Disability Discrimination and the European Union: The Impact of the Framework Employment Directive 2000/78/EC

Sarah Ryan Enright

Supervisor: Professor Marie-Ange Moreau

3 October 2005

Thesis submitted for assessment with a view to obtaining the Diploma in Comparative, European and International Legal Studies (L.L.M.)

41,591 Words incl. footnotes

B/C →

Table of Contents

INTRODUCTION

In general terms, it is estimated that there are some 500 to 600 million people living with disabilities world-wide[1]. Some 50 million of these people are citizens of the European Union[2]. Therefore it is quite a substantial group of people whose needs must to be taken into account across the policy and programme field of the EU. Despite this, disability discrimination is a relatively new area in European Union law. Until the Treaty of Amsterdam in 1997, disability matters lay within the sole responsibility of the Member States. Article 13 of the Treaty of Amsterdam signifies that for the first time the Community has a legal basis to take action against discrimination suffered on the ground of disability. This has resulted in the creation of the Framework Employment Directive 2000/78/EC, which prohibits disability discrimination in the employment context. Therefore, currently at the European level there exists anti-discrimination legislation protecting the rights of persons with disabilities solely within the employment sphere.

It is undeniable that there was a clear need for legislation in the area of employment. There was and still is a general consensus throughout the EU that people with disabilities have a low rate of participation in the labour market. Unemployment levels among people with disabilities are considerably higher in comparison to people without disabilities[3]. Often, those who are employed tend to end up in low skilled and poorly paid jobs. This results in a vicious cycle of disadvantage that inevitably has serious repercussions for participation rates in other aspects of life. It cannot be overstated that employment is an essential element of social inclusion. It provides the opportunity to earn economic independence, gain personal satisfaction, form relationships with the outside world and live in society with dignity and self-esteem. Exclusion from the labour market therefore naturally inhibits an individual's ability to participate fully in public, market and social life. Against this background, anti-discrimination legislation prohibiting discrimination in the employment sphere has

[1] This is a statistic quoted by the World Health Organization; see www.who.int
[2] Statistic quoted by the European Disability Forum. See http://www.edf-feph.org/en/welcome.htm
[3] According to data in "The Employment situation of people with disabilities in the European Union", a study prepared by EIM Business and Policy Research for the European Commission Directorate General Employment and Social Affairs [2001] only 42% of people with disabilities are employed compared with almost 65% of non-disabled people and as many as 52% of people with disabilities are economically inactive compared with only 28% of non-disabled people.

been a major and welcome achievement. However, the restriction to the employment field only has been disappointing[4]. The EU does not require Member States to outlaw disability discrimination in fields such as education, public transport and the provision of goods and services. Therefore, there still remains a significant amount to be done in order to achieve equality across all aspects of life for people with disabilities.

In this thesis I propose to examine the effectiveness of the non-discrimination legislative framework now in place at the European level as a tool for achieving fairness and a decent standard of living for people with disabilities. With this aim in mind, the first section of the thesis will examine what factors led the Union to frame its work in the promotion of disability rights and how current anti-discrimination legislation emerged as a result. Section two goes on to examine the relationship between equality and disability and how the notion of equality can be applied to disability discrimination. Section three is dedicated to an analysis of the Framework Directive and its effectiveness in ensuring protection and rights for people with disabilities in the labour market. Finally section four examines the potential of the most innovative part of the Directive for people with disabilities, the concept of reasonable accommodation, which has been introduced to EU law for the first time by Article 5 of the Directive.

[4] This is made all the more apparent by the fact that EU Directives prohibiting discrimination on the grounds of sex and race have a much wider scope. For example, see Article 3 of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, which covers social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services which are available to the public, including housing, in addition to all aspects of employment.

I: THE EMERGENCE OF DISABILITY RIGHTS IN THE EU

The concept of 'disability rights' is a relatively new phenomenon to European law as well as to European social policy. For years people with disabilities were treated as invisible citizens of Europe, disability policy was a barren ground of a few weak initiatives and disability law was non-existent. However, the European Union's engagement in the disability field has changed substantially in the course of the last twenty years[1]. In this first section, I wish to explore what factors led to disability rights finally becoming a pressing item on the agenda of the European Union and consequently how this led to the creation of anti-discrimination legislation in the shape of the Framework Employment Directive. This will involve an analysis of how the perception of disability in Europe departed from the traditional model of viewing disability as a medical and welfare issue to embracing the rights based approach. I will trace the contemporaneous change in European disability policy; examine how national and international laws and policies were a major influence in instigating change and thus how the current European disability strategy emerged as a result.

1.1 The move from welfare to rights

The reason why the laws in the majority of European Member States did not prohibit discrimination on the grounds of disability until recently is because legislators and policy makers commonly believed that people with disabilities were instead primarily in need of social security, care and assistance[2]. This is now commonly referred to as the 'welfare approach'. However, there has been a noticeable change in the past ten years in the legal and policy responses of the Union and many European countries to the issue of disability. This new and still emerging response is often termed the 'rights based approach'[3]. Let us now examine these two different approaches to disability in more detail, observing the rationale behind each and what factors led to the change in attitude and direction.

---

[1] Hvinden, B., "The Uncertain Convergence of Disability Policies in Western Europe", Social Policy and Administration (2003) Vol. 37, No. 6, pp. 609-624, 618.

[2] Hendriks, A., 'Promoting Disability Equality after the Treaty of Amsterdam: New legal Directions and Practical Expansion Strategies' in Anna Lawson and Caroline Gooding (Eds.) 'Disability Rights in Europe: From Theory to Practice' Hart Publishing 2005, 187.

[3] Lawson, Anna, 'The EU rights-based Approach to Disability. Some Strategies for Shaping an Inclusive Society' at 1. Paper presented at the European Commission Conference on Disability, Sofia, Bulgaria. 10 December 2004. Available at http://europa.eu.int/comm/employment_social/disability/conference_bulgaria/index_en.html

1.11 The medical model of disability

Disability has traditionally been regarded as a welfare issue in Europe. In this context, disability has been presented as a social, psychological, educational or medical 'problem' with the individual which has to be resolved[4]. The traditional legal and policy responses to people with disabilities in the EU were shaped by this understanding of disability, which has become known as the 'medical' or 'individual' model[5]. Unless that individual can be cured or somehow adapted, they will not be able to participate in the life of mainstream society. It is *they* that must change or be changed in order to fit within a society designed for people without disabilities[6]. Therefore, the segregation of people with disabilities is a natural consequence of the medical model understanding of disability. In order to explain how anti-discrimination legislation for people with disabilities came into being, it is necessary to examine how the welfare state based on the medical model failed to ensure a decent life for people with disabilities. This failure led people with disabilities to identify anti-discrimination legislation as a model for change and was therefore an instrumental factor in the eventual enactment of such legislation.

Disability law before the anti-discrimination era often helped to construct and perpetuate the medical model of disability in Europe. After World War I, welfare legislation for disabled war veterans was introduced in most European countries. These welfare laws reflected society's sense of obligation to compensate war veterans through disability pensions, rehabilitation benefits and employment quotas[7]. The introduction of employment quotas[8], which obliged employers and/or state bodies to ensure that their workforce contained a certain minimum percentage of disabled

---

[4] Baker, Lynch, Cantillon, Walsh, "Equality: From Theory to Action". Palgrave Macmillan 2004, 13

[5] See Rioux, M. H. 'Disability: The Place of Judgement in a World of Fact', Journal of Intellectual Disability Research, 1997 Volume 41, Number 2, pp. 102-111 and Lisa Waddington, "Disability, Employment and the European Community", Maklu 1995, Chapter One for a discussion of the different social 'pathologies' of disability.

[6] Lawson, A., *supra* note 3, 1.

[7] Degener T. and G Quinn , "A survey of International, Comparative and Regional Disability Law Reform", in Chapter 1 Mary Lou Breslin & Silvia Yee, 'Disability Rights Law and Policy-International and National perspectives', (Transnational, 2002), 21,22. Degener distinguishes between three periods of modern disability law at the domestic level. The first period started after World War I with the introduction of welfare legislation for disabled war veterans, the second period began in the 60's with an extension of welfare legislation to all people with disabilities. The third period in the 90's marked a departure from the previous welfare orientated policies when some European countries began to adopt anti-discrimination legislation for persons with disabilities.

[8] For a discussion of employment quotas from a disability rights perspective, see generally Lisa Waddington, 'Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws' (1996) 18 *Comparative Labour Law Review* 62.

employees, has since become a staple feature of most European countries' disability employment policy[9]. Although the intention was positive, the imposition of employment quotas was a tactic which basically presupposed the inability of people with disabilities to compete on the open job market, thus reinforcing a negative image of disability[10]. In practice, quota enforcement mechanisms were generally not very effective. They were rarely used by the state and were not enforceable by people with disabilities themselves. A quota would be satisfied in cases where employees with disabilities were clustered in low status and poorly paid roles[11]. Despite these apparent shortcomings, employment quotas are still used by many European Member States today[12]. Unfortunately it has not proved to be a successful method of achieving equality in practice for people with disabilities[13]. In the employment field generally, segregation has been particularly evident. Sheltered employment schemes provide another example of a welfare approach, where despite good intentions, the end result actually perpetuates inequality and segregation. They are generally subsidised by the state and offer work which is usually low paid and unskilled[14]. This is a policy also developed on the assumption that people with disabilities are incapable of working in mainstream environments, thus serving to reinforce exclusion and disadvantage rather than promote integration. It is these false assumptions that people with disabilities are incapable, incompetent and pitiful objects, which result in the introduction of such inadequate welfare measures.

1.12 The development of the social model

In the 60s welfare legislation was extended to cover all, not just war veterans. Laws were enacted in areas such as special education, medical and rehabilitation benefits,

---

[9] The Scandinavian countries are an exception. See Waddington and Diller, 'Tensions and Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law' in Mary Lou Breslin & Silvia Yee, 'Disability Rights Law and Policy- International and National perspectives', (Transnational, 2002), 241 at 256.

[10] Lawson A, *supra* note 3, 3.

[11] Ibid.

[12] For example, Germany has a quota of 5% for companies with at least 20 employees (paragraph 71 Abs. 1 *Sozialgesetzbuch* IX). If employers do not meet their quota target, they are obliged to pay a fine or levy. In recent years this quota system has become less effective. The combination of economic difficulties and a low levy has resulted in payment taking preference for employers over the risk of employing a person with a disability. France adopted the German model and has a quota of 6% for companies with at least 20 employees (Article L 323-1 *Code du travail*). See Waddington and Diller, *supra* note 9, 258.

[13] See generally Waddington and Diller, *supra* note 9 at 256-262.

[14] Lawson A, *supra* note 3, 3.

employment quotas and institutionalised care services, which served to introduce charity to a broader group of people with disabilities[15]. This system of welfare frequently did guarantee a basic income and essential care and assistance to people with disabilities but it rarely conferred enforceable legal entitlements[16]. It was also unpredictable and often dependent on the state of the economy and the current dominant political power[17]. Therefore, despite the adoption of further welfare provisions, people with disabilities were often left disempowered and segregated under this system. This failure of the welfare state caused an outcry among people with disabilities and led to serious demands for change. These demands for change led to a new way of viewing disability, which became known as the 'social model'. This model rejects the long-established idea that the obstacles to people with disabilities' participation arise solely from their impairment, and focuses instead on barriers posed by the environment, including: inaccessible physical infrastructure; the attitudes and prejudices of society; the policies, practices and procedures of local and national governments and administrations; and the structure of the health, welfare and education systems. From this perspective, barriers to the participation of people with disabilities must be addressed through changes to their social, physical and educational environment. For people with disabilities, the social model is both a liberating and empowering view. It advocates putting the person first rather than viewing her or him through a particular medical condition. According to Baker *et al*[18], "the fundamental distinction of the social model is between impairment and disability. Impairments are the physical and psychological differences between persons with disabilities and people with 'normal' capabilities. By contrast disability is the process by which societies prevent people with impairments from realising their full potential and from participating as fully as possible in activities that others take for granted." This 'disabling' of persons with disabilities by society has grave consequences across all aspects of life. It generates inequalities and discrimination, worsens their already disadvantageous position and above all restricts them from taking part in 'normal' community life.

The social model was largely developed by the work of various academics who at the end of the 1970's and beginning of the 1980's began to question dominant orthodoxy

[15] Degener *supra* note 7, 22.
[16] Hendriks, A, *supra* note 2, 189.
[17] Ibid.
[18] Baker *et al, supra* note 4, 9.

about disability. The notion that disability could be seen as a social and political issue soon began to emerge in the literature. Writers such as Finkelstein[19], Oliver[20] and Barnes[21], in developing the social model, helped to shift the focus from the individual, medical condition of people with disabilities to the disabling structures of society[22]. By the 1990s a definite shift in the established perception of disability began to emerge. During this decade and the one that followed, the disabled people's movement gained in strength and influence and began to revolutionise thinking on disability. It must be noted that the move by persons with disabilities themselves to form their own organisations had a major influence on the shift from the medical to the social model of disability. It promoted a growing consensus between them on what was the correct method to approach disability. In this way, it began a process of reformulating the problems of disability, shifting the focus away from the functional limitations of impaired individuals (medical model), towards a rights-based approach (social model) focusing on the barriers posed by society to people with disabilities[23]. This eventually led to people with disabilities themselves identifying institutional discrimination as the main problem and anti-discrimination legislation as the most promising way of tackling it[24]. During the 90s[25] some European countries finally began to adopt anti-discrimination legislation for people with disabilities[26]. This was achieved as a result of intensive lobbying on the part of disabled people's organisations[27]. Another influential factor was that many countries already had sex and race discrimination laws in place, which further encouraged people with disabilities to demand similar treatment[28]. Effective lobbying ensured that the new

---

[19] Finkelstein Victor, "Attitudes and Disabled People: Issues for Discussion" (New York: World Rehabilitation Fund) 1980.

[20] Oliver, Mike "The Politics of Disablement" Basingstoke: Macmillan 1990.

[21] Barnes, Colin, "Disabled People in Britain and Discrimination" (London: Hurst and Co.) 1991. For a detailed recent discussion of the social model, see Barnes, Mercer (Eds.) "Implementing the Social Model of Disability": Theory and Research, Leeds, The Disability Press, 2004.

[22] Baker *et al, supra* note 4, 13

[23] Bynoe, Oliver, Barnes, "Equal Rights for Disabled People: The case for a new law". IPPR 1991,11

[24] Ibid at 7

[25] The 1990s in particular was a banner decade for disability law. More than 40 nations enacted disability discrimination laws during this period. See generally Degener *supra* note 7.

[26] Most notably the British Disability Discrimination Act 1995; the Swedish Law on the Prohibition of Discrimination in Working Life of Persons with Disabilities, SFS No. 1999-132 (Official Title: Lag (1999:132) om forbüd mot diskriminering i arbetslivet av personer med funktionshinder) and the Irish Employment Equality Act 1998.

[27] In the U.K for example, disability groups had fought for decades to achieve anti-discrimination legislation. See Doyle, Brian J. "Disability Discrimination: The New Law" (London: Jordans) 1996.

[28] For example in the UK there had been anti-discrimination laws in place since the mid 70s; The Sex Discrimination Act 1975 and the Race Relations Act 1976.

laws were based on the social model of disability and that discrimination was finally recognised as a major obstacle in the lives of people with disabilities.

According to Degener, a key element of disability discrimination legislation is the understanding that the exclusion and segregation of people with disabilities does not follow from the impairment but from political choices based on false assumptions about disability[29]. This sums up the failure of the EU to adequately tackle disability discrimination until now. For too long, European disability policy was rooted in false assumptions about disability and for this reason it failed to bring about constructive changes in the lives of people with disabilities. The transformation of ideas that introduced the social model of disability was an integral factor leading to the creation of rights-based disability anti-discrimination legislation in Europe.

1.2 International Influence

As well as the general disillusionment with welfare provision nationally, significant international developments began to influence the demand for anti-discrimination legislation at the European level. In particular, the disability civil rights movement in the United States and the adoption of international human rights instruments in the field of disability[30] were a major influence on European policies.

1.21 Americans with Disabilities Act 1990

Civil rights legislation in the United States had a considerable influence on the welfare to rights movement in Europe. The US was the first country in the world to adopt anti-discrimination legislation for persons with disabilities[31]. The motivation for the enactment of disability anti-discrimination legislation grew out of what is now called the 'disability rights movement'. This movement had identified people with disabilities as a minority group subject to discrimination and successfully campaigned

---

[29] Degener *supra* note 7, 25.

[30] There are only a few treaties which specifically offer protection against disability discrimination and it must be noted that it is normally by way of an open-ended or 'other status' criterion, which is not very effective. See for example Article 14, the non-discrimination provision of the European Convention on Human Rights, where disability is not listed as a ground but it must be interpreted as coming under the heading of 'other status'. It has been more common at the international level to condemn disability discrimination through declarations, resolutions and recommendations, all of which do not have binding effect. See Aart Hendriks, 'Different Definition-Same Problems-One Way Out?' in Breslin &Yee (Eds.) 'Disability Rights Law and Policy- International and National perspectives, (Transnational, 2002) at 196.

[31] See Waddington, Lisa, "Disability, Employment and the European Community", Maklu 1995, 141-180 for a comprehensive overview of US Disability Discrimination legislation.

for anti-discrimination legislation, which was passed firstly in the form of the Rehabilitation Act in 1973[32] and later with the adoption of the more comprehensive Americans with Disabilities Act in 1990[33], a landmark piece of legislation which drew noticeably on the race discrimination model in the Civil Rights Act of 1964[34]. The American disability rights movement was directly influenced by the civil rights efforts of African Americans during the sixties[35]. The success of the civil rights movement acted as a catalyst for other groups, including women and people with disabilities, and spurred them on to demand the same equality of treatment and protection of their civil rights. It is important to note the vital role played by people with disabilities in the introduction of anti-discrimination legislation. Public demonstrations, marches, vigils and constant pressure on the political actors involved were crucial factors which led to the eventual enactment of legislation. The ADA was groundbreaking in the sense that it finally abandoned the welfare approach to disability and fully endorsed the civil rights approach[36].

The ADA has welcomed in a new era of 'disability rights' for people with disabilities; a movement which has continued to gather momentum throughout the world to the present day. It has had a major influential impact on the evolution of disability discrimination law and policy world-wide[37] and in Europe in particular. This thesis will demonstrate later on how the disability provisions of the European Framework Directive were directly influenced by the ADA[38].

---

[32] Pub.L. No. 93-112, 87 Stat. 357 (1973)

[33] Pub.L. No. 101-336, 104 Stat. 327 (1990)

[34] 42 U.S.C. § 2000e.

[35] Two important publications in the sixties recognised the prototype that the civil rights efforts of African Americans offered for individuals with disabilities. See Leonard Kriegal, 'Uncle Tom and Tiny Tim: Some Reflections on the Cripple as a Negro' 38 AM. SCHOLAR 412 (1962) where it was suggested that people with disabilities who were seeking equality and dignity should adopt as a model the approaches taken by black people in their civil rights struggles. See also Richard Allen, 'Legal Rights of the Disabled and Disadvantaged' (Washington: U.S Social and Rehabilitation Service 1969). Cited in Robert L. Burgdorf, 'U.S. Anti-discrimination Law and Disability- Focus on Title 1 of the Americans with Disabilities Act' at 4. Teaching Materials for the Disability Discrimination Summer School, NUI Galway, Ireland. 4-15 July 2005.

[36] The American National Council on Disability declared that from the preamble to its final provision, the ADA is solely about 'equal opportunity'. National Council on Disability, 'Negative Media Portrayals of the ADA' Paper no.5 of the ADA Policy Brief Series: Righting the ADA. Cited in Robert L. Burgdorf, *supra* note 35 at 18.

[37] This influence has been so extensive that it is claimed that the ADA has had a more profound external than internal impact. Currently there is a lack of consensus in US legal literature as to whether the ADA has been successful. See ADA Symposium Issue; "Backlash Against the ADA", 21 Berkeley Journal of Employment and Labour Law (2000)

[38] See Section VI: Article 5 of the Framework Directive: The Concept of Reasonable Accommodation at 4.11.

1.22 UN Standard Rules 1993

Other measures at the international level such as the early work done at the UN[39] and the resulting Standard Rules were hugely significant in the European context[40]. The shift from welfare to rights that was so characteristic of the ADA was explicitly ratified at international level in the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities in 1993[41]. The adoption of the Standard Rules was the culmination of the increased recognition of the rights-based approach to disability internationally and regionally since the 1970s[42]. This was evident in the focus of the Standard Rules, which was exclusively on equal opportunity and equal participation. Unfortunately the Rules have no binding force in law. Despite this apparent hindrance, they have become quite authoritative world-wide. The history of disability discrimination law in a number of countries reveals that either the ADA and/or the Standard Rules have served as the model law for the development of domestic legislation[43]. The transformation of disability policy that is evidenced by the ADA and the Standard Rules has certainly influenced national and regional European policy over the last decade. Let us now turn in more detail to the examination of European disability policy itself to determine how the European Union came to frame its work in the promotion of disability rights.

1.3 The evolution of a rights-based disability policy in the European Union

From a historical perspective the European Union is a peculiar source of law and policy in the context of disability[44]. The Union has its origin in three separate treaties

---

[39] E.g. 1971 Declaration on the Rights of Mentally Retarded Persons (Proclaimed by General Assembly Resolution 2856 (XXVI) of 20 December 1971) which stipulates that a person with an intellectual impairment is accorded the same rights as any other person; 1975 Declaration on the Rights of Disabled Persons (Proclaimed by General Assembly Resolution 3447 (XXX) of 9 December 1975) which asserts the equal civil and political rights of disabled persons.

[40] For an overview of human rights instruments in the disability context, see generally Quinn, G., "The Human Rights of People with Disabilities under EU law", in P. Alston (Ed), 'The EU and Human Rights' (Oxford and New York: OUP 1999), 281-326.

[41] GA Res. 48/96 (1993). A full set of the Standard Rules can be obtained from http://www.un.org/esa/socdev/enable/dissre00.htm or from United Nations, Division for Social Policy and Development. For comment see Bengt Lindqvist, 'Standard Rules in the Disability Field-A new United Nations Instrument' in Degener and Koster-Dreese (Eds.) 'Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments' (Martines Nijhoff Publishers, 1995), 63-68, cited in Quinn *supra* note 40 at 294.

[42] See Quinn *supra* note 40 at 293-299 for a detailed overview of relevant international and regional measures taken during this period.

[43] See Degener *supra* note 7, 20.

[44] See Quinn *supra* note 7, 91

which originally created three separate 'communities'[45]. The economic thrust behind the Union was made clear from the beginning and the concentration on economic integration was set out as an aim in the Preamble and in Article 2[46] of the Treaty of Rome in 1957. The main objectives of the Union were to establish a common market, to promote harmonious development of economic activities throughout the Community, to increase stability and the standard of living and to promote closer relations between the Member States[47]. This economic framework was not considered a suitable context for the promotion of civil rights and non-discrimination. Rather the view at that time was that the fight against discrimination at large was a question of human rights, to be dealt with by the Council of Europe, the European Court of Human Rights and the United Nations[48].

1.31 The non-discrimination principle in European Union Law

In the early years of European integration, the introduction of laws prohibiting discrimination was not a pressing item on the agenda of the European Communities. At the time of drafting the Treaty of Rome (EEC) in 1957, there was some debate about whether the achievement of human rights as such should be added to the treaties as an objective of the Community[49]. However for a variety of political reasons, the Member States decided to focus solely on the use of economic means toward functional integration. As a result of this, the EEC Treaty[50] concentrated solely on the

[45] The Treaty establishing the European Coal and Steel Community (ECSC) was signed in 1951 by France, Germany, Italy and the three Benelux countries aiming to establish a common market in coal and steel. This was followed by the signing of the Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (EURATOM) in Rome in 1957.

[46] Article 2 TEC "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."

[47] Craig and DeBúrca "EU Law: Text, Cases and Materials." 2nd Edition. (Oxford: OUP 1998), 11. For a detailed historical and political background to the development of European integration, see pp. 3-48.

[48] Swiebel, J., "From Rome to Amsterdam and Beyond: Reinforcement of Protection" at 1. Paper delivered at the seminar "The Fight Against Discrimination: the Equal Treatment Directives of 2000", Academy of European Law. Trier 5-6 March 2004. Available at www.era.int

[49] See generally Kaczorowska, Alina, "EU Law Today", London: Old Bailey Press, 1998 cited by Quinn *supra* note 7, 92.

[50] The Treaty of Maastricht (Treaty on European Union) signed in 1992 established a three pillar structure for what was henceforth to be called the European Union, with the Communities as the first of these pillars. The EEC Treaty was officially renamed the European Community Treaty (TEC). The

social protections necessary for enabling a free market of workers to come into existence. It focused mainly on the free movement of workers and contained only those non-discrimination provisions thought to be required to achieve this end. The Treaty of Rome 1957, contained only two specific non-discrimination clauses: the ban on discrimination on the basis of nationality[51] and the famous Article 119[52], which provided that men and women should be entitled to equal pay for equal work[53]. These provisions were included as they were regarded as necessary social conditions to achieve the economic objectives of the Community. They were not subsumed under any broader or deeper equality provision and as a result no general prohibition existed under EC law against discrimination based on other characteristics such as age, sexual orientation or disability[54]. Therefore issues relating to discrimination on the basis of disability lay within the sole responsibility of the Member States.

1.32 EU Social Policy

Disability first registered as an issue in the context of EU social policy. The social dimension to the European Union is asserted by the founding provisions of the EU and EC treaties[55]. This social dimension is expressed as both additional to and consequent upon the economic activities and objectives which are the main focus of the Union[56]. Therefore, the original aim of EU social policy was to create and complete an efficient internal market as opposed to correcting the inequalities posed by a free market system[57]. It is therefore no surprise that the very late engagement of

---

second pillar of the Union is Common Foreign and Security Policy (CFSP) and the third pillar is Justice and Home Affairs (JHA).

[51] Article 6 EEC Treaty, now Article 12 EC Treaty.

[52] Article 119 EEC Treaty, now Article 141 EC Treaty.

[53] Article 119 was the basis for a series of supplementary directives prohibiting gender discrimination across the employment field. See Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay between men and women; Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions; Directive 79/7/EEC on the progressive implementation of the principle of equal treatment between men and women in matters of social security; Directive 86/378/EEC on the implementation of the principle of equal treatment of men and women in occupational social security schemes; Directive 97/80/EC on the burden of proof in cases of discrimination based on sex.

[54] Quinn *supra* note 7, 98

[55] See Article 2 TEC "The Community shall have as its task...to promote throughout the Community...a high level of employment and social protection..." and Article B TEU "The Union shall set itself the following objectives: to promote economic and social progress..."

[56] Hervey, Tamara "European Social Law and Policy". European Law Series. Longman. (1998), 1

[57] Ibid at 3

EU institutions with disability rights has been attributed to a lack of legal competence in social policy and disability policy in particular at EU level[58].

A move towards developing a stronger social policy emerged throughout the 1970's and 80's. In the context of disability the Community started up some measures in the 60s in the area of employment[59]. These developments arose not out of a desire to achieve equality of opportunity but to improve the skills of the labour force and were in accordance with the welfare approach to disability[60]. The first major involvement in disability policy by the European Community was in the area of vocational integration. The Council Resolution[61] of 21 January 1974 called for the creation of an action programme to encourage the "vocational rehabilitation of handicapped persons". An Action Programme[62] with this aim in mind was established by Council Resolution of June 1974[63]. Unfortunately the traditional and medical model of disability was underlying this initial programme, which limited its success. However, it was an important initial step which paved the way for future measures.

It was not until 1981, as a response to the UN International Year of Disabled Persons, that a renewed effort was made by the Community to encourage the vocational integration of persons with disabilities. From the early 80s until the mid 90s the European Commission began to promote the development of a European disability policy through a succession of action programmes[64]. The first Community action programme[65] on the Integration of Handicapped People was agreed in the 1980s[66].

---

[58] Hvinden, B *supra* note 1, 618.

[59] See Waddington *supra* note 31 for a comprehensive overview of disability policy and initiatives in the Community before the adoption of the Amsterdam Treaty.

[60] Gubbels, André, "The Evolution of EU Disability Policy: from Charity to Rights", Paper presented at the Disability Discrimination Summer School, NUI Galway, Ireland. 4-15 July 2005.

[61] Council Resolution of 21 January 1974. OJ No. C 13/1 13/2/74.

[62] The Initial Community Action Programme for the Vocational Rehabilitation of Handicapped Persons (1974-1979)

[63] Council Resolution of 27 June 1974. OJ No. C 80/30 9/7/74.

[64] Article 235 TEC was the basis for initiating an action programme dealing with disability in the social affairs field. Article 235 of the TEC allows the Council to adopt measures that fall within the broad objectives of the EC, but for which no specific competence has been provided elsewhere in the text of the treaties. Unanimity in the Council is required before it can be invoked. It is the legal basis for many provisions of EC Social Law. See Tamara Hervey, *supra* note 56, 46-47.

[65] Action programmes are drawn up by the Council and the Commission on their own initiative and serve to put into practice the legislative programmes and general objectives laid down in the treaties. If a programme is specifically provided for in the treaties, the Community institutions are bound by those provisions when planning it. Other programmes are in practice merely regarded as general guidelines with no legally binding effect. They are, however, an indication of the Community institutions' intended actions. See the European Union website at http://europa.eu.int/eur-lex/en/about/abc/abc_20.html

[66] First Action Programme 1983-1988; OJ 1981 C347/1. This programme was called for by the Council Resolution on the social integration of handicapped people [1981] OJ No C 347, 31. 12. 1981

This action programme was expressed to be concerned with the 'social integration' of people with disabilities, but was in effect focused on economic integration especially employment and training[67]. The first programme was followed by HELIOS I (1988-1991)[68], which adopted a somewhat wider remit across social integration and employment[69]. However these programmes did not produce any real changes. Both had a fairly traditional social policy orientation; they promoted networking among professionals involved in particular disability policy sectors such as rehabilitation and education, they focused on special services and facilities rather than rights and equal opportunities and were criticised for allowing professionals to dominate rather than involving people with disabilities themselves[70].

The design of the third disability action programme HELIOS II (1992-1996)[71] showed a significant development in the Commission approach. There was more of an emphasis on the political mobilisation of people with disabilities. Those involved in European level disability policy at this time strongly desired that disability NGOs would have a role in consultation over policy[72]. This hope was realised when the European Disability Forum[73] was set up as a consultative committee to the HELIOS II Programme. In the end, the most significant achievement of the HELIOS programmes turned out to be the development of a very active community of disability activists at the European level. This inevitably resulted in a growing furore for equal treatment and non-discrimination legislation at the EU level. Lobbying by these disability groups would prove to be a crucial factor in securing the inclusion of the ground of

---

[67] Hervey, Tamara *supra* note 56, 169

[68] 88/231/EEC: Council Decision of 18 April 1988 establishing a second Community action programme for disabled people (Helios) OJ L104/38. (HELIOS 1)

[69] See generally Mabbett, Deborah, "The Development of rights -based social policy in the European Union: The Example of Disability Rights", Journal of Common Market Studies 2005 Volume 43. Number 1, 97-120 for a detailed discussion on the success (or lack thereof) of early Community measures in the context of disability.

[70] Lovelock, R and Powell, G (1994) "Disability: Britain in Europe. An Evaluation of UK Participation in the HELIOS Programme (1988-1991)" Aldershot: Avebury, cited by Deborah Mabbett *supra* note 69, 107.

[71] HELIOS II (Third) Community Action Programme to assist disabled people (1993) OJ L56/30.

[72] Mabbett *supra* note 69, 108

[73] The European Disability Forum is an umbrella organisation of European Disability Organisations, which exists to represent people with disabilities in dialogue with the European Union and other European authorities. Its mission is to promote equal opportunities for people with disabilities and to ensure disabled citizens' full access to fundamental and human rights through their active involvement in policy development and implementation in the European Union. Its institutionalised roles include providing the secretariat to the Disability Intergroup of the European Parliament. See www.edf-feph.org for more Information on the work and policies of the EDF.

disability in Article 13 of the Amsterdam Treaty and the eventual adoption of anti-discrimination legislation.

In addition to action programmes, resolutions[74] and recommendations[75] other soft law measures were popular with the Community as a method of catering for people with disabilities throughout the 80s. The Community Charter of Fundamental Social Rights of Workers was adopted in 1989 and provides a section on workers with disabilities. Point 26 provided that 'all disabled workers....must be entitled to additional concrete measures aimed at improving their social and professional integration'. The Charter does not confer any rights on individuals or provide a separate legal basis for the European Institutions to take further action but it does provide a statement of principle underpinning any action within Community competence[76]. Although soft law measures may potentially set standards and raise expectations[77], they are generally not measures that transform existing policy. The tendency to adopt soft law instruments during this period illustrates the relatively cautious and non-directive role of the EU in the field of disability policy. A series of weak proposals and initiatives clearly did not put the EU in a position to influence established policy aims and practices of Member States to any great extent[78].

The 90s, however, proved to be a decade which resulted in major advances at European policy level. The winds of change were evident in the Commission's White Paper of 1994 where it committed itself to finding a way to express the UN Standard Rules in EU policy[79]. It was clear that the Commission was moving towards a rights based approach for people with disabilities. It stated: "as a group, people with disabilities face a wide range of obstacles which prevent them from achieving full economic and social integration. There is therefore a need to build the fundamental

---

[74] See Council Resolution of 22 December 1986 on an action programme on employment growth OJ No C 340, 31. 12. 1986, p. 2 where the Council advocated special provisions in training for the disadvantaged and disabled.

[75] See Recommendation and Guideline on the Employment of Disabled People in the EC OJ 1986 L 225/43

[76] Hervey *supra* note 56, 170

[77] They may also have an indirect influence on the interpretation of the main 'hard law' instruments, especially in the context of national legislation. See McCrudden, C "The New Concept of Equality", Paper delivered at the Academy of European Law in the framework of the conference "Fight against Discrimination: The Race and Framework Employment Directives". Trier 2-3 June 2003. Available at: www.era.int

[78] Hvinden, B *supra* note 1, 618.

[79] White Paper: European Social Policy-A way forward for the Union, COM (94) 333 final at VI. Social Policy and Social Protection.

right to equal opportunities into Union policies".[80] This stance was further elaborated upon in the Commission's 1996 Communication on Equality of Opportunity for People with Disabilities[81], which set out the new equality of opportunity approach. This Communication was the most far-reaching strategic statement on disability that the Commission had taken up until that point. It displayed a shift in perspective by clearly endorsing the 'rights-based' equal opportunities approach to disability. The Commission made it clear that "the old approach is now giving way to a much stronger emphasis on identifying and removing the various barriers to equal opportunities and full participation in all aspects of life" for people with disabilities.[82] One of the strongest recommendations in the Communication concerned mainstreaming. Mainstreaming allows for the introduction of a 'disability perspective' across a whole range of social programmes[83]. It is a tool which has major potential to promote the equal treatment of people with disabilities on a far-reaching scale. However in practice States only accepted mainstreaming at a general level and several concrete attempts to mainstream non- discrimination in national social policy have been rejected[84]. In fact many successful examples of mainstreaming are confined to the Commission's own practices and services[85].

As we have seen, during this period up until the 90s, European level measures aimed at improving the situation of people with disabilities were kept within the ambit of the European social policy sphere. This resulted in mostly soft law provisions, which had no hard legal effect. However, these measures did contain innovative proposals and

---

[80] White Paper: European Social Policy-A way forward for the Union, COM (94) 333 final at 51. Cited in Quinn *supra* note 7 at 85.

[81] COM (96) 406 final of 30 July 1996. The Communication was adopted by Council Resolution in 1997 (OJ 1997 C 12/1.) The Resolution was an endorsement of the UN Standard Rules and was based on the respect for fundamental human rights as a general principle of the EU (Article F2 TEU), point 26 of the Community Charter and the UN General Assembly Resolution on Equal Opportunities (Resolution 48/46 of 20 December 1993).

[82] Communication on Equality of Opportunity for People with Disabilities COM (96) 406 final of 30 July 1996, Executive Summary and Policy Conclusions at 3.

[83] Ibid at 19, "This entails the formulation of policy to facilitate the full participation and involvement of people with disabilities in economic, social and other processes, while respecting personal choice." See DGV Working Paper 'Mainstreaming Disability within EU Employment and Social Policy' 1999 for an insight into the Commission's strategy for mainstreaming disability into employment and social policy. Available online at: http://europa.eu.int/comm/employment_social/soc-prot/disable/dresden/workpaper_en.pdf

[84] Mabbett *supra* note 69,109

[85] Ibid.

new ideas which laid down the theoretical groundwork for 'hard law', which would come into effect as a result of the Amsterdam Treaty 1997.

1.33 Article 13 of the Amsterdam Treaty 1997

Against the background of national welfare legislation and European soft law measures depicted above, the inclusion of Article 13 in the Treaty of Amsterdam heralded major changes for the treatment of disability and non-discrimination in general in the EU. The addition of Article 13 EC extends the Community's express competence to act against discrimination. It provides:

"Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, ***disability****, age or sexual orientation."*

In essence the article provides a legal basis for the Community to take legislative action to combat discrimination on the grounds of *inter alia* disability. The reasons that led to the enactment of the final text of the provision are speculative. The diversity of grounds on which discrimination may be combated reflects the diversity of the political forces, which led to the incorporation of Article 13[86]. According to Mabbett, the inclusion of disability, age and sexual orientation reflected the idea that a new generation of civil and social rights should be developed in the course of modernising and restructuring the way that European welfare states regulate the life courses and family arrangements of their citizens[87]. There is some disagreement in the academic commentary as to how much the Community was motivated by economic or social integration motives[88] and how far the future enlargement of the Union was important[89]. Indeed it is quite possible that different motives underpinned the inclusion of different grounds of discrimination. It is also likely that the Commission

[86] Mabbett *supra* note 69, 106
[87] Ibid.
[88] For commentary see Waddington, L "Testing the limits of the EC Treaty Article on Non-Discrimination" (1999) ILJ 133-151, 134 and Fredman S. "Equality: A new Generation?" (2001) ILJ 145-168, 149
[89] See Bell, Mark, "Article 13 EC: The European Commission's anti-discrimination Proposals" (2000) 29 ILJ 79-84, 84.

was anxious to exploit the political opportunity it was offered to include as broad a range of grounds as possible in as few directives as possible, knowing that some grounds would be unlikely to be accepted if they were contained in separate instruments[90].

Initially the drafters were sceptical of the need to incorporate disability into a non-discrimination provision as many were concerned that it would undermine the European social welfare model[91]. It was in effect the intensive lobbying on the behalf of European disability NGOs[92], the European Parliament and the Commission[93] that secured the inclusion of disability into Article 13[94]. However, many groups were disappointed with the final result as Article 13 does not provide a basis for the judicial development of principles of non-discrimination. Despite its broad scope, the article suffers from two major limitations. Firstly, it provides only a legal basis to take action. It was carefully worded so that it would not have direct effect. Therefore it does not *oblige* Member States to prohibit discrimination. Secondly, the decision-making procedure requires that the Council has to decide unanimously and the Parliament only has an advisory role. This greatly reduces its potential impact. Therefore at the time it was thought that Article 13 would be largely symbolic[95]. Accordingly, it was a surprise to all when, despite these apparent limitations, the Community adopted two Directives to combat discrimination on the basis of Article 13 with remarkable speed. Before the year 2000 was out, the Community had adopted

---

[90] McCrudden, C *supra* note 77, 15.

[91] Hendriks A *supra* note 2 at 190; see generally O' Hare 'Enhancing European Equality Rights: a New Regional Framework' (2001) 8 Maastricht Journal 133 for a history of Article 13 and its Directives.

[92] The joint effort of European disability organisations was a major factor in securing the ground of disability in Article 13 of the Amsterdam Treaty. It is imperative to underline the important role of the European disability movement in advancing disability rights in Europe, having taken its initiative from the experience in the US. The movement is made up of various specific disability interest groups, Non-Governmental Organisations representing the interests of people with disabilities and individuals with disabilities and their families. Their solidarity has led to the emergence of a fairly strong transnational network of disabled people's organisations, putting pressure on supranational bodies for the acceptance of stronger rights and protection against discrimination. See Hvinden *supra* note 1, 610. See generally Newman, M. 'Democracy, Sovereignty and the European Union', London: Hurst and Company (1997) and Geyer, R.R, 'Exploring European Social Policy', Cambridge: Polity Press. (2000)

[93] Since the 90s the European Parliament and the Commission had acknowledged the need to address disability discrimination at a Community level and called for amendment of the Treaty to provide the European Community with the necessary legislative competence to act in this area. See generally Whittle, Richard, "Disability Discrimination and the Amsterdam Treaty", 23 European Law Review February 1998, 52

[94] See Mark Bell and Lisa Waddington, "The 1996 Intergovernmental Conference and the Prospects of a Non-discrimination Treaty Article", 25 Industrial Law Journal 4 (1996), 320-336.

[95] Mabbett *supra* note 69, 105

a Directive targeted at race discrimination[96] and a general framework Directive[97] covering employment discrimination on the grounds of religion or belief, disability, age and sexual orientation. The speed with which these directives were adopted would appear to demonstrate a serious commitment on behalf of the Commission to combating all kinds of discrimination, including disability. The adoption of a 'hard' legal instrument to combat disability discrimination in employment is a very significant advancement in European disability policy. Firstly, it signifies a change in attitude towards disability in the European Union: people with disabilities have moved from being seen as objects of welfare, health or charity to being recognized as subjects of legal rights[98]. Secondly, the adoption of anti-discrimination legislation is also an indicator of the new, broader disability strategy that the EU has developed and displays a much stronger ambition to influence the policies and practice of Member States with regard to disability policy.

1.4 Concluding Remarks

The progress that has been achieved in the past 20 years in European disability policy is considerable. We have observed how disability first emerged as a medical and welfare issue in Europe, which regarded people with disabilities as objects of pity and charity. The continuing segregation and isolation from society experienced by people with disabilities under this model eventually led them to reject this misconceived perception of disability. This soon led to a new way of viewing disability which recognized that many of the obstacles, barriers and difficulties faced by people with disabilities are as a result of the ways in which society is organised and physically designed and not by reason of the person's impairment. This view, now known as the social model of disability, suggests that people with disabilities are being institutionally discriminated against on a regular basis and insists that such discrimination should not be tolerated. The widespread acceptance of the social model soon led to demands to make such discrimination illegal in the form of anti-discrimination legislation. These demands were partially realised in the form of the

---

[96] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] O.J. L180/22. For a discussion of the Race Directive see Guild E, "The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations" (2000) 29 ILJ 416.

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

[98] Kimber, Cliona, "Equality and Disability (2001) 6 Irish Bar Review 494 [part 1] at 494.

Framework Employment Directive in 2000 and disability is now commonly regarded as a human rights as well as a non-discrimination issue[99]. Even though I have highlighted the failings of the welfare approach, it should not be completely abandoned in this new era of anti-discrimination legislation[100]. Many people with disabilities still rely on welfare measures as they are unable to take advantage of the non-discrimination norm. Therefore, either anti-discrimination legislation must provide for effective, enforceable positive rights or states should adopt a welfare system which provides for people with disabilities in a manner which does not segregate them from society. A reworked welfare approach developed in conjunction with the new anti-discrimination legislation, in a manner in which both models complement one another, could be an effective solution.

The next sequential step is to analyse the Framework Directive itself and determine what exactly it offers for people with disabilities in the EU. Is it the key to solving the problem of serious underemployment among people with disabilities? Will it create a more equal future? Before attempting to answer these questions, it is first necessary to examine *how* the concepts of equality and non-discrimination apply to the complex ground of disability. This will provide an insight into the most effective way to apply the principle of equality to people with disabilities and thus aid in a critical analysis of the provisions of the Framework Directive and how they relate to the ground of disability.

[99] Negotiations are currently under way to adopt a UN Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, which would be a legally binding instrument tailoring the application of human rights to people with disabilities. To view the draft articles and the current status of negotiations see http://www.un.org/esa/socdev/enable/

[100] The negative consequences of this have been illustrated in the US where due to a unilateral focus on non-discrimination, equal treatment is largely dependent on the willingness and ability of individuals to file complaints. See Hendriks, A. *supra* note 2, 191.

II: DISABILITY AND CONCEPTIONS OF EQUALITY

"The notion of Equality is closely linked to the idea of Justice and has perhaps greater resonance than any other notion in law"[101]

Aristotle, who was one of the first to provide an elaborate synthesis of the notion of equality considered equality and justice to be synonymous[102]. In *Nicomachean Ethics*, Aristotle identifies justice in general as the greatest moral virtue and asserts that particular justice is a sort of equality[103]. The link between justice and equality may account for the importance attached to discrimination today. Discrimination is considered to be wrong or unjust because it is a breach of the principle of equality and equal treatment. The idea of equality has been deliberated and pondered over for centuries[104]. What exactly is meant by equality? Is it desirable? Is pure equality between persons possible? Is it morally necessary in society? It is a basic fact that human beings are unequal in almost every way. They are of different shapes, sizes, sexes, colours, have different physical and mental capabilities and different orientations. Yet it is one of the basic principles of almost all contemporary moral and political theories that humans are essentially equal and should have this ideal reflected in the economic, social and political structures of society[105]. The reconciliation of human difference with the equality ideal has proved to be a consistently challenging task. This complexity has been particularly evident in the case of disability, as will be illustrated throughout this section.

Initially, the idea of equal treatment existed more as an ethical and philosophical notion than as a rule of law. The concept of equality entered onto the legal stage in the age of enlightenment, a period during which the right to equality informed the political theories of some of the most influential thinkers of that time such as Locke,

---

[101] Tridimas, Takis, "The General Principles of EC Law" (Oxford: OUP, 1999), Chapter 2: The Principle of Equality, 40.

[102] Ethica Nicomachea V.3. 1131a-1131b.

[103] Pojman, Louis P. and Westmoreland, Robert (Eds.) "Equality: Selected readings" (New York, Oxford) Oxford University Press 1997 at 17. Aristotle's interpretation is but one of the many theories of equality. For a contemporary treatment of justice and equality, see Rawls, John, "A Theory of Justice" (Oxford, OUP 1971).

[104] Larry S. Temkin has noted that "few moral ideals have been more widely discussed, yet less well understood than the notion of inequality." See Larry S. Temkin "Inequality" in Pojman, Louis P. and Westmoreland, Robert (Eds.) "Equality: Selected readings", *supra* note 103 at 75.

[105] Pojman, Louis P. and Westmoreland, Robert (Eds.) "Equality: Selected readings", *supra* note 103 at 1.

Paine and Rousseau[106]. Subsequent to the French revolution guarantees of equality began to find their way into constitutional texts across Western Europe, beginning a process of entry of concepts of equality into European legal systems which has continued to the present day[107]. Today equality has been described as "a central feature of the vision of Europe that is developing"[108] and according to the European Commission, the principles of equal treatment and non-discrimination are at the heart of the European Social Model[109]. In recent years, there have been considerable developments at the European level with the adoption of measures aimed at achieving equality across a wide domain, as seen at the end of the last chapter[110]. Despite this progress, however, there are still serious definitional problems associated with the concept of 'equality' and a general lack of consensus as to its meaning.

In this section I shall discuss a number of well-established conceptions of equality in order to examine the application and potential of the concept with regard to people with disabilities. I shall then chart the range of ways in which equality has been conceptualised legally in the European Union and whether these methods can be applied effectively in the disability context. Based on this analysis it is hoped to pinpoint the most effective legal method of conceptualising equality in order to create a more equal society for people with disabilities.

2.1 The Notion of Equality in the Context of Disability Discrimination

There are two broad concepts into which egalitarian legal theory is normally divided into: that of formal equality and that of substantive equality[111]. The ideological foundations of the equality principle can be traced back to Aristotle who famously

---

[106] Barnard, Catherine, "The Principle of Equality in the Community Context: P, Grant, Kalanke and Marshall: Four uneasy bedfellows?" (1998) CLJ 352, 362

107 Barrett, Gavin, "The Concept and Principle of Equality in European Community Law-Pouring new wine into old bottles?" in Costello, C and Barry, E (Eds.), "Equality in Diversity-the New Equality Directives" (Dublin: Irish Centre for European Law 2003) at 101.

[108] McCrudden, Christopher, "Theorising European Equality Law", in Costello C and Barry E (Eds.), "Equality in Diversity-the New Equality Directives". (Dublin: Irish Centre for European Law 2003), 1.

[109] European Commission Green Paper "*Equality and Non-Discrimination in an enlarged European Union*" Luxembourg 2004, 3.

[110] See Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] O.J. L180/22 and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] O.J L303/16 which prohibits discrimination on the grounds of disability, age, sexual orientation and religion or belief.

[111] See generally Pojman, Louis P. and Westmoreland, Robert (Eds.) "Equality: Selected Readings" *supra* note 103, for a collection of writings on the various concepts of equality ranging from classical works to contemporary selections.

stated: "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unlikeness"[112]. Hence, equality is generally made up of two parts: the formal element which is generally understood as the right to treat like cases alike and the substantive part which attempts to move beyond this basic concept of equality to further concentrate on the relevant differences on which treatment is made. Let us begin with the formal and traditional model of equality.

2.11 The Challenge of Formal Equality

It has been claimed that formal equality is a manifestation of the principle of consistency which means that equal treatment includes consistent treatment i.e. likes must be treated alike[113]. Therefore, in order for the principle to operate, there must be a general assumption of 'sameness' before the law. This involves a symmetrical approach which subjects all classifications to the same standard of review, which implies that men and women, disabled and non-disabled, black and white etc. are all equal before the law and must be treated equally[114]. Exceptions to this principle of 'sameness' are only allowed if there is reasonable and objective justification[115]. The formal equality principle in practice has shown that differential treatment is only allowed in extremely limited circumstances[116].

A feature of formal equality in its legal construction is that it is normally framed in terms of an individual right to equal treatment. It aims to resolve individual instances of discrimination and thus focuses on improving the situation of the individual victim of discrimination rather than the group to which he or she may belong. Therefore, formal equality in a legal format generally aims to ensure that the external characteristics of the person, such as gender, race or disability, will be ignored in decision making processes (for example a job interview) in order to treat individuals the 'same'. In practice however, such a consistent approach tends to favour the

---

[112] Ethica Nicomachea V.3. 1131a-1131b.

[113] Barnard C and Hepple B, "Substantive Equality" (2000) 59 CLJ 562, 562

[114] Wentholt, K., "Formal and Substantive Equal Treatment: the Limitations and the Potential of the Legal Concept of Equality" in Loenen, T. and Rodrigues, P.R., "Non Discrimination Law: Comparative Perspectives" Kluwer Law International 1999, 53 at 54.

[115] It was Cicero who first enunciated this principle even though it is usually attributed to the Roman jurist Ulpian. See Schwarze J, "European Administrative Law" (Sweet and Maxwell, 1992), 545 and cited by Barrett *supra* note 107 at 104.

[116] The formal equality principle in practice can be observed in the prohibition of direct discrimination. See further Section III: 3.11.

dominant norm. Treating two people alike when one comes to the situation already burdened with disadvantage will clearly not achieve equality in any real sense[117]. The operation of formal equality in practice then shifts the emphasis from the external characteristics of a person to others such as efficiency, 'merit' and achievement[118]. Consequently, it is unlikely that this type of approach will improve the employment possibilities of a black person/female/person with a disability that was deprived of educational opportunities as a result of systemic and structural disadvantage. Formal equality does not recognise that individuals may lack the capabilities to achieve a relevant standard because of entrenched social disadvantage[119]. Hence this approach may well serve to solve isolated instances of clear discrimination but it will not challenge the traditional and dominant structures in society which bring about disadvantage for certain groups, including people with disabilities.

It is commonly accepted that formal rather than substantive equality has exerted considerable influence on European Community law up to now[120]. The tendency towards formal equality is reflected in the prohibition of direct discrimination[121] and can also be found in the European Court of Justice's interpretation of Community legislation[122]. This penchant towards formal equality can be explained by examining the economic rationale of the Community. It is an established fact that the European

---

[117] Fredman, S., "Disability Equality: A Challenge to the existing Anti-Discrimination Paradigm?" in Anna Lawson and Caroline Gooding (Eds.) "Disability Rights in Europe: From Theory to Practice" Hart Publishing 2005 pp.199-218 at 203.

[118] McCrudden C, *supra* note 108, 21

[119] Fredman *supra* note 117, 204.

[120] See Barnard C, "Article 13: through the looking glass of Union citizenship", in D. O' Keefe, P. Twomey (Eds.), "Legal Issues of the Amsterdam Treaty", Hart Publishing, Oxford-Portland Oregon, 1999, 387; Barnard C and Hepple B, "Substantive Equality" (2000) 59 CLJ 562; Mark Bell, "Equality and the European Constitution" 33 Industrial Law Journal No.3 September 2004, 242 at 245.

[121] See Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay between men and women; Article 2 (1) of Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions; Article 2(2)(a) of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Article 2(2)(a) of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. See further Section III: 3.11

[122] See for example Case C-399/92, *Helmig* [1994] ECR I-5727 where the ECJ used a formal approach of equality in coming to their decision. It disregarded the concept of indirect discrimination when it ruled that there was no discrimination when part-timers, who were predominantly women, did not receive overtime rates for hours worked over their normal contractual hours but less than full-time hours. The mechanisms in society which result in part-time workers being mostly female was not considered a determining factor. See Wentholt, *supra* note 114 at 63.

Community was originally established for economic purposes[123]. Formal equality in its legal construction serves the purposes of a capitalist, market oriented society because in order to have free play of market forces, individuals must be treated as equivalent factors of production, comparable in all relevant respects[124]. Formal equality serves this purpose with its emphasis on 'sameness' and by the fact that it only takes into account the personal qualities of individuals that may have an impact on their position on the market i.e. merit, efficiency and achievement. In addition the limited degree of intervention permitted by the formal equality principle preserves and possibly enhances the operation of the market[125]. In light of these characteristics, it has been readily adopted by the EU in order to safeguard the economic goals of the Union.

Formal equality is subject to a number of serious limitations. As I have stated above, the assumption that all subjects are the same before the law appears to be the starting point for an assessment of formal equality. Therefore, in order for the formal equality principle to operate, there must be an initial test of comparability of the situation and of the persons. This is a complex process. It is obviously not feasible for the law to pedantically take into account every similarity and difference that exists between persons. The issue of finding a suitable comparator is particularly problematic in relation to disability. How effective is it to compare a person with a disability to a person without a disability? A relevant comparison will depend on many intangible factors such as the nature and severity of the disability, environmental factors and accommodations made by the employer. The role of the comparator has proved critical for the operation of the formal equality principle[126] and it has been suggested that if a suitable comparator cannot be found then its very application will be prevented[127]. As a result of the difficulties in finding a suitable comparator, it is

[123] See Craig P and DeBúrca G, "EU Law: Text, Cases and Materials." 2nd Edition. (Oxford: OUP 1998), 11

[124] Apostolopoulou, Z., "Equal Treatment of people with disabilities in the EC: What does "Equal" mean?" Jean Monnet Working Paper 09/04 NYU School of Law at 9. Available online at: http://www.csmb.unimo.it/adapt/bdoc/01_05/apostolou.pdf

[125] McCrudden *supra* note 108, 21

[126] See Case C-249/96 *Grant v South West Trains* [1998] ECR 1-621 which illustrates the importance of finding an appropriate comparator in sex discrimination cases.

[127] Barrett, *supra* note 107, 105.

submitted that laws embodying the principle of formal equality will not be very effective in the specific context of disability discrimination[128].

A second limitation to the principle is that it "is no more than a relative concept: it is satisfied as long as likes are treated alike"[129]. This means that once persons are treated the same, regardless of whether they are treated equally well or equally badly, equality in the formal strict sense has been achieved. Therefore the application of formal equality does not in any way guarantee a satisfactory outcome in terms of correcting the discriminatory situation. Equality in this sense embodies a notion of procedural justice[130]; Barnard and Hepple refer to this system as a process whereby equal treatment can be satisfied by depriving both the persons compared of a particular benefit (levelling down) as well as by conferring the benefit on them both (levelling up)[131]. Therefore there is no violation of this principle if an employer treats disabled and non-disabled employees equally badly. This is obviously not the solution sought by the affected parties in a discriminatory situation.

Thirdly, as I have mentioned above formal equality is characterised by the individual justice model. Fredman has highlighted an important criticism in relation to the individualistic nature of formal equality. She claims that the emphasis on the individual will produce negative effects because "each person's affinity, sense of history and identity, mode of reasoning and expression of feelings is constituted by group affinities"[132]. Even though everyone has attributes that are independent of group identities it is unavoidable that they will also have group attributes. Therefore it is unrealistic and ineffective not to take this into account. According to Fredman, it will result in disparaging effects on the real value to the individual of his or her own group identity and create strong pressures to conform to the dominant thinking in society[133].

---

[128] For a general opposing view see Michael Banton, "Discrimination Entails Comparison" in Loenen, T. and Rodrigues, P.R., "Non Discrimination Law: Comparative Perspectives" Kluwer Law International 1999, where the author argues that the process of comparison is crucial to both the enactment and the application of laws against discrimination.

[129] Fredman, Sandra "Combating Racism with Human Rights: the Right to Equality" in Fredman (Ed) 'Discrimination and Human Rights-the Case of Racism', (Oxford University Press) 2001, 18

[130] Apostolopoulou, Zoe *supra* note 124 at 11.

[131] Barnard C and Hepple B *supra* note 113, 563

[132] Fredman, Sandra 'Equality: A New Generation' *supra* note 88 at 154.

[133] Ibid.

2.111 Conclusion

It is clear from the arguments above that the concept of formal equality has limited potential for people with disabilities. Under this model, people with disabilities and non-disabled people alike are considered as comparable in all respects and therefore entitled to equal treatment. This is a very unrealistic test. By its initial requirement of "sameness", it refuses to recognise the high improbability that a person with a disability will be in a comparable situation to a non-disabled person due to historical discrimination and disadvantage. Formal equality has been criticised as advocating only a superficial view of equality as individual and societal differences as a result of which people find themselves differently situated are ignored[134]. For example, unequal access to education and skills development is often due to class division, status differences and wealth inequalities. In this way formal equality does nothing to combat the more hidden, structural and institutional types of discrimination, which stem from the way society is constructed. Therefore we can conclude that the principle of formal equality alone is not enough to provide equal treatment for people with disabilities. Something more effective is needed, which may be found in the form of substantive equality measures.

2.12 The Potential of Substantive Equality

The limitations outlined above have resulted in challenges to the theory and operation of formal equality. These challenges have consequently produced alternative theories to formal equality that aim to improve and complement the traditional principle of equal treatment. The alternative or counterpart to formal equality has been conceptualised in the form of substantive equality[135]. This notion of equality places greater emphasis on ensuring equality in practice and is willing to depart from the supposed neutrality of decision making to achieve this[136]. The key distinction lies in the recognition of difference, which requires differences to be taken into account and

---

[134] Waddington, Lisa, "Disability, Employment and the European Community", *supra* note 31, 61

[135] There is no commonly accepted definition of substantive equality but Advocate General Tesauro gave a good description in the Opinion to *Kalanke v. Freie Hansestadt Bremen* (Case C-450/93) [1995] ECR I-3051, Para. 16. "The principle of substantive equality refers to a positive concept by basing itself precisely on the relevance of those different factors themselves in order to legitimise an unequal right, which is to be used in order to achieve equality as between persons who are regarded not as neutral but having regard to their differences."

[136] Bell, M "The Concept of Equality" at 1. Paper given at the conference, "The Fight against Discrimination: the Equal Treatment Directives of 2000". Academy of European Law, Trier 1-2 Oct 2004. Available at: www.era.int

dealt with accordingly[137]. In addition substantive equality is based on a group justice model,[138] which starts from the recognition that discrimination is based on the characteristics of a group of persons and results in collective disadvantage[139]. This can be illustrated, for example, in the prohibition of indirect discrimination,[140] which involves prohibiting practices that have the effect of disproportionately disadvantaging a particular group[141]. From the outset it is apparent that a model of equality which recognises 'difference' and aims to ensure equality across a much wider scale will be more beneficial to people with disabilities, given the particular nature of disability discrimination.

Within the broad model of substantive equality, different, overlapping approaches have been identified[142]. The most significant of these are equality of opportunity and equality of results. Equality of opportunity is more oriented towards individual merit in the sense that it aims for equality in the opportunities of individuals to perform in accordance with their abilities[143]. Therefore in relation to people with disabilities, it would be most beneficial to those whose impairment has a limited impact on their abilities and as a result suffer less from stigma and stereotypical attitudes. Equality of results on the other hand envisages a more redistributive approach coupled with

---

[137] For an ambitious treatment of the importance of recognising difference in achieving equality, see Rawl's 'difference principle' which states that "social and economic inequalities" should work "to the greatest benefit of the least advantaged" members of society. See Rawls "A Theory of Justice" (Oxford: OUP 1971), 83. Cited in Baker, Lynch, Cantillon, Walsh, "Equality: From Theory to Action" *supra* note 4, 25.

[138] In addition to the individual and group justice models of equality, McCrudden has identified two other possible interpretations of equality; equality as protecting and enhancing identity and equality as participation. Equality as recognition of diverse identities realises the failure to accord due importance to different identities as a form of oppression and inequality in itself. Equality as participation views claims by minority groups for equality as a claim for political participation in a broad sense. For a more detailed discussion of these ideas, see McCrudden, C, *supra* note 108 pp. 28-33

[139] Bell, M *supra* note 136 at 4.

[140] See for example Article 2(2) (b) of Council Directive 2000/43/EC; Article 2(2) (b) of Council Directive 2000/78/EC; Article 2(2) of Council Directive 2002/73/EC.

[141] See further Section III: 3.12 for a detailed examination of the concept indirect discrimination in EU law.

[142] Fredman has identified four different yet interconnected approaches to substantive equality; equality of results, equality of opportunity, equality as auxiliary to substantive rights and finally "a broad value driven approach". See Fredman, S, "A Critical Review of the Concept of Equality in UK Anti-Discrimination Law", Independent Review of the Enforcement of UK Anti-Discrimination Legislation, Working Paper No. 3, (Cambridge Centre for Public Law and Judge Institute of Management Studies, November 1999), paras. 3.7-3.19.

[143] Brunel University, "Definitions of Disability in Europe: A Comparative Analysis", (London: Brunel University, 2002), 67.

positive action. This is a more radical model which would encompass a wider group of people with disabilities, especially those with a more substantial impairment[144].

2.121 Equality of opportunity

Equality of opportunity is a notion of equality which holds that individuals should have equal chances in life[145]. It calls for compensation for those who have had less fortune early in life to bring them to the level of those who had advantages. Fredman[146] has employed the metaphor of the race to describe the concept: "It is maintained that true equality cannot be achieved if individuals begin the race at different starting points. An equal opportunities approach therefore aims to equalise the starting point, accepting that this might necessitate special measures for the disadvantaged group."

Although this approach does endorse the use of positive action programmes and other compensatory policies, it is only allowed to a certain extent. When the starting point has been equalised there is no further assistance or intervention allowed under this model. This creates a problem for people with disabilities as disability can create a disadvantage which needs to be continually countered[147]. As a result of the limited space for the use of positive action measures, Barnard and Hepple have noted that it is not clear whether the promotion of equality of opportunity is a narrow procedural obligation or a broader substantive one[148]. The procedural view of equal opportunities involves the sole removal of obstacles or barriers to participation whereas a broader substantive approach complements this with a range of other special measures to realise equality in practice. A procedural approach will technically offer equal opportunities in the sense that it offers the right to compete. However the mere right to compete does not does confer equal opportunities in the real sense of the term. A person with a disability and a non-disabled person can have equal opportunities in this sense even if one of them has no real prospect of achieving anything[149]. Seen in this way, the equality of opportunity model appears to embody elements of both formal

---

[144] Ibid.

[145] See generally Roemer, John E., "Equality of Opportunity", (Cambridge: Harvard University Press 1998)

[146] Fredman S., "Affirmative action and the Court of Justice: A Critical Analysis" in (Ed) Jo Shaw, 'Social Law and Policy in an Evolving European Union' Hart Publishing Oxford Portland 2000, 182-186 and cited in Barrett *supra* note 107 at 110.

[147] Waddington, L *supra* note 31 ,62

[148] Barnard and Hepple *supra* note 113, 566

[149] See Baker, Lynch, Cantillon, Walsh, *supra* note 4, 33.

and substantive equality. With regard to people with disabilities, the removal of barriers alone is not enough to counter discrimination; therefore an equal opportunity model with a broad substantive approach is recommended to achieve equality in practice for persons with disabilities.

The equal opportunity model is currently the dominant approach to disability in the EU[150]. It has also been reflected in EC gender equality legislation[151] and in the case law interpreting that legislation[152]. At the national level, it has also been endorsed and can be seen in s. 75 of the Northern Ireland Act 1998, which imposes a duty on specified public authorities to have 'due regard to the need to promote equality of opportunity' across all the protected grounds including disability in carrying out their public functions[153]. Reasons for the appeal of the equality of opportunity model in the EU are related to the fact that it fits in relatively well with the market. The dominant use of negative anti-discrimination legislation and the limited role of positive action, which are characteristic of equality of opportunity, are more favourable to market dynamics[154].

2.122 Equality of Results

An alternative but not dissimilar model of substantive equality is equality of results, which involves a redistributive approach to equal treatment[155]. This is a clear example of the substantive model at work. Under this model it is not the procedure that is considered but the actual distribution of resources and rights. It aims to actively overcome under-representation of disadvantaged groups and to achieve fair, proportionate and full participation in the workplace and in access to education, goods and services for these groups[156]. Under this model, if the outcome of supposed equal and "consistent" treatment is unequal then the goal of substantive equality has been

[150] See *Equal Opportunities for People with Disabilities: A European Action Plan* COM (2003) 650 final of 30 October 2003. See also the Commission's 1996 Communication on Equality of Opportunity for People with Disabilities and the White Paper of 1994. See further Section I at p13/14.
[151] See Article 2(4) of Council Directive 76/207/EEC
[152] See Case C-450/93 *Kalanke v. Freie und Hansestadt Bremen* [1995] E.C.R. I-3051, para. 23
[153] O' Cinneide, Colm 'A New Generation of Equality Legislation? Positive Duties and Disability Rights' in Anna Lawson and Caroline Gooding (Eds.) 'Disability Rights in Europe: From Theory to Practice' Hart Publishing 2005, 230.
[154] Quinn, G., "The Human Rights of People with Disabilities under EU law", in P. Alston (Ed), 'The EU and Human Rights' *supra* note 40 at 292.
[155] See generally Rawls "A Theory of Justice" (Oxford: OUP 1971) and R. Dworkin, "Sovereign Virtue. The Theory and Practice of Equality", Cambridge: Harvard University Press 2000, pp.65-119.
[156] Barrett *supra* note 107, 108.

infringed. In order to achieve its goal, equality of results will generally involve special measures to overcome historical disadvantage that affects particular groups, for example; a quota requirement that equal numbers of disabled and non-disabled, men and women, Catholics and Protestants etc. are employed in the workplace. However, the emphasis on positive action measures has been criticised as being too radical and deeply inconsistent with the formal equality principle. The active promotion of one group over another would seem to directly contradict the very principle of equal treatment that this model is supposed to advance[157]. Is it "equal" to actively discriminate in favour of one group over another? Yet in the context of disability, this model of equality has the potential to be a very powerful tool. People with disabilities often find themselves trapped in a cycle of disadvantage as a result of the way society is arranged. They may not have the same standard of education and skills as non-disabled people as a result of segregated schools, physical and environmental barriers to major activities in society and attitudinal barriers resulting from the stigma surrounding disability. These factors result in low self-esteem, an inability to secure employment and consequently low income or poverty. As a result of this vicious cycle, people with disabilities often find themselves in a position where the structures in society will not allow them to have the same opportunities as non-disabled persons. Therefore in order to break this cycle, active measures are needed to catapult people with disabilities to the same position as non-disabled people.

The equality of results model is not yet widely used throughout the EU. It can be observed in Sweden, Germany and the U.K where it has been pursued as a legislative objective[158]. At EU level, hard measures aimed at securing equality of results have been rejected but a greater degree of tolerance than expected has been exhibited in certain areas of Community law[159].

---

[157] Fredman, S 'Combating Racism with Human Rights' *supra* note 129, 19

[158] In the UK see for example the temporary provisions concerning composition of the police force in s. 46 of the Police (Northern Ireland) Act 2000. In Sweden, note the legislative background to Case C-407/98 *Abrahamsson and Andersson v Fogelqvist* [2000] ECR I-5539. In Germany note the legislative background to Case C-450/93 *Kalanke v Bremen* [1995] ECR I-3051; Case 158/97 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363 and Case 407/98 *Badeck v Hessischer* Ministerpräsident [2000] ECR I-1875. Cited in Barrett *supra* note 107, 108

[159] Especially in relation to national policies in the field of gender equality; see Barrett *supra* note 107, 109. The concept of positive action has also been cautiously endorsed at EU level; the three core directives on discrimination in the labour market all permit Member States to allow positive action. See Article 5 of Council Directive 2000/43/EC; Article 7of Council Directive 2000/78/EC; Article 2(8) of Council Directive 2002/73/EC.

Both the equality of opportunity and the equality of results approach are similar in nature. Both recognise the importance of difference, the value of diversity and have similar aims. Both seek to correct disadvantages and discrimination arising from societal and institutional barriers. Arguments in favour of the equal opportunity approach claim that it seems capable of achieving more than the mere application of consistent treatment while not presenting the same ethical dilemmas as equality of results[160]. However, it is submitted that the equality of results approach is more likely to achieve equality in practice for people with disabilities. With its focus on equality of outcome and positive action measures, it attempts to eliminate the disadvantages that are generated by society and at the same time compensate for inherent disadvantages[161]. Also, in contrast to the equal opportunity model, which discontinues operating once the initial starting point has been equalised, equality of results continues to provide assistance until equality in practice is achieved.

In addition to the conceptions discussed above, Baker *et al*[162] have proposed a more sweeping equality strategy in the form of equality of condition, which contains elements of both equality of opportunity and equality of results but is more ambitious. The objective of this notion of equality is to eliminate inequalities altogether. The key to achieving this lies in the recognition that inequality is rooted in social structures, particularly structures of domination and oppression. Therefore, as opposed to adjusting unequal structures in society through the use of positive measures and accommodations, equality of condition argues for institutional and structural change. It goes further than equality of opportunity by demanding a society where people will have *real* choices among *real* options, not just equality of opportunity in the procedural sense. With this objective in mind, it emphasises the rights and advantages of individuals as well as groups, it focuses on the power relations that exist between people and it pays particular attention to the influence of social factors on people's choices and actions[163]. Equality of condition aims to achieve equality for all groups within a broad model and in this sense it embodies a universalist notion. The actual realisation of this goal will prove extremely difficult as it requires the complete transformation of capitalist society and the elimination of racism, patriarchy, privilege

[160] Barrett *supra* note 107, 110
[161] Waddington, L *supra* note 31, 64
[162] See Baker *et al supra* note 4, 33
[163] Ibid.

and other systems of oppression which have been existent in human society for a significant period of history[164].

2.123 Conclusion

It is proposed that equality for people with disabilities cannot be achieved without substantive measures. Firstly and essentially substantive equality takes an asymmetric approach to equality: it recognises diversity and demands that differences be taken into account and accommodated accordingly. This is crucial for people with disabilities, as disability by its nature does mark a person as different to the existing non-disabled 'norm'. Within existing societal structures, it will be difficult for a person with a disability to be in the same position as a person without a disability, therefore the sole application of equal treatment in the traditional Aristotelian manner will be problematic. Thus far, the solution to this problem of 'difference' can be found in substantive equality measures such as positive action, the prohibition of indirect discrimination and reasonable accommodation[165]. Without such positive measures, the right to formal equality for people with disabilities would be empty. These measures help to level the playing field and provide the most realistic possibility for people with disabilities to enjoy real equality in present-day society. Certainly, substantive equality is not totally unproblematic. The issues of positive action and accommodation are controversial. As already noted, is difficult to reconcile positive action with the concept of equality and the traditional non-discrimination framework. I have also commended the substantive approach for its emphasis on difference, yet it is not specified how exactly differences should be taken into account and dealt with. On what basis does one differentiate between groups? Then, how far does one accommodate? If one takes into account all the differences between individuals and groups, accommodation could go on endlessly[166]. It is obvious that limits and parameters will have to be drawn in order to have a workable and effective model of substantive equality.

It is apparent from this brief discussion that equality is not a simple idea. There are many conceptions of equality which are overlapping, controversial and unworkable. I propose that one conception of equality does not fit all. While I have endorsed the

---

[164] Ibid.

[165] See further Section VI: Article 5 of the Framework Directive: The Concept of Reasonable Accommodation.

[166] Wentholt, K., *supra* note 114, 58.

necessity of substantive equality measures to combat discrimination, formal equality cannot be abandoned; it is the founding principle of basic equal treatment and is therefore a necessary basis and starting point for all equality provisions. However, this does not mean that it is enough. It needs to be complemented and supported by additional measures which actually take differences into account. This is especially required in the case of disability discrimination as has been demonstrated. In practice, a flexible model of equality of opportunity which encompasses measures such as a prohibition on indirect discrimination, an obligation to provide reasonable accommodation and positive action to promote equality could offer a good model of equality for people with disabilities[167].

2.2 Equality as a legal rule in European Union Law

Internationally the right to equality before the law and protection against discrimination is recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the United Nations Covenant on Civil and Political Rights and on Economic, Social and Cultural Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. All Member States of the European Union are signatories to the European Convention on Human Rights and the basic principle of equality enshrined in the above mentioned international instruments has been adopted by all Member States which have Constitutions. Bearing this in mind, let us examine how equality has been conceptualised as a legal rule thus far in European Union law. I will analyse the importance that has been attached to the principle of equal treatment at EU level and the potential of the relevant instruments in the field of disability discrimination.

2.21 Equality as a 'general principle'

Firstly, I shall address the status of equality as a "general principle" of European law. The European Court of Justice (ECJ) has developed a jurisprudence that subjects the exercise of Community competence to the requirement that it complies with 'general

[167] Barnard and Hepple have recommended a model of substantive equality in the form of a flexible concept of indirect discrimination coupled with an obligation to make reasonable accommodation. See *supra* note 113, 584.

principles'[168]. General principles are unwritten principles of law extrapolated from the laws of the Member States by a process similar to that of the development of common law by the English Courts[169]. Equality has this status of a general principle of law in the Community legal order, the requirements of which have been left to the Court of Justice to determine. In its case law, the Court has referred to "the general principle of equality which is one of the fundamental principles of Community law."[170] The Court has decided that the general principle of equality means that comparable situations are not to be treated differently and different situations not to be treated in the same way, unless that treatment is objectively justified[171]. This is the standard methodology used by the ECJ and the net effect is that there should be no arbitrary treatment without justification. It is clear from the Court's interpretation that equality as a general principle is normally conceptualised in terms of formal equality. The rationale for the development of a general principle of equality is ambiguous as there were already provisions in the EC Treaty that provided a legal basis for equal treatment with regard to specific matters[172]. Tridimas[173] has suggested that the Treaty provisions that were in place did not guarantee equal treatment in all cases so the development of a general principle was necessary to cover the lacunae left in the law. He goes on to speculate that the real reason may have been one of principle rather than practical necessity in which the principle of equality was seen as a democratic guarantee preventing the

---

[168] See generally Takis Tridimas, "The General Principles of EC Law" (OUP, 1999) and McCrudden, C. "The New Concept of Equality", Paper delivered at the Academy of European Law in the framework of the conference "Fight against Discrimination: The Race and Framework Employment Directives". Trier 2-3 June 2003. Available at: www.era.int

[169] Tridimas, T *supra* note 168 at 4.

[170] See Joined cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753, paragraph 7 and Case C-309/96 *Annibaldi* [1997] ECR I-7493, paragraph 18.

[171] See for example Case C-189/01 *Jippes and Others* [2001] ECR I-5689, Paragraph 129 and and Case C-149/96 *Portugal v Council* [1999] ECR I-8395, paragraph 91.

[172] The key provisions are Article 6 EC (non-discrimination on grounds of nationality), Article 40 (3) EC (non-discrimination as between producers and consumers in the context of the Common Agricultural Policy), Article 48 EC (non-discrimination as between workers who are nationals of the host state and those who are nationals of another Member State), Article 52 EC (equal treatment between as between nationals and non-nationals who are established in a self-employed capacity in a Member State), Articles 59-60 EC (equal treatment for providers of services who are not established in the Member State in question), Article 95 EC (non-discrimination in the field of taxation as between domestic and imported goods) and Article 119 EC (equal pay as between men and women). Cited in Grainne de Búrca, "The role of Equality in European Community Law" in Dashwood and O' Leary (Eds.) "The principle of Equal Treatment in EC Law" Sweet and Maxwell 1997, 20.

[173] Tridimas, Takis, "The Application of the Principle of Equality to Community Measures", in (Eds.) Alan Dashwood and Siofra O Leary "The Principle of Equal Treatment in EC Law", Sweet and Maxwell 1997, 2.

Community and national authorities from imposing differential treatment without good reason[174].

Another way in which equality comes under the auspices of a general principle is through the protection of fundamental rights[175]. The protection of fundamental rights is one of the general principles of Community law and particular elements of equality have been recognised among these fundamental rights. Religious equality[176] and the prohibition of sex discrimination[177] have been acknowledged as fundamental rights and the Court has also held that fundamental rights include the general principle of 'equality and non-discrimination'[178]. In the case of *P v S and Cornwall*[179], the Court held that sex equality was a fundamental human right and therefore the scope of the Equal Treatment Directive[180] could not be restricted based on the fact that a person is of one or other sex. In this decision the general principle of equality was seen to transcend the provisions of Community legislation,[181] which signified a greater potential for the use of general principles in EU law. However the Court has since declined to take this approach any further[182] and has been cautious in its application since. It can therefore be deduced that equality as an element of the general principle of fundamental rights has a somewhat limited and uncertain role in EC law and cannot be relied upon as a solid basis to make a claim.

In conclusion, equality as a general principle is quite a restricted legal tool in terms of basing a claim in EC law. Certain limitations derive from its very status as a general principle because such principles only apply when a question of Community law is involved[183]. Where no question of Community law arises the general principles are of

---

[174] Ibid.
[175] McCrudden C *supra* note 168 at 3.
[176] Case 130/75 *Prais v Council* [1976] ECR 1589
[177] *Defrenne v Sabena*, G149/77, [1978] ECR I-1365 at paragraphs 26, 27.
[178] See *Ángel Rodríguez Cabellero v Fondo de Garantía Salarial (Fogasa)*, Case C-442/00, European Court Reports 2002 paragraph 32.
[179] Case C-13/94 [1996] ECR I-2143. The issue at the centre of this case was whether discrimination on the grounds of having undergone transgender surgery amounted to discrimination on the grounds of sex.
[180] Council Directive 76/207/EEC on the implementation of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions [1976] O.J. L39/40.
[181] McCrudden, C "The New Concept of Equality", *supra* note 168 at 4.
[182] See Case C-249/96, *Grant v South West Trains Ltd.* [1998] ECR I-621
[183] Barrett *supra* note 107, 119

no relevance[184]. Secondly, even within the context of Community law, the reach of the general principles is limited; they apply only to legislative and administrative Acts. With regard to measures taken by Member States, general principles such as the principle of equality only apply in limited circumstances, namely where the Member State implements Community law[185]. As a result of these limitations, the general principle of equality is not a free standing basis for legal action by individuals[186]; it is not a positive and enforceable right and is not directly effective per se[187]. Therefore challenges to the applicability of national legislation have to be on the foot of some rule of Community law other than a general principle such as a Directive, an article of an EC Treaty or some other equivalent such measure[188]. It is therefore clear that equality as a general principle, standing alone, is not a solid instrument to combat inequality in practice. A series of additional and complementary legal instruments, concepts and methods would be needed in order for it to succeed.

2.22 Treaty Provisions and Legislation

As I mentioned earlier, there are several EC Treaty provisions which are specific manifestations of the general principle of equality[189]. The original rationale behind these provisions was economic rather than social. Commentators have noted that the principle of equal treatment in the EU has been employed as an instrument for the attainment of specific Community aims, for example, the eradication of obstacles to the completion of the single market[190]. It was not until the emergence of measures to combat gender discrimination in employment that the Community began to take more of an interest in equality as a social issue as opposed to an economic one. The gender equality experience has been instrumental in shaping current European anti-discrimination law. Articles 2[191] and 3(2)[192] of the EC Treaty impose the task of

---

[184] Ibid.

[185] Ibid. See Case 230/78 *Eridania v Minister for Agriculture and Forestry* [1979] ECR 2749

[186] Hepple, B., 'The Principle of Equal Treatment in Article 119 EC and the Possibilities for Reform' in Dashwood and O' Leary (Eds.) "The Principle of Equal Treatment in EC Law" Sweet and Maxwell 1997 at 142 and cited in Barrett *supra* note 107, 120

[187] Ellis, E., 'The Principle of Equality of Opportunity irrespective of Sex: some Reflections on the present state of European Community Law and its Future Development' in Dashwood and O' Leary (Eds.) "The principle of Equal Treatment in EC Law" Sweet and Maxwell 1997 at 190 and cited in Barrett *supra* note 107, 120.

[188] Barrett *supra* note 107, 120

[189] The key Treaty provisions have been outlined above, see *supra* note 172.

[190] See De Búrca, Grainne "The role of Equality in European Community Law" in Dashwood and O' Leary (Eds.) "The principle of Equal Treatment in EC Law" Sweet and Maxwell 1997 at 2.16.

[191] Article 2 "The Community shall have as its task..... equality between men and women"

promoting equality between men and women in the Community. The original motive for the insertion of Article 119 EEC[193] in the Treaty of Rome demanding equal pay between men and women was to protect those states that had equal pay legislation at the time of the formation of the Community from being undercut by those without such legislation[194]. However as a result of the growing women's rights movement throughout Europe in the 1970's and the ground breaking decisions by the ECJ in the *Defrenne*[195] cases, the original economic objective was supplemented by an aim of ensuring greater equality between men and women in employment, for reasons of greater fairness in the labour market and of individual fulfilment[196]. Throughout the 70's a number of important Directives were adopted on the basis of Article 141, including the Equal Pay Directive[197] and the Equal Treatment Directive[198]. A number of concepts that have since proved crucial to the operation of European anti-discrimination law were developed during the gender equality experience. For example, the concepts of indirect discrimination[199] and positive action[200] were recognised by the European Court of Justice as necessary to combat structural and institutional forms of discrimination. These concepts have now been applied to a vast new range of relationships and situations by the Equal Treatment Directives of 2000[201]. Thus far the success of gender discrimination case-law has shown that reliance on anti-discrimination legislation has proved to be the most successful way of implementing the principle of equal treatment.

---

[192] Article 3(2) "In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women."
[193] Now Article 141 EC; "Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied."
[194] McCrudden *supra* note 108, 4
[195] Case 80/70 *Defrenne v Sabena* [1971] ECR 445; Case 43/75 *Defrenne v Sabena* (No. 2) [1976] ECR 455 and Case 149/77 *Defrenne v Sabena* (No.3) [1978] ECR 1365 where the right to equal pay as laid down by Article 119EEC (now Article 141 EC) was held to be an enforceable individual right.
[196] McCrudden *supra* note 108, 4.
[197] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women [1975] OJ L 45/19.
[198] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion [1976] OJ 39/40. See also Parliament and Council Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EEC [2002] OJ L269/15.
[199] Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Harzt* [1986] ECR 1607
[200] Case C-450/93 *Kalanke v Freie und Hansestadt Bremen* [1995] ECR I-3051.
[201] See *supra* note 110

2.23 Charter of Fundamental Rights

Another source of the principle of equality in EU law is the European Charter of Fundamental Rights[202] which was adopted at Nice in December 2000. This document sets out the fundamental rights already considered by the ECJ as arising from the general principles of Community law[203]. The Charter contains a chapter headed "Equality", which includes a provision that everyone is equal before the law[204]. Article 21 of the Charter sets out a wider catalogue of rights than ever before, prohibiting discrimination expressly on the grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, *disability*, age and sexual orientation[205]. There is also a special article on the rights 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[206]. The strength of this provision lies in the implicit mandate for positive measures to assist the integration of people with disabilities[207]. It refers to the 'right' of people with disabilities to such positive action, which clearly reflects a substantive model of equality[208]. Therefore this provision could have real implications for the promotion of equal treatment of people with disabilities, especially if used in conjunction with measures that were adopted under the Framework Directive such as the obligation to provide reasonable accommodation and the article on positive action[209]. However, the Charter was adopted without any binding effect which unfortunately reduces its potential as a hard legal instrument. It applies throughout the scope of EU law but does not generate autonomous rights to non-discrimination[210]. Even though it is more

---

[202] 18 December 2000, [2000] OJ C 364/1

[203] McCrudden C "The New Concept of Equality" *supra* note 168, 8.

[204] Chapter III, Article 20

[205] Chapter III, Article 21 (1). Discrimination on the grounds of nationality is prohibited separately in Article 21 (2).

[206] Article 26 "The Union recognises 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."

[207] Bell, M. 'The Right to Equality and Non-Discrimination' in Hervey, T and J Kenner (Eds.) "Economic and Social Rights under the EU Charter of Fundamental Rights-a Legal Perspective" (Oxford: Hart Publishing, 2003) pp.91-110 at 103.

[208] Ibid.

[209] Article 5 and Article 7 of Council Directive 2000/78/EC respectively. These provisions are discussed in more detail in Section IV and Section III: 3.24

[210] Bell, M. "Walking in the same direction? The contribution of the European Social Charter and the European Union to combating discrimination", Paper completed during a Jean Monnet Fellowship at the Robert Schuman Centre for Advanced studies, European University Institute, Florence 2004.

explicit than the general principle of equality, they are comparable in terms of limited effect[211]. Despite its limitations, the Charter has become an important reference document for the ECJ in its interpretation of Community law[212]. It has been acknowledged that "the Charter of Fundamental Rights of the European Union has not been recognised as having genuine legislative scope in the strict sense..... [However] in proceedings concerned with the nature of a fundamental right, the relevant statements cannot be ignored"[213]. This jurisprudence signifies that the fundamental rights enshrined in the Charter could therefore be influential when the Court comes to examine anti-discrimination legislation such as the Framework Employment Directive.

The Charter was incorporated into the Treaty establishing a Constitution for Europe[214], adopted in June 2004, which if ratified would elevate the legal status of the Charter to give it binding force. All the rights in the Charter will be governed by the key principles of Community law, including the primacy principle, which means that the Charter will prevail over all the law of the Member States and their Constitutions[215]. The equality chapter of the Charter was retained intact during incorporation. This signifies a major step forward for the recognition of fundamental rights and the principle of equality in the EU[216]. It indicates that the Charter will no longer be considered as a mere political declaration but as a catalogue of enforceable rights which can be potentially relied upon before the European Court of Justice and national courts[217]. In addition to the incorporation of the Charter, the new Treaty

---

[211] Ibid.

[212] European Commission. Green Paper "*Equality and non- discrimination in an enlarged European Union*", Luxembourg 2004 at 15. See Case C-245/01-*RTL Television GmbH v Niedersächsische Landesmedienanstalt für privaten Rundfunk* ECR [2003] 0000.

[213] Case C-173/99 *BECTU v Secretary of State for Trade and Industry* [2001] ECR I-4881, Opinion of Advocate General Tizzano

[214] See European Constitution Part II: The Charter of Fundamental Rights of the Union. Title III Equality, Article II-81 on Non-discrimination corresponding to Article 21 of the Charter and in relation to people with disabilities, see Article II-86 corresponding to Article 26 of the Charter. A consolidated version of the Constitutional Treaty can be found on the website of the European Union at the following address: http://europa.eu.int/constitution/

[215] Ortega, Luis, 'Fundamental Rights in the European Constitution', Volume 11 Issue 3 European Public Law 2005, 363 at 366.

[216] See generally Mark Bell, 'Equality and the European Constitution' 33 Industrial Law Journal No.3 September 2004, 242 for a discussion of how equality has been dealt with in the Constitutional Treaty. He concludes that there is no settled vision or concept of equality running though the Constitution but instead various points of reference which are inconsistent. With regard to the Charter, he notes that it was awkwardly inserted and overlaps with other elements of the Constitution, see p259.

[217] See 'Brief Summary of the EU Constitution from a Disability Perspective' at http://www.edf-feph.org/Constitution/content_summary_en.htm

emphasises the promotion of equality and non-discrimination in all the activities of the Union[218].

However the Constitutional Treaty can only enter into force and be effective if it is adopted by each of the signatory countries[219] but thus far the text has been rejected by France and the Netherlands[220]. These rejections have naturally resulted in a setback to the ratification procedure and it is now uncertain whether the Constitution in its current form will be ratified[221]. As a result, the extent to which the equality provisions of the Charter will give rise to a legally enforceable principle of equality remains to be seen.

2.3 Concluding Remarks

Having examined the various ways in which the Union has conceptualised the concept of equality up until now, it is submitted that due to the lack of legal effect of the general principle of equality, the uncertain ratification of the Constitutional Treaty and the success of anti-discrimination legislation in the field of gender equality; anti-discrimination legislation is currently most effective way to achieve equal treatment for people with disabilities. In the next section, I will concentrate on the Framework Employment Directive, the sole piece of anti-discrimination legislation at the European level which prohibits discrimination on the ground of disability and analyse its strength and possibilities in combating disability discrimination.

---

[218] See European Constitution Part III: The Policies and Functioning of the Union. Title I: Provisions of General Application. Article III-118 which states "In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, *disability*, age or sexual orientation." See also Part III, Title II: Non-Discrimination and Citizenship. Article III-124 (1) which stipulates "Without prejudice to the other provisions of the Constitution and within the limits of the powers assigned by it to the Union, a European law or framework law of the Council may establish the measures needed to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Council shall act unanimously after obtaining the consent of the European Parliament."

[219] Once ratified, the Treaty stipulates that the Constitution may enter into force from 1 November 2006.

[220] In the referendums of the 29 May and 1 June 2005 respectively.

[221] The results of the referendums in France and the Netherlands led the Council to declare the date of 1 November 2006 as no longer tenable for the entry into force of the Constitution. For updates of the ratification process, see the European Union website at http://europa.eu.int/constitution/referendum_en.htm

III: THE FRAMEWORK EMPLOYMENT DIRECTIVE 2000/78/EC

The Framework Employment Directive 2000/78/EC[222] establishes a general framework for equal treatment in employment and occupation on the grounds of religion or belief, disability, age and sexual orientation[223]. The purpose of the Directive is to set minimum common standards in the laws against discrimination in force in EU Member States on the above mentioned grounds[224]. The aim is to create a general legal framework for combating discrimination thus putting into effect the principle of equal treatment[225]. With the Framework Directive, the EU has expanded the concepts, standards and protections that are already in place with regard to anti-discrimination law on the grounds of gender, to include new definitions and understandings of the concept of discrimination[226]. The Directive contains a new definition of indirect discrimination and it legally recognises new forms of discrimination, such as harassment and a failure to make a reasonable accommodation.

The scope of the Directive is limited to employment and occupation; it does not require Member States to outlaw disability discrimination in fields such as education, public transport and the provision of goods and services. However, it does have a wide-ranging scope within the employment sphere. Hence, discrimination on the grounds of *inter alia* disability is outlawed with regard to access to employment, self-employment or an occupation, including selection criteria and recruitment; access to all types of vocational training and guidance, including practical work experience; employment and working conditions, including dismissals and pay; and membership of or involvement in trade unions and other worker organisations, employers'

---

[222] [2000] O.J L303/16

[223] The deadline for transposition of the Directive was the 2 December 2003. In relation to the grounds of age and disability, Member States were allowed to ask for up to an additional 3 years for implementation. France and the UK decided to use the additional 3 years in relation to disability and Denmark chose to use 1 year. See Article 18 of Council Directive 2000/78/EC.

[224] European Commission. *Equality and Non-Discrimination* Annual Report 2005 at 7.

[225] Ibid. Article 1 of Council Directive 2000/78/EC lays down its purpose: "The purpose of this Directive is 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 principal of equal treatment."

[226] Waddington, L and Bell, M "More Equal than Others: Distinguishing European Union Equality Directives" C.L.M.R 38 2001, 587-611, 588

associations and professional bodies[227]. It can therefore be reasonably deduced that the purpose of the Directive is to increase the participation in the labour market of certain groups, including people with disabilities and to reduce or eliminate adverse treatment that these groups are susceptible to.

This Directive is the first piece of anti-discrimination legislation at EU level prohibiting discrimination on the ground of disability. As we have seen from the previous chapters, anti-discrimination laws are currently regarded as the leading legal tool to achieve equality. However, commentators have pointed out some serious flaws in current forms of anti-discrimination legislation. Baker et al[228] note that contemporary anti-discrimination laws tend to exhibit several interconnected features. First they are subordinate to the operation of market based economies. This is certainly the case with EU anti-discrimination legislation as it was originally created as a mechanism to further the economic aims of the Community[229]. Secondly, as a result of roots in formal equality, they tend to focus on individual justice rather than group relations and the reliance on the use of a comparator limits their application to many disadvantaged groups, including people with disabilities. The formal assumption that justice requires ignoring certain socially prominent differences means that positive action is treated as exceptional and open to challenge. As a result of these features, it has been argued that contemporary anti-discrimination laws cannot effect radical change in the workplace[230].

Bearing these criticisms in mind I propose to analyse the Framework Employment Directive from a disability rights perspective. I will consider the concepts of discrimination that are provided for in the Directive and their application to the ground of disability. I will then examine the exceptions to the principle of equal treatment and how they relate to disability illustrating that some of these exceptions have the potential to be quite damaging if not interpreted strictly. Finally I will discuss the limitations of the Directive in the context of disability and suggest modifications that could greatly improve the protection offered on the ground of disability.

---

[227] See Article 3(1) of Council Directive 2000/78/EC.
[228] Baker, Lynch, Cantillon, Walsh, "Equality: From Theory to Action" *supra* note 4 at 125.
[229] See Section I: 1.3.
[230] Baker *et al*, *supra* note 4 at 125.

3.1 The prohibition of Discrimination on the ground of disability

The broad definition of discrimination in Article 2 of the Framework Employment Directive is broken down into four separate definitions of discrimination: Direct Discrimination, Indirect Discrimination, Harassment and an Instruction to discriminate. I shall briefly outline these provisions and examine to what extent they can offer protection against discrimination on the ground of disability.

3.11 The prohibition of Direct Discrimination

The European Court of Justice began to distinguish between direct and indirect discrimination from the 1970s onwards[231]. They are now well-established concepts that have been developed by case law dealing predominantly with sex discrimination[232]. The Framework Directive provides that the principle of equal treatment shall mean that there shall be no direct or indirect discrimination on the ground of *inter alia* disability[233].

Direct Discrimination on the grounds of *inter alia* disability is defined under Article 2(2) (a) as occurring where "one person is treated less favourably than another is, has been or would be treated in a comparable situation". This is a classic definition of plain and clear discrimination. It implies that discrimination occurs when individuals that are fundamentally the same are treated differently for illegitimate reasons. Direct discrimination is often intentional and motivated by prejudice. In the case of disability this type of discrimination often occurs as a result of myths and stereotypes associated with the abilities and capacities of people with disabilities. For example, an employer who refuses to hire a cosmetically disfigured person on the basis that it would upset other employees[234] or considers a person with a physical impairment to be mentally incapable of performing the functions of the job. Policies prohibiting direct discrimination normally take the form of a blanket ban in which the employer must

---

[231] See Case 152/73 *Sotgiu* [1974] ECR 153 (with respect to nationality) and Case 170/84 *Bilka Kaufhaus* [1986] ECR 1607 (with respect to sex)

[232] In relation to direct discrimination see Case 129/79 *Macarthys v. Smith* [1980] ECR 1275 and Case C-279/93 *Finanzamt Koeln-Altstadt v Schumacker* [1995] ECR I-225 at paragraph 30, " It is also settled law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations. This was upheld in Case 342/93 *Gillespie & ors v. Northern Health and Social Services Board & ors* [1996] ECR 225 at paragraph 16.

[233] Article 2(1) Council Directive 2000/78/EC

[234] Karlan & Rutherglen, 'Disabilities, Discrimination and Reasonable Accommodation' 46 Duke Law Journal 1 (1996), 10.

ignore the irrelevant characteristic (whether it be disability, sex, race, religion etc.) and treat every employee the same.

Direct discrimination is a clear example of the formal equality principle at work. The principle can be seen running through the definition with its emphasis on individual litigation ("one person") and the requirement to identify a suitable comparator. A suitable comparator is normally a person in the same situation who received more favourable treatment. This approach therefore implicitly endorses a notion of equality as sameness. The identification of a "comparable situation" and a suitable 'comparator' are crucial for the application of direct discrimination yet there is no legislative guidance given on this matter[235]. The issue of finding a suitable comparator is particularly contentious in the case of disability. As a result of the multitude of barriers (physical, attitudinal and systemic) that people with disabilities face on entry to the labour market it is difficult that they will be in a "comparable situation" to a non-disabled person[236]. Therefore it is important that the concept of "reasonable accommodation" will be taken into account when making this comparison[237]. Whittle[238] has pointed out that the definition of direct discrimination also allows an additional level of comparison between individuals with different disabilities by simply referring to the comparator as 'another'. This could be an alternative to a comparison with a non-disabled person. However the huge variety of disabilities and the innumerable differences in relation to the nature, type and duration of impairment could give rise to further difficulties during comparison. An employee with a mental illness will certainly experience different types of disadvantage compared to a wheelchair bound employee, for example, therefore it may be problematic proving that they are in a 'comparable situation' for the purposes of the definition. It has also

[235] Waddington and Bell *supra* note 226, 591. See Case 129/79 *MacCarthys v Smith* [1980] ECR 1275 with regard to how the ECJ defined a comparator for the purposes of gender discrimination.

[236] In the UK, courts and tribunals found it difficult from early on to identify an appropriate non-disabled norm to function as the comparator under the Disability Discrimination Act 1995. See *Clark v Novacold* [1999] 2 ALL ER 977 where the Court attempted to minimise the role of the comparator in order to focus simply on the unlawfulness of subjecting a person to discrimination on the grounds of their disability. See Sandra Fredman, 'Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?' *supra* note 117 at 211.

[237] Article 5 of the Framework Directive provides for the obligation on employers to provide reasonable accommodation for people with disabilities. This duty on employers has the potential to put persons with disabilities on an equal footing with non-disabled people by making adaptations to the workplace. Therefore it could be a determining factor in identifying a "comparable situation" for the purposes of the definition. See Section IV of this thesis for a detailed examination of Article 5.

[238] Whittle, Richard "The Framework Directive for Equal Treatment in Employment and Occupation: an Analysis from a Disability Rