specific circumstances, the duty arises when the employer is informed of the existence of the disability.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed		x	The degree of proactiveness required from the employer will depend on the circumstances of the case. An employer who knows that an applicant/ worker is disabled, is *expected* to make inquiries about whether RA measures are needed.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful	x		
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **required** to consult others about what accommodations might be helpful	x*		Depending on the circumstances of the case, an employer might be required/expected to consult others (occupational doctors, health experts, trade union representatives, the person responsible for diversity policy (if any) or a regional fund).
Employers are **expected** to consult others about what accommodations might be helpful	x		
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		

* Chiefly: occupational doctors and trade unions.

Country fiche

BULGARIA

Margarita Ilieva

Reasonable accommodation for disabled people in employment contexts is required by:

- Protection Against Discrimination Act,[3] Article 16;
- Integration of Persons with Disabilities Act,[4] Article 24;
- Labour Code,[5] Article 314;
- Civil Servants Act,[6] Article 30;
- Healthy and Safe Working Conditions Act,[7] Article 16, section 1, subsection 4.

For the purposes of the reasonable accommodation duty, "disability" is not specially defined, but is instead defined generally, for all purposes, including RA. Under the Integration of Persons with Disabilities Act (IPDA), § 1.1 Additional Provision, *disability* is 'any loss or impairment of the anatomical structure, physiology, or psychology of an individual'. Furthermore, under the IPDA, § 1.2 Additional Provision, *lasting disability* is an 'anatomical, physiological or psychological impairment resulting in a permanent reduction of an individual's abilities to perform activities in the manner and to the extent possible for a healthy individual, where the medical authorities have certified a reduction in working ability or have stipulated a type and degree of disability of 50% or more'.[8]

Within the employment context…	**Yes**	**No**	**Additional clarification**
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x*	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability		x	
The RA duty arises if the employer ought to know of the existence of the disability		x	
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA measures are needed		x	The duty to provide 'labour accommodation' arises only when the employer is served a written instruction to accommodate a worker/ employee by the health authorities.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **required** to consult health authorities about what accommodations might be helpful		x	Employers are **required** to comply with health authority requirements regarding what accommodations are to be provided.
Employers are **expected** to consult others about what accommodations might be helpful		x	
State funding is available to assist employers with the costs of accommodations	x		

3 Adopted September 2003, last amended April 2015.
4 Adopted September 2004, last amended December 2010 (amendments in force as of January 2011).
5 Adopted April 1986, last amended July 2014.
6 Adopted July 1999, last amended February 2015 (amendments in force as of April 2015).
7 Adopted December 1997, last amended March 2014.
8 This definition is reproduced literally in the Employment Encouragement Act, Additional Provision, § 1(29).

Within the employment context…	Yes	No	Additional clarification
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable		x	

* N/A.

Country fiche

CROATIA

Lovorka Kušan

Reasonable accommodation for disabled people in employment contexts is required by:

- Anti-discrimination Act, Official Gazette 85/2008 and 112/2012, Article 4(2);
- Labour Act, Official Gazette 93/2014, Article 41(2);
- Act on Professional Rehabilitation and Employment of Persons with Disabilities, Official Gazette 157/2013 and 152/2014;
- Rules on Incentives for the Employment of Persons with Disabilities, Official Gazette 44/2014, 2/2015 and 13/2015

For the purposes of the reasonable accommodation duty, "disability" is defined as 'a long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder a person's full and effective participation in society on an equal basis with others' (Act on Professional Rehabilitation and Employment of Persons with Disabilities, Official Gazette 157/2013 and 152/2014, Article 3(1).

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	It is imposed on all private employers.
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability			The law is not clear in this respect.
The RA duty arises if the employer ought to know of the existence of the disability			The law is not clear in this respect.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed	x		The law does not expressly regulate this issue, but it should be a part of their general duty of RA.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	

Within the employment context…	Yes	No	Additional clarification
Employers are **required** to consult others about what accommodations might be helpful			To be eligible for incentives, for each employee with a disability, the employer must provide an expert opinion from the Centre for Professional Rehabilitation, part of which is also a plan for reasonable accommodation; if the disability occurred during the employment, the employer must accommodate the employee with a disability in accordance with the expertise of the body that has established the disability.
Employers are **expected** to consult others about what accommodations might be helpful			The law is not clear.
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		

Country fiche

CYPRUS

Corina Demetriou

Reasonable accommodation for disabled people in employment contexts is required by Law for people with disabilities (N.127(I)/2000, Article 5(1A).[9]

Definition of disability

The definition of disability does not differ when claiming RA from when claiming general protection from discrimination. "Disability" is defined in law[10] as 'any form of deficiency or disadvantage that may cause bodily, mental or psychological limitation permanently or for an indefinite duration which, considering the background and other personal data of the particular person, substantially reduces or excludes the ability of the person to perform one or more activities or functions that are considered normal or substantial for the quality of life of any person of the same age who does not experience the same deficiency or disadvantage'.

9 Cyprus, Law on persons with disabilities (ΟΠερίΑτόμωνμεΑναπηρίεςΝόμος) No. 127(I)/2000), Article 5(1A). Available at www.cylaw.org/nomoi/arith/2000_1_127.pdf

10 Cyprus, Law on persons with disabilities (ΟΠερίΑτόμωνμεΑναπηρίεςΝόμος) No. 127(I)/2000), Article 2. Available at www.cylaw.org/nomoi/arith/2000_1_127.pdf

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	Although the law does not require a minimum number of employees in order for the RA duty to arise, it is likely that a small business with only a few employees would be able to argue successfully that the burden of the requested measure would be disproportionate. If the requested measure does not require any expenditure on the part of the employer, then the RA duty applies to all employers, large or small.
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability		x	Although the law is silent on this issue, it is unlikely that it will be interpreted as creating an RA duty that is conditional upon the employer's knowledge or ignorance of the disability. It is more likely to be interpreted as imposing a RA duty where the employee requests a certain RA measure, in which case knowledge must be inferred.
The RA duty arises if the employer ought to know of the existence of the disability		x	As above, although the law is silent on this issue, it is reasonable to assume that the RA duty arises where the employee requests a certain RA measure.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed		x	
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	The law is silent on this point, however it is reasonable to assume that the employee concerned must be consulted.
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful	x		As above.
Employers are **required** to consult others about what accommodations might be helpful		x	This is not a duty but an option. In the past, public sector employers have consulted the Equality Body about what RA measures are required in particular cases.
Employers are **expected** to consult others about what accommodations might be helpful		x	
State funding is available to assist employers with the costs of accommodations		x	
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	

Within the employment context…	Yes	No	Additional clarification
Employers in breach of this duty can be ordered to pay damages.	x		The law provides that, *in order to comply with the principle of equal treatment*, the employer must take RA measures so that the person with a disability may have access to a position of employment, may exercise their profession or may attend training, provided the burden is not unreasonable.* From the wording of the law, it may be inferred that a breach of the duty to provide reasonable accommodation amounts to discrimination and therefore the sanctions foreseen in the law for breaches of the non-discrimination duty (which include damages)** also apply to breaches of the RA duty. The sanctions apply only where the perpetrator has acted 'without reasonable cause'.***
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable		x	The law does not foresee such a sanction but the Equality Body often requires specific measures to be taken in its mediation initiatives.

* Cyprus, Law on persons with disabilities (ΟΠερίΑτόμωνμεΑναπηρίεςΝόμος) No. 127(I)/2000), Article 5(1A). Available at www.cylaw.org/nomoi/arith/2000_1_127.pdf

** Cyprus, Law on persons with disabilities (ΟΠερίΑτόμωνμεΑναπηρίεςΝόμος) No. 127(I)/2000), Article 9(3). Available at www.cylaw.org/nomoi/arith/2000_1_127.pdf

*** Cyprus, Law on persons with disabilities (ΟΠερίΑτόμωνμεΑναπηρίεςΝόμος) No. 127(I)/2000), Article 9(3). Available at www.cylaw.org/nomoi/arith/2000_1_127.pdf

Country fiche

CZECH REPUBLIC

David Zahumenský

Reasonable accommodation for disabled people in employment contexts is required by:

Title of the law: Law No. 198/2009, Anti-discrimination Law
Abbreviation: Anti-discrimination law
Date of adoption: 23 April 2009
Latest amendments: Law No. 89/2012
Entry into force: 1 September 2009/1 December 2009
Grounds protected: Sex, race, ethnic origin, sexual orientation, age, disability, religion, belief or other conviction, 'nationality' (in Czech: *národnost*)
Article: Section 3(2)

For the purposes of the reasonable accommodation duty, "disability" is defined in Section 5(6) of the Anti-discrimination Law as, 'Physical, sensory, mental, psychological or other disability, which impedes or may impede the right to equal treatment. It must be a long-term disability which lasts or will last, according to medical science, for at least a year'. The Explanatory Note adds that disability is a, 'Limitation which arises from a physical, mental or psychological disability that impedes an individual in participating in

professional life. It must be probable that the disability will be long-term, in order for it to fall within the scope of the Anti-discrimination law'.[11]

According to the Law on Employment[12] disabled persons are those who are considered as disabled according to the social security body[13] (people with first, second or third degree of disability or people who have another health impairment). It is not necessary for a person's condition to comply with the definition of disability according to the Law on Employment in order for them to have the right to reasonable accommodation.

Within the employment context...	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	There is no specific provision or court ruling concerning this matter.
The RA duty is imposed on public employers	x		But employees may have more difficulty in accessing employment in the public sector, which may consequently mean the requirements on public sector employers are not as great.
The RA duty arises if the employer knows of the existence of the disability	x		Section 3(2) of the Anti-discrimination Law.
The RA duty arises if the employer ought to know of the existence of the disability	x		There is no specific provision or court ruling concerning this matter.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed		x	There is no specific provision or court ruling concerning this matter.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	There is no specific provision or court ruling concerning this matter.
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	There is no specific provision or court ruling concerning this matter.
Employers are **required** to consult others about what accommodations might be helpful		x	There is no specific provision or court ruling concerning this matter.
Employers are **expected** to consult others about what accommodations might be helpful		x	There is no specific provision or court ruling concerning this matter.
State funding is available to assist employers with the costs of accommodations	x		There is no specific provision, but (for example) contributions to the creation of a protected work post, extra support for remuneration** or the costs of preparing for the employment of disabled persons*** might be understood as a contribution by the State to the costs of reasonable accommodation.
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others	x		Advantages within placing public procurement,**** income tax discount.*****
Employers in breach of this duty can be ordered to pay damages.	x		Courts as well as administrative bodies (Labour Inspectorates, Trade Inspectorates) can order damages to be paid.

11 Czech Republic, Explanatory note to the Anti-discrimination Law *(Důvodová zpráva k zákonu č. 198/2009 Sb. o rovném zacházení a právních prostředcích ochrany před diskriminací),* 2007.
12 Czech Republic, Law No. 435/2004 Coll., on employment *(Zákon č. 435/2004 Sb., o zaměstnanosti),* 13 May 2004.
13 In Czech *Orgán sociálního zabezpečení.*

Within the employment context…	Yes	No	Additional clarification
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		The Court may decide about prohibitory injunctions, ordering an employer to eliminate an unlawful situation. The practice for court rulings concerning the area of reasonable accommodation has not yet been developed.

* See Section 114 (4): 'Public service is performed by disabled employees in appropriate posts…' Czech Republic, Law No. 234/2014 on Public Services (*Zákon č. 234/2014 Sb., o státní službě),* 1 October 2014. On the other hand the provisions of the Anti-discrimination law concerning reasonable accommodation apply. The courts have not yet dealt with the application of the above-mentioned provisions of the Law on Public services.

** See Section 75 and 78 of the Law No. 435/2004 Coll., on employment *(Zákon č. 435/2004 Sb., o zaměstnanosti),* 13 May 2004. For more explanation see part 5.1. of Thematic report on Reasonable Accommodation and Accessibility Obligations in Employment.

*** See Section 73(1): Czech Republic, Law No. 435/2004 Coll., on employment *(Zákon č. 435/2004 Sb., o zaměstnanosti),* 13 May 2004.

**** Section 101 of: Czech Republic, Law No. 137/2006 Sb., on public procurement *(Zákon o veřejných zakázkách),* 14 March 2006. For more explanation see part 5.2. of the *Thematic report on Reasonable Accommodation and Accessibility Obligations in Employment.*

***** Czech Republic, Law. No. 586/1992 Coll., on income tax *(Zákon č. 586/1992 Sb., o daních z příjmů),* 20 November 1992. For more explanation see part 5.2. of the *Thematic report on Reasonable Accommodation and Accessibility Obligations in Employment.*

Country fiche

DENMARK

Pia Justesen

Reasonable accommodation for disabled people in employment contexts is required by:

Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. *[Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.].*[14]

The definition of a disability for the purposes of claiming reasonable accommodation is the same as for claiming protection from discrimination in general. Danish anti-discrimination legislation does not contain a definition of "disability" and the meaning of the disability concept has been ambiguous and arguably too narrow. Since the Supreme Court judgment of 13 June 2013, the meaning of disability should be clearer as the Supreme Court referred to the definition of disability in the EU cases Ring and Skouboe Werge of the Court of Justice of the European Union (C-335/11 and C-337/11).[15]

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability	x		

14 Consolidated Act No. 1349 of 16 December 2008.

15 U.2013.2575H.

Within the employment context…	Yes	No	Additional clarification
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed	x*		
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful	x		
Employers are **required** to consult others about what accommodations might be helpful		x	
Employers are **expected** to consult others about what accommodations might be helpful	x**		
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable		x	

* The employer is required to examine the kind of accommodation that should be established for the individual to be able to function in the job. It is not established whom the employer should consult in this process – only that an examination must be made.

** "Others" means disability rights organisations, doctors, the municipality and other experts.

Country fiche

ESTONIA

Vadim Poleshchuk

Reasonable accommodation for disabled people in employment contexts is required by Article 11 of the Law on Equal Treatment.[16]

Note: some rights might be provided under Article 10^1 of the Law on Occupational Health and Safety[17] (safety).

For the purposes of the reasonable accommodation duty, "disability" is defined as the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person which has a significant and long-term unfavourable effect on the performance of everyday activities (Article 5 of the Law on Equal Treatment).

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	Number of employees is irrelevant.
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		This interpretation corresponds to local legal tradition and practice.

16 Estonia, Law on Equal Treatment (*Võrdse kohtlemise seadus*), RT I 2008, 56, 315.

17 Estonia, Law on Occupational Health and Safety (*Töötervishoiu ja tööohutuse seadus*), RT I 1999, 60, 616.

Within the employment context…	Yes	No	Additional clarification
The RA duty arises if the employer ought to know of the existence of the disability	x		This interpretation corresponds to local legal tradition and practice.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed		x	
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **required** to consult others about what accommodations might be helpful		x	However, they may consult the working environment council for safety issues.
Employers are **expected** to consult others about what accommodations might be helpful		x	According to local practice employers are supposed to consult the Labour Inspectorate regarding the application of labour law.
State funding is available to assist employers with the costs of accommodations	x		The Law on Labour Market Services and Benefits* provides unemployed disabled people with special services (Articles 20-23). According to Article 9 (5) of the Law, all these services are only granted to disabled persons if they are necessary to overcome the disability-related obstacle to their employment, and other employment services will not be effective for finding work for the disabled persons.
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		Judicial interpretation is required.

* Estonia, Law on Labour Market Services and Benefits (*Tööturuteenuste ja -toetuste seadus*), RT I 2005, 54, 430.

Country fiche

FINLAND

Rainer Hiltunen

Reasonable accommodation for disabled people in employment contexts is required by:

The Non-Discrimination Act [*Yhdenvertaisuuslaki* (1325/2014)], Section 15(1)

The Non-Discrimination Act does not include a definition of disability and neither does the Government Proposal.[18] The Government Proposal first mentions that disability has several definitions in different Acts and then refers to the HK Danmark decision as the authoritative interpretation of disability in interpreting the Anti-discrimination Directives and to the definition in the United Nations Convention on the Rights of Persons with Disabilities.

18 Page 79, Government Proposal on the Non-Discrimination Act 19/2014 [*Hallituksen esitys yhdenvertaisuuslaiksi 19/2014 vp*] http://www.finlex.fi/fi/esitykset/he/2014/20140019.

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	All private employers have an RA duty.
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability			
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed	x		
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful	x		
Employers are **required** to consult others about what accommodations might be helpful		x	
Employers are **expected** to consult others about what accommodations might be helpful		x	
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others	x		
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable		x	

Country fiche

FRANCE

Sophie Latraverse

Reasonable accommodation for disabled people in employment contexts is required by:

- Article L1133-4 of the Labour Code adopted by Law n°2005-102 of 11 February 2005 provides that measures taken in favour of disabled workers, intending to allow access to equal treatment as foreseen by Article L5213-6 of the Labour Code, do not constitute discrimination;
- Article L 5213-6 of the Labour Code created by Law n°2005-102 of 11 February 2005, Article 24 V and 32;
- Article 6 sexies of Law 38-634 of 13 July 1983 regarding civil servants, which amended Law n°2005-102 of 11 February 2005, Article 31;
- Article 27 of Law 84-16 of 11 January 1984 regarding contractual agents of the public service, which amended Law n°2005-102 of 11 February 2005, Article 32;
- Article 2 para. 2 of Law n°2008-496 of 27 May 2008.

For the purposes of the reasonable accommodation duty, "disability" is defined in Article L 5213-6 of the Labour Code (LC), Article 6 sexies of Law 38-634 and Article 27 of Law 84-16 as the obligation of employers towards disabled workers mentioned in Article L5212-13 LC para. 1. to take, in relation to the needs dictated by the concrete situation, all necessary measures to allow disabled workers to have access

to or to keep a position of employment that corresponds to their qualifications, to execute their work, progress therein or have access to adapted professional training.

Article L5213-6 para. 2 further indicates that these measures are taken as long as the costs are not disproportionate, given the financial support awarded in application of Article L5213-10 LC.

Article L5213-6 para. 3 states that the refusal to implement reasonable accommodation can be qualified as discrimination as defined by Article L1132-1 of the Labour Code.

Article L5212-13 of the Labour Code identifies disabled workers benefiting from the obligation of reasonable accommodation as people recognised as disabled by the French authorities managing the various allowances and support awarded to disabled people in France.

In addition, private and public employers have an obligation to abide by the recommendation of the health and safety officer who issues recommendations to prevent any employment-related impact on employees' health (Article L4622-2 para. 2 LC) and provides reasonable accommodation recommendations in order to enable people to execute their work contract.

Within the employment context…	**Yes**	**No**	**Additional clarification**
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability	x		
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed	x		Implementation is supervised by the compulsory occupational health officer.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful	x		
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful	x		
Employers are **required** to consult others about what accommodations might be helpful	x		The occupational health officer, AGEFIPH*, FIPHFP** and SAMETH***
Employers are **expected** to consult others about what accommodations might be helpful	x		IDEM
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others	x		
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		The Labour Inspector can order implementation of the recommendation of the health and safety officer, failing which it initiates penal sanctions.

* *Association de Gestion du Fonds pour l'Insertion Professionnelle des personnes Handicapées* - Association for the management of the fund for the professional integration of disabled persons.

** *Fonds pour l'Insertion des Personnes Handicapées dans la Fonction Publique* - Fund for the professional integration of disabled persons in the civil service.

*** *Service d'appui pour le maintien dans l'emploi des travailleurs handicapés* – Support service for maintaining disabled persons in employment.

Country fiche

GERMANY

Matthias Mahlmann

Reasonable accommodation for disabled people in employment contexts is required by:

- Section 81.4 Social Code IX (SGB IX), 19 June 2001
- Section 241.2 Civil Code (BGB), 18 August 1896

For the purposes of the reasonable accommodation duty, "disability" is defined as follows.

Section 2 Social Code IX (*Sozialgesetzbuch IX, SGB IX*) and Section 3 of the Equal Opportunities for Disabled People Act (*Behindertengleichstellungsgesetz, BGG*) provide the most important legal definition of disability. According to these provisions, people are disabled if their physical functions, intellectual abilities or mental health have a high probability of differing from the state typical for their age for longer than six months and if, in consequence, their participation in society is impaired. This definition is close to the findings of the ECJ in C-13/05 (Chacón Navas) and further developed in C-335/11 (Ring and Skouboe Werge).

According to Section 2 Social Code IX (*Sozialgesetzbuch IX*) people are "severely disabled" (*schwerbehindert*) if their disability reduces their ability to participate in working life by at least 50%. Severe disability is the precondition for the application of special disability legislation.

People with a degree of disability of less than 50% but more than 30% are treated as severely disabled if they cannot find or maintain employment due to their disability. The degree of disability is established by the relevant authorities, applying standards defined by experts and the authorities, the details of which are contentious. A minimum impairment of 20% is necessary for a formal declaration of the degree of disability in this procedure by the authorities. If the above-mentioned threshold of a 30% reduction in the ability to participate in working life is not reached, the individual cannot under any circumstances be classed as severely disabled.

The Länder disability laws mostly follow the definition of disability contained in Section 2 SGB IX.

Within the employment context...	**Yes**	**No**	**Additional clarification**
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability	x		Judicial interpretation needed.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed	x		
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful	x		
Employers are **required** to consult others about what accommodations might be helpful			Judicial interpretation required.

Employers are **expected** to consult others about what accommodations might be helpful			Judicial interpretation required.
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		

Country fiche

GREECE

Athanasios Theodoridis

Reasonable accommodation for disabled people in employment contexts is required by:

- Article 10 of Law 3304/2005 on the application of the principle of equal treatment regardless of ethnic or racial origin, religious or other beliefs, disability, age or sexual orientation (OG 16 A /27 January 2005);
- Article 27 (1) (i) of Law 4074 /2012 on the ratification of the UN Convention on the Rights of Persons with Disabilities (OG 88 A /11 April 2012);
- Article 7 of Law 3528/2007 on the modification of the Code of Public Employees (OG 26 A /9 February 2007);
- Article 28 of Law 2831/2000 on the General Building Code (OG 140 A /13 January 2000).

In Greek law there is no definition of disability for the purposes of claiming reasonable accommodation. However, after the adoption of the above-mentioned Law 4074 /2012 (OG 88 A /11 April 2012*)* by the Greek Parliament, which ratified the UN Convention on the Rights of Persons with Disabilities, the right of persons with disabilities to enjoy 'a work environment that is open, inclusive and accessible' to them as defined in para. 1 of Article 27 of the Convention is guaranteed.

Within the employment context…	**Yes**	**No**	**Additional clarification**
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability			No such clear provision, but there could be judicial interpretation. No case law as yet.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed			No such clear provision, but there could be judicial interpretation. No case law as yet.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful			No such clear provision, but there could be judicial interpretation. No case law as yet.

Within the employment context…	Yes	No	Additional clarification
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful			No such clear provision, but there could be judicial interpretation. No case law as yet.
Employers are **required** to consult others about what accommodations might be helpful			No such clear provision, but there could be judicial interpretation. No case law as yet.
Employers are **expected** to consult others about what accommodations might be helpful			No such clear provision, but there could be judicial interpretation. No case law as yet.
State funding is available to assist employers with the costs of accommodations			Yes (very rare).
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others			No such clear provision, but there could be judicial interpretation. No case law as yet.
Employers in breach of this duty can be ordered to pay damages.			Yes.
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable			No such clear provision, but there could be judicial interpretation. No case law as yet.

Country fiche

HUNGARY

András Kádár

Reasonable accommodation for disabled people in employment contexts is required by:

- Article 15 of Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities, Paragraphs (1) and (2): 1 January 1999; Paragraphs (3) and (4): 1 January 2008;
- Article 51 Paragraph (5) of Act I of 2012 on the Labour Code: 1 July 2012;
- Article 2 Paragraph (3) of Act XXXIII of 1992 on the Status of Public Employees: 1 July 2012;
- Article 222 Paragraph (1) of Act CLXII of 2011 on the Status and Remuneration of Judges: 1 January 2013;
- Article Act LXVIII of 1997 on the Service Relationship of Employees of the Justice System: 1 January 2013;
- Act CLXIV of 2011 on the Status of the Chief Prosecutor, Prosecutors and Other Prosecutorial Employees: 1 January 2013;
- Act CXCIX of 2011 on Civil Servants: 1 March 2012.

Disability is not defined for the purposes of the reasonable accommodation duty in the Labour Code (which contains this obligation expressly). However, Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities, which also contains relevant provisions, provides a definition: under Article 4 of this act, persons with disabilities are those who have irreversible or long-term sensory, communication-related, physical, intellectual or psychosocial impairments or the accumulation thereof, which in interaction with significant environmental, societal or other barriers restrict or hinder their full and effective participation in society on an equal basis with others.

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		With the exception of armed forces.
The RA duty arises if the employer knows of the existence of the disability	x		Not expressly stated in law, but can be inferred from general labour law principles.
The RA duty arises if the employer ought to know of the existence of the disability		x	Based on employee's obligation to cooperate and disclose information that is important from the point of view of the job.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed	x		Not expressly stated in law, but can be inferred from general labour law principles.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful	x		Not expressly stated in law, but can be inferred from general labour law principles.
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **required** to consult others about what accommodations might be helpful		x	
Employers are **expected** to consult others about what accommodations might be helpful		x	
State funding is available to assist employers with the costs of accommodations	x		In practice, only specialised employers receive funding for strictly interpreted reasonable accommodation, while "general" employers receive supplementary – and time-restricted – funding for the wages/salary of newly employed persons with disabilities.
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		In principle, yes, but courts are often reluctant to interpret the relevant provisions in a manner which would allow such an application.

Country fiche

Ireland

Orlagh O'Farrell

Reasonable accommodation for disabled people in employment contexts is required by the Employment Equality Act 1998-2011 (hereafter the EEA)

- EEA 1998-2011, Section 16(3) and (4), Section 34. Date of adoption: 18 June 1998; entry into force: 18 October 1999.

For the purposes of the reasonable accommodation duty, "disability" is defined as:

(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 without the condition or malfunction;
(e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour.

Furthermore, disability 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 (EEA Section 2(1)).

Within the employment context…	**Yes**	**No**	**Additional clarification**
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	The duty is imposed on all employers but appropriate measures required under RA must not impose a "disproportionate burden" on the employer, which might vary according to the size of the company (EEA s. 16(3)(b) and (c)).
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability	x		
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed	x		
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful	x		
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **required** to consult others about what accommodations might be helpful	x		
Employers are **expected** to consult others about what accommodations might be helpful		x	
State funding is available to assist employers with the costs of accommodations	x		The Workplace/Equipment Adaptation Grant provides funding towards the costs of modifications or special equipment that will allow a disabled person to take up an offer of employment or to remain in employment. Grants for employers to retain employees with disabilities: the Employment Retention Grant Scheme is a scheme that aims to assist employers to retain employees who acquire an illness or impairment that affects their ability to carry out their job.

Within the employment context…	Yes	No	Additional clarification
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		

Country fiche

Iceland

Gudrun D. Gudmundsdottir

Reasonable accommodation for disabled people in employment contexts is required by:

- The Act on the Affairs of People with Disabilities No. 59/1992

For the purposes of the reasonable accommodation duty, "disability" is defined as 'a mental or physical disability which calls for special services or assistance; including intellectual disability, psycho-social disability, reduced mobility, sight and hearing impairment. Disability may also be the result of prolonged illness and accidents.'[19]

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers		x	Article 29 of the Act on the Affairs of Persons with Disabilities 59/1992 simply states that persons with disabilities shall be given assistance, when necessary, in order to hold jobs. This is done through special personal support in the workplace, as well as through information and instructions for other workers. People with disabilities have access to vocational training in private enterprises and institutions, where possible. In such cases, a special agreement is concluded, setting out, inter alia, the period of training and the costs involved. The costs incurred because of special assistance in the workplace are paid for by the State Treasury.
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers		x	No explicit duty is set out, however, Article 30 of the Act on the Affairs of People with Disabilities No. 59/1992 sets out that in each service area there shall be jobs available in the general labour market for people with disabilities. This would mean that some RA is necessary but it is not formulated as a duty on individual employers. In addition, Article 39 sets out that people with disabilities shall have priority for public-sector jobs when they are equally or more qualified than other applicants. The result would be that the employer in question would be obliged to provide RA for the new employee with disabilities.

19 This is not a definition explicitly in relation to reasonable accommodation; it is an enumeration of those entitled to assistance under the Act on the Affairs of People with Disabilities No. 59/1992, see Article 2.

Within the employment context…	Yes	No	Additional clarification
The RA duty arises if the employer knows of the existence of the disability		x	
The RA duty arises if the employer ought to know of the existence of the disability		x	
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed		x	
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **required** to consult others about what accommodations might be helpful		x	
Employers are **expected** to consult others about what accommodations might be helpful		x	
State funding is available to assist employers with the costs of accommodations	x		Article 29 of the Act on the Affairs of Persons with Disabilities 59/1992 states that persons with disabilities shall be given assistance, when necessary, to hold jobs. This is done through special personal support in the workplace, as well as through information and instructions for other workers. People with disabilities have access to vocational training in private enterprises and institutions, where possible. In such cases, a special agreement is concluded, setting out, inter alia, the period of training and the costs involved. **The costs incurred because of special assistance in the workplace are paid for by the State Treasury.**
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.		x	
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable		x	

ITALY

Chiara Favilli

Reasonable accommodation for disabled people in employment contexts is required by:

- Article 3 (3-*bis*) of Legislative decree 216/2003

"Disability" is not defined for the purposes of the reasonable accommodation duty.

Within the employment context…	**Yes**	**No**	**Additional clarification**
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability		x	
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed	x		
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful	x		
Employers are **required** to consult others about what accommodations might be helpful		x	
Employers are **expected** to consult others about what accommodations might be helpful	x		
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		

Country fiche

LATVIA

Anhelita Kamenska

Reasonable accommodation for disabled people in employment contexts is required by:

- Labour Law,[20] Section 7 (3), 22 April 2004

20 Latvia, Labour Law (*Darba likums*), 22 April 2004, Section 7 (3), available in Latvian at http://likumi.lv/ta/id/88260-grozijumi-darba-likuma.

In Latvian legislation "disability" is defined in the Disability Law and is a long-term or non-transitory very severe, severe or moderate level of limited functioning, which affects a person's mental or physical abilities, ability to work, to look after themselves and their integration into society.[21] There are three possible degrees of disability, in accordance with the provisions of the Law, depending on the severity of the impairment. The law specifies moderate disability as the loss of 25-59% of the capacity to work, severe disability as the loss of 60-79% of the capacity to work and very severe disability as the loss of 80-100% of the capacity to work. The definition in Latvian law (Section 5 (1) of the Disability Law) is narrower than the concept of disability in Skouboe Werge and Ring[22] (based on Article 1 UNCRPD), as it refers only to people who have been assessed as having one of the three degrees of disability by the State Medical Commission for the Assessment of Health Condition and Working Ability.

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x*	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability			
The RA duty arises if the employer ought to know of the existence of the disability		x	
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed		x	
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **required** to consult others about what accommodations might be helpful		x**	
Employers are **expected** to consult others about what accommodations might be helpful	x***		
State funding is available to assist employers with the costs of accommodations	x****		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable		x	

* N/A

** Ergotherapist/ occupational therapist.

*** If the employer participates in a state co-subsidised scheme for creating jobs specifically for people with disabilities run by the State Employment Agency.

**** Only if the employer participates in a scheme for creating jobs specifically for people with disabilities run by the State Employment Agency; in other cases the costs are borne by the employer.

21 Latvia, Disability Law (*Invaliditātes likums*), 25 May 2010. Article 5 (1), available in Latvian at http://likumi.lv/ta/id/88260-grozijumi-darba-likuma.

22 CJEU, joined cases C-335/11 and C-337/11, judgment of 11 April 2013.

Country fiche

LIECHTENSTEIN

Wilfried Marxer / Patricia Hornich

Reasonable accommodation for disabled people in employment contexts, in terms of providing a duty which focuses on accessibility to reasonable accommodation for people with disabilities, is required by:

- Act on Equality of People with Disabilities (*Behindertengleichstellungsgesetz*),[23] AEPD/BGlG, 25 October 2006, Article: 11 -14;
- By-law of the Act on Equality of People with Disabilities (*Behindertengleichstellungsverordnung*),[24] AEPDR/BGlV, 19 December 2006.

The above acts provide regulations concerning buildings and public transport facilities regarding accessibility and suitability for people with disabilities. These rules can be seen as a general duty to provide accessibility, which exists in the absence of an individual request.

Reasonable accommodation under Liechtenstein law refers not to the duty to provide reasonable accommodation for people with disabilities in general, as no national law exists for that purpose. Article 7 §3 of the AEPD[25] states that indirect discrimination is also considered to exist if no attempts were undertaken to accommodate the situation of the person concerned. If the indirect discrimination is a consequence of barriers, Article 7 §4 of the AEPD states that it must be proved whether legal provisions regarding accessibility exist and, if so, whether the legal tasks are fulfilled.

Within the employment context…	**Yes**	**No**	**Additional clarification**
The RA duty is imposed on private employers		x	
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		The law does not contain any explicit regulations but from the definition provided it could be assumed that the legal obligation exists in general with regard to public buildings.
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability		x	The law is silent about this issue.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed	x		The law is silent about any specific duty, but from the regulations regarding indirect discrimination such a duty can be assumed.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	The law is silent about such a requirement.
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful	x		The law is silent about any specific duty, but from the regulations regarding indirect discrimination such a duty can be assumed.

23 *Gesetz vom 25. Oktober 2006 über die Gleichstellung von Menschen mit Behinderungen* (*Behindertengleichstellungsgesetz; BGlG*), LGBl. 2006, no. 243. Source: https://www.gesetze.li/get_pdf.jsp?PDF=2006243.pdf.

24 *Verordnung vom 19. Dezember 2006 über die Gleichstellung von Menschen mit Behinderungen* (*Behindertengleichstellungsverordnung; BGlV*), LGBl. 2006, no. 287. Source: http://maidstone.advanced.li/Portals/0/docs/PDF-Dateien/Behindertengleichstellungsgesetz/verordnung_behindertengeleichstellungsverordnung.pdf.

25 *Gesetz vom 25. Oktober 2006 über die Gleichstellung von Menschen mit Behinderungen* (*Behindertengleichstellungsgesetz; BGlG*), LGBl. 2006, no. 243.

Within the employment context…	Yes	No	Additional clarification
Employers are **required** to consult others about what accommodations might be helpful		x	The law is silent about such a specific requirement.
Employers are **expected** to consult others about what accommodations might be helpful		x	
State funding is available to assist employers with the costs of accommodations	x		Based on Art. 20 of the AEPD, state funding is possible in certain cases but not on a general basis.
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others	x		Based on Art. 20 of the AEPD, state funding is possible in certain cases, e.g. pilots.
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		

Country fiche

LITHUANIA

Gediminas Andriukaitis

Reasonable accommodation for disabled people in employment contexts is required by:

- Law on Equal Treatment (date of adoption: 18 November 2003; entry into force: 1 January 2005; latest amendments: 2 July 2013).

Article 7 (9) states that when applying equal treatment employers must 'take appropriate measures to provide conditions for disabled people to obtain work, to work, to pursue a career or to study, including adapting premises, provided that the employer would not be disproportionately burdened with duties as a result'.

"Disability" is not defined in the Law on Equal Treatment for the purposes of the reasonable accommodation duty.

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		The law does not elaborate on this. Judicial interpretation is required.
The RA duty arises if the employer ought to know of the existence of the disability	x		The law does not elaborate on this. Judicial interpretation is required.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed		x	The law does not elaborate on this. Judicial interpretation is required.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	The law does not elaborate on this. Judicial interpretation is required.
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	The law does not elaborate on this. Judicial interpretation is required.

Within the employment context…	Yes	No	Additional clarification
Employers are **required** to consult others about what accommodations might be helpful	x		
Employers are **expected** to consult others about what accommodations might be helpful	x		
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others	x		
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		The law does not elaborate on this. Judicial interpretation is required.

Country fiche

LUXEMBOURG

Tania Hoffmann

Reasonable accommodation for disabled people in employment contexts is required by:

- Article 8 of the modified law dated 12 September 2003 on disabled persons

For the purposes of the reasonable accommodation duty, "disability" is defined as reduced working capacity, whether the cause is natural or accidental, due to a work accident or armed conflict (Law of 12 September 2003 on disabled persons Mémorial A-144 29 September 2003. P.2938 doc parl. 4827).

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		Only people who have a 30% disability and have been officially recognised as such are entitled to claim reasonable accommodation.
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		Only people who have a 30% disability and have been officially recognised as such are entitled to claim reasonable accommodation.
The RA duty arises if the employer knows of the existence of the disability	x		Only people who have a 30% disability and have been officially recognised as such are entitled to claim reasonable accommodation.
The RA duty arises if the employer ought to know of the existence of the disability		x	
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed		x	
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	

Employers are **required** to consult others about what accommodations might be helpful		x	
Employers are **expected** to consult others about what accommodations might be helpful		x	
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.		x	
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable		x	

Country fiche

MALTA

Tonio Ellul

Reasonable accommodation for disabled people in employment contexts is required by:

- Equal Opportunities (Persons with Disability) Act (date of adoption: 10 February 2000; entry into force: 1 October 2000; Article 7);
- Equal Treatment in Employment Regulations (date of adoption: 5 November 2004; entry into force: 5 November 2004; Article 4°).

For the purposes of the reasonable accommodation duty, "disability" is defined in Article 2 of the Equal Opportunities (Persons with Disability) Act as a long-term physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may hinder an individual's full and effective participation in society on an equal basis with others.

Within the employment context…	**Yes**	**No**	**Additional clarification**
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability			The law makes no provision on this.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed			The law makes no provision on this.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful			The law makes no provision on this.
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful			The law makes no provision on this but it is assumed.
Employers are **required** to consult others about what accommodations might be helpful			The law makes no provision on this.
Employers are **expected** to consult others about what accommodations might be helpful			The law makes no provision on this.

Within the employment context…	Yes	No	Additional clarification
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others			The law makes no provision on this.
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		

Country fiche

THE NETHERLANDS

Rikki Holtmaat

Reasonable accommodation for disabled people in employment contexts is required by:

- Disability Discrimination Act (DDA), adopted on 3 April 2003, entered into force on 1 December 2003, last amended on 7 November 2011, Article 2:

'The prohibition of making a distinction also includes the duty for the person to whom the prohibition is addressed, to make effective accommodations in accordance with the necessity thereto, unless doing so would constitute a disproportionate burden upon him or her.'

For the purposes of the reasonable accommodation duty, "disability" is not defined under Dutch equality law. However, unlike the EU level of protection, in addition to "disability", "chronic disease" is also explicitly included as a ground in the DDA. With regard to the definition, some guidelines can be derived from the *travaux préparatoires* for the DDA and cases brought to the then Equal Treatment Commission (ETC, now the Netherlands Institute of Human Rights, NIHR). Criteria mentioned during the preparation of the DDA were, amongst others, the long duration of the disability or chronic disease and the fact that – in the case of disability – the impairment is irreversible. This means that temporary disability as a consequence of an accident is excluded.[26]

According to the Explanatory Memorandum to the DDA, the concept of disability may cover not only physical, but also intellectual and psychological impairments.[27] The Government is of the opinion that the question of what constitutes a disability is not only dependent on the physical or psychological characteristics of the individual, but also on the physical and social environment that allows/does not allow a person to participate on an equal footing. The NIHR has accepted this line of reasoning and – considering the goal of the DDA – interprets the terms "disability" and "chronic disease" in an extensive way and in accordance with the case law of the CJEU.[28]

26 See the Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 9 and p. 24 and no. 5, p. 16. See also ETC 2005-234.
27 Tweede Kamer, 2001-2002, 28 169, no. 3, p. 24.
28 See e.g. ETC 2005-234, 2006-227, 2007-25, 2009-62, 2009-102 and 2011-78.

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	There is no threshold, but the number of employees does influence the assessment of whether the accommodation constitutes a "disproportionate burden".
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability		x	
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed		x	
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful	x		'The effectiveness and necessity of an accommodation must be determined using objective criteria. The opinion of the employee is important but not decisive.' ETC 2007-128, para. 3.9.
Employers are **required** to consult others about what accommodations might be helpful		x	
Employers are **expected** to consult others about what accommodations might be helpful		x	This is not obligatory, but usually at least an occupational health expert will be involved.
State funding is available to assist employers with the costs of accommodations	x		Financial compensation is, for example, offered through Art. 36 of the Work and Income according to Labour Capacity Act (WIA).
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.	x		In the Netherlands failure to meet the duty of reasonable accommodation does count as discrimination, or more specifically, as a form of forbidden distinction, for which the ordinary sanctions can be imposed.
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		Besides damages, civil law courts can also order the illegal situation to be rectified.

Country fiche

NORWAY

Else Leona McClimans

Reasonable accommodation for disabled people in employment contexts is required by:

- Anti-Discrimination and Accessibility Act (AAA) of 21 June 2013, No 61 Section 26;
- Working Environment Act (WEA) of 17 June 2005, No 62, Section 4-6.

For the purposes of the reasonable accommodation duty, "disability" is not legally defined, but is formulated in the legislative preparatory works as 'reduced functional ability regarding physical, mental or cognitive abilities'.[29] The social element of the reduced functional ability and the interaction with the environment in working life is also covered by the employer's general duty of accommodation in the WEA, Section 4-6. The Norwegian definition of disability is much wider than the definition of disability in the EU directives.[30]

Within the employment context…	**Yes**	**No**	**Additional clarification**
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees	x		
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability		x	If the employer can see the disability, the duty of the employer arises. If the disability is unseen, it is up to the employee to inform the employer before such a duty arises.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed	x		
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful	x		
Employers are **required** to consult others about what accommodations might be helpful		x	Not required, but often done, as is seen as useful. In particular, the National Welfare Service (NAV) which may provide funding.
Employers are **expected** to consult others about what accommodations might be helpful		x	Not expected, but often done, as is seen as useful. In particular, the National Welfare Service (NAV) which may provide funding.
State funding is available to assist employers with the costs of accommodations	x		

29 See *travaux préparatoires* to the AAA, NOU 2005:8 *Likeverd og tilgjengelighet* (Equal worth and accessibility) pp. 162-163.

30 For more information on the concept of disability, see a recently released report on 'The right to reasonable accommodation – a summary' (*Forbudet mot diskriminering på grunn av nedsatt funksjonsevne. Rett til individuell tilrettelegging for arbeidstakere og arbeidssøkere med nedsatt funksjonsevne – en oppsummering*) from the Equality and Anti-Discriminiation Ombud, published in Norwegian in April 2014, available at http://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/diverse-pdf1/diverse-pdf/oppsummering-individuell-tilrettelegging-270314.pdf (accessed on 10 April 2015). The author states on page 33 that, 'It is important to note that the ECJ in the judgment of 2013 interprets the definition of disability much more widely than previously in light of the CRPD, in line with the dynamic interpretation of the definition that the Convention asks for in its preamble, para. e. This is more in line with Norwegian case law, which may give further case law (from the ECJ) more adapted to and relevant for Norwegian conditions.' (author's translation).

Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others	x		
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		The Court has the power to order particular accommodations.

Country fiche

POLAND

Łukasz Bojarski

Reasonable accommodation for disabled people in employment contexts is required by Article 23a of the Act of 27 August 1997 on the Vocational and Social Rehabilitation and Employment of Disabled Persons (*Ustawa z 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*) [hereafter 'Disabled Persons Act']. The Act was amended by the Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (*Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), which introduced the concept of reasonable accommodation.

There is no special definition of disability for the purposes of the reasonable accommodation duty. The Disabled Persons Act includes a definition of disability stipulating that a disabled person is someone whose disability has been confirmed by a competent medical authority.[31] Elsewhere, disability is defined as a permanent or temporary inability to carry out social functions due to a permanent or long-term impairment of performance of the human organism, in particular, resulting in incapacity to work.[32] There are three levels of disability: mild, moderate and severe.[33] In particular cases, however, the court is not bound by the definition of the disability in the Act and must decide itself whether the person concerned is disabled or not. The court may take into account the definition contained in the Disabled Persons Act, but it may go beyond this definition, in line with international law, including Directives and jurisprudence of the CJEU.

Within the employment context…	**Yes**	**No**	**Additional clarification**
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability		x	
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed		x	
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	

31 Article 1 Disabled Persons Act.
32 Compare Article 2.10 Disabled Persons Act.
33 Article 3.1 Disabled Persons Act.

Within the employment context…	Yes	No	Additional clarification
Employers are **required** to consult others about what accommodations might be helpful		x	
Employers are **expected** to consult others about what accommodations might be helpful		x	
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others	x		
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable		x	

Country fiche

PORTUGAL

Ana Maria Guerra Martins

Reasonable accommodation for disabled people in employment contexts is required by:

- Article 86 of the Labour Code

For the purposes of the reasonable accommodation duty, "disability" is defined as "the situation of someone who, because of loss or irregularity, whether congenital or acquired, of bodily functions or structures, including psychological functions, has specific difficulties that are likely, in combination with environmental factors, to limit or hinder their activity and participation on equal terms with others" (Article 2 of the Law 38/2004, of 18 August 2004).

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees			
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability	x		
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed		x	
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **required** to consult others about what accommodations might be helpful		x	
Employers are **expected** to consult others about what accommodations might be helpful		x	

State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		

Country fiche

ROMANIA

Romanița Iordache

Reasonable accommodation for disabled people in employment contexts is required by the following laws:

- RA is defined as a provision for the person with disabilities and not as a duty for the employer and no sanction is provided in the Disability Act, Law 448/2006 on the protection and promotion of the rights of persons with disabilities, adopted on 6 December 2006, latest amendments from 12 May 2014 in Article 5(4).
- The national equality body and the courts have interpreted the general prohibition of discrimination in employment in Articles 5-8 of the Anti-discrimination Law as applicable to failure to ensure reasonable accommodation based on the Anti-discrimination Law, Governmental Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination, adopted on 31 August 2000 and amended for the last time on 25 June 2014.

For the purposes of the reasonable accommodation duty, "disability" is defined based on the general definition of disability (the actual term used in Romanian legislation is *'handicap')* in Article 2 of Law 448/2006 stating that, 'disabled persons shall be those persons who, due to a physical, mental or sensory condition, do not have the ability to perform day-to-day activities normally and require protection measures in support of their social recovery, integration and inclusion'.

Within the employment context…	**Yes**	**No**	**Additional clarification**
The RA duty is imposed on private employers	x		The legislation does not provide for a duty but for a benefit for the person with a disability, without actually creating a mechanism of enforcement or a sanction for the breach of RA provision in employment.
The RA duty is imposed on private employers above a certain number of employees	x		There is no guidance as to the minimum number of employees as there is no provision on what reasonable means.
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability			No specific provision.
The RA duty arises if the employer ought to know of the existence of the disability			No specific provision.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed			No specific provision.

Within the employment context…	Yes	No	Additional clarification
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	No specific provision.
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	No specific provision.
Employers are **required** to consult others about what accommodations might be helpful		x	No specific provision.
Employers are **expected** to consult others about what accommodations might be helpful		x	No specific provision.
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others	x		
Employers in breach of this duty can be ordered to pay damages.	x		If a case is filed with the civil courts based on the anti-discrimination legislation.
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		If a case is filed with the civil courts based on the anti-discrimination legislation.

Country fiche

SLOVAKIA

Janka Debrecéniová

Reasonable accommodation for disabled people in employment contexts is required by the Anti-discrimination Act and the Labour Code. The respective provisions of the Labour Code are also applicable to the field of public service.

- Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination and on Changing and Supplementing Other Laws (Anti-discrimination Act) (*zákon č. 365/2004 Z. z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon)*), in effect from 1 July 2004, Sections 7 and 2(3);
- Act No 311/2001 Coll. Labour Code, as amended (*zákon č. 311/2001 Z. z. Zákonník práce v znení neskorších predpisov*), in effect from 1 April 2002, Article 8 of the Basic Principles and Sections 158, 159 and 87(3).

"Disability" is not defined in the Anti-discrimination Act for the purposes of the reasonable accommodation duty (and it is not defined in the Anti-discrimination Act for any other purpose either).

The Labour Code defines an 'employee with a disability' (for the purposes of the Labour Code only) as an employee who is officially recognised as disabled on the basis of the Social Insurance Act[34] and who submits to their employer a decision proving entitlement to a disability pension.[35] Given that the definition of disability contained in the Labour Code is in breach of the definition of disability as stipulated

34 Act. No. 461/2003 Coll. on Social Insurance, as amended *(Zákon č. 461/2003 Z. z. o sociálnom poistení v znení neskorších predpisov)*. The Social Insurance Act defines the following conditions to qualify for a disability pension (see Sections 70-72 of the Act No 461/2003 Z. z. on Social Insurance, as amended):
at least 40% loss of the ability to work (when compared to a "healthy" person);
attainment of a sufficient number of years of pension insurance;
long-term unfavourable state of health, i.e. state of health causing a loss of ability to perform gainful activities expected, on the basis of medical assessment, to last at least one year.

35 Section 40(8) of the Labour Code.

by the CJEU and the Convention on the Rights of Persons with Disabilities,[36] it is questionable whether the reasonable accommodation provisions contained in the Labour Code are applicable to disability as defined by the CJEU and the Convention on the Rights of Persons with Disabilities, or whether they apply only to disability in the narrow sense (as defined by the Labour Code) – especially if they cover issues that are not explicitly covered by the Employment Equality Directive.

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		The RA duty is imposed on all private and public employers.
The RA duty is imposed on private employers above a certain number of employees		x	There is no threshold in terms of a minimum number of employees in order for the RA duty to arise.
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability			Slovak legislation is silent on this question and it is hard to infer the answer from an interpretation of existing law.
The RA duty arises if the employer ought to know of the existence of the disability			Slovak legislation is silent on this question and it is hard to infer the answer from an interpretation of existing law.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed			Slovak legislation is silent on this question and it is hard to infer the answer from an interpretation of existing law.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	
Employers are **required** to consult employees´ representatives about what accommodations might be helpful	x		
Employers are **expected** to consult others about what accommodations might be helpful		x	
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others			There might be some state grant schemes (such as the EU-funded Operational Programme on Human Resources) that might provide (indirect) opportunities for some employers to acquire resources for providing reasonable accommodation to disabled applicants/employees, but these are not widely known and/or are extremely difficult to access and/or administer.
Employers in breach of this duty can be ordered to pay damages.	x		

36 The Social Insurance Act defines the following conditions to qualify for a disability pension (see sections 70-72 of the Act No 461/2003 Z. z. on Social Insurance, as amended):
at least 40% loss of the ability to work (when compared to a "healthy" person);
attainment of a sufficient number of years of pension insurance;
long-term unfavourable state of health, i.e. state of health causing a loss of ability to perform gainful activities expected, on the basis of medical assessment, to last at least one year.

Within the employment context…	Yes	No	Additional clarification
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		

Country fiche

SLOVENIA

Neža Kogovšek Šalamon

Reasonable accommodation for disabled people in employment contexts is required by:

- Vocational Rehabilitation and Employment of Persons with Disabilities Act (*Zakon o zaposlitveni rehabilitaciji in zaposlovanju invalidov*), Official Journal of the Republic of Slovenia, No. 63/2004. Date of adoption: 21 May 2004; entry into force: 25 June 2004; latest amendments: 19 October 2011. Relevant articles: Article 37.
- Act on Equal Opportunities for People with Disabilities (*Zakon o uresničevanju načela enakega obravnavanja – uradno prečiščeno besedilo*), Official Journal of the Republic of Slovenia, No. 93/07. First adopted on 22 April 2004; entered into force on 7 May 2004; date of latest amendment: 22 June 2007. Relevant article: Article 3, § 3.
- Employment Relationship Act (*Zakon o delovnih razmerjih*), Official Journal of the Republic of Slovenia, No. 21/13 and 78/13. Adopted on 5 March 2013; entered into force 12 April 2013. Relevant Articles: Article 196.

For the purposes of the reasonable accommodation duty, "disability" is defined as follows:

- According to the Vocational Rehabilitation and Employment of Persons with Disabilities Act the term "persons with disabilities" applies to a person who has obtained the status of a person with disabilities according to the Pension and Disability Insurance Act, or according to any other regulation, and to a person for whom the consequences of a permanent physical or mental malfunction or disease have been ascertained by an administrative decision, and whose chances of obtaining or retaining a job or obtaining promotion are substantially reduced. In accordance with Article 63, § 2 of the Pension and Disability Insurance Act, employees with disabilities are assigned to three categories, according to their remaining capacity to work. Those in the first category are not capable of any work, while those in the second and third categories are able to work but subject to certain limitations or after rehabilitation. The status of a person with disabilities is granted if the impairment to the insured individual's health cannot be reversed by medical treatment or medical rehabilitation, such impairments have been determined according to the Pension and Disability Insurance Act, and result in decreased ability to obtain or to retain a job or be promoted.
- According to the Act on Equal Opportunities for People with Disabilities, people with disabilities are those who have long-term physical, mental or sensory impairments and disturbances in their mental development which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		This is not defined by law, but by logic the employer must somehow know about the disability.

Within the employment context…	Yes	No	Additional clarification
The RA duty arises if the employer ought to know of the existence of the disability		x	Not defined by law.
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed		x	Not defined by law.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	Such a duty is not defined by law.
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful		x	Such an expectation is not defined by law.
Employers are **required** to consult others about what accommodations might be helpful		x	Such a duty is not defined by law.
Employers are **expected** to consult others about what accommodations might be helpful		x	Such an expectation is not defined by law.
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	
Employers in breach of this duty can be ordered to pay damages.	x		Yes, if so ordered by a court.
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable		x	No such specific remedy available.

Country fiche

SPAIN

Lorenzo Cachón

Reasonable accommodation for disabled people in employment contexts is required by:

General Law on the Rights of Persons with Disabilities and their social inclusion (RDL 1/2013, of 29 November 2013 (BOE, 3 December 2013) (Article 2.m and 63); Law 31/1995, of 8 November 1995, on the prevention of occupational risks (BOE, 10 November 1995) (Articles 14, 15 and 25); and Royal Decree 39/1997, of 17 January, on the Regulation of Prevention Services (BOE, 31 January 1997).

For the purposes of the reasonable accommodation duty, "disability" is defined in RDL 1/2013, Article 4.1: 'Persons with disabilities are those who have physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others'. It provides that, 'For the purposes of this law, persons with a disability shall be deemed to be those with a recognised degree of impairment equal to or greater than 33%'" (Article 4.2).

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability		x	

If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed	x		
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful	x		
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful	x		Employers are *required* to consult and then *expected* to provide reasonable accommodation.
Employers are **required** to consult others about what accommodations might be helpful		x*	
Employers are **expected** to consult others about what accommodations might be helpful	x		
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others	x		
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable	x		

* "Others" means health experts, doctors, ICT experts, trade unions, etc.

Country fiche

SWEDEN

Per Norberg

Reasonable accommodation for disabled people in employment contexts is required by:

- Discrimination Act (2008:567), Chapter 1 Section 4 point 3 in conjunction with Chapter 2 Section 1;
- Employment Protection Act (1982:80), Section 7 (in conjunction with the two acts below);
- Social Security Code (2010:110), Chapters 29-30 (contains the employer's duty towards permanently sick (i.e. disabled) individual employees);
- Work Environment Act (1977:1160). This act regulates the general duty of employers to have a working environment that is safe and can be adapted to the needs of the employees.

The definition of disability is the same in all areas of the Discrimination Act. There is no special definition with regard to reasonable accommodation.

According to Ch. 1 Sec. 5 p. 4 disability means:

'[P]ermanent physical, mental or intellectual limitation of a person's functional capacity that is a consequence of an injury or illness that existed at birth, has arisen since then or can be expected to arise.'

The definition is thus stated in general terms, a requirement being that the limitation is "permanent", i.e. the limitations in functional capacity must be long-lasting. For example, a person with a broken arm will not be covered by the law, since the disability caused is of a passing nature. There is no threshold of "severity", or a reference to the ability to engage in "normal life activities" or "professional life". The latter is part of the assessment as regards "similar situation". However, until there is clear case law on the point it will be difficult to define the issues more specifically.

Within the employment context…	Yes	No	Additional clarification
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees			
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability	x		
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed	x		No case law but it seems to be self-evidently the case.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful	x	x	With regard to dismissals, normally the trade union represents the worker (both may be present when reasonable accommodation is discussed), but with regard to applicants and jobs not represented by a trade union it would be the worker the employer consults with.*
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful	x		
Employers are **required** to consult others about what accommodations might be helpful	x	x	There is a duty to co-operate with the National Social Insurance Agency but this duty is only indirectly sanctioned.**
Employers are **expected** to consult others about what accommodations might be helpful	x		
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	Generally speaking, this is true, but special rules cover adaptation of computer programmes which potentially benefits others. With regard to new employees, the potential benefit to others could be used as an argument to exceed the soft funding limit.
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable		x	Not with regard to individual cases.***

* The general formal and directly sanctioned duty is to consult with the trade union. Not fulfilling this will lead to a civil damage claim in relation to the trade union (according to rules in the Co-determination Act). A formal duty to consult with the individual worker leading to damages exists only when a dismissal is imminent (Employment Protection Act Section 30). Therefore neither a Yes nor a No seems appropriate.

** Since the word "required" is in bold, the indirect sanction of increased risk of having a dismissal declared unjust according to the Employment Protection Act that follows violations of the obligations in Chapter 30 of the Social Security Code seems hard to assess as a clear Yes or No.

*** The Work Environment Act contains these possibilities but its application must benefit the workers as a collective. A reasonable accommodation measure tailored to the needs of a certain individual would not be legal.

Country fiche

UNITED KINGDOM

Aileen McColgan

Reasonable accommodation for disabled people in employment contexts is required by the Equality Act 2010 ss21 & 21, 39-52 and Sch 8 (date of adoption: 8 April 2010; entry into force: 1 October 2010; latest amendments: 5 April 2013).

According to s6 of the Equality Act 2010, 'A person (P) has a disability if (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities'.

Within the employment context…	**Yes**	**No**	**Additional clarification**
The RA duty is imposed on private employers	x		
The RA duty is imposed on private employers above a certain number of employees		x	
The RA duty is imposed on public employers	x		
The RA duty arises if the employer knows of the existence of the disability	x		
The RA duty arises if the employer ought to know of the existence of the disability	x		
If the employer has the required degree of knowledge of the existence of a disability s/he is under a duty to inquire whether RA are needed		x	Not as such but a failure to do so will likely result in a failure to make reasonable adjustments which amounts in turn to discrimination.
Employers are **required** to consult the disabled person concerned about what accommodation might be helpful		x	Not as such but a failure to do so will likely result in a failure to make reasonable adjustments which amounts in turn to discrimination.
Employers are **expected** to consult the disabled person concerned about what accommodation might be helpful	x		
Employers are **required** to consult others about what accommodations might be helpful		x	Not as such but a failure to do so will likely result in a failure to make reasonable adjustments which amounts in turn to discrimination.
Employers are **expected** to consult others about what accommodations might be helpful	x		
State funding is available to assist employers with the costs of accommodations	x		
Additional State funding is available where accommodations would have the effect of enhancing accessibility and thus potentially benefiting others		x	Not as such though it is possible that this might be taken into account by decision-makers considering Access to Work applications.
Employers in breach of this duty can be ordered to pay damages.	x		
Employers in breach of this duty can be ordered to carry out particular accommodations which the Court regards as reasonable		x	The Court can only make recommendations which are not enforceable (other than by way of increased compensation).

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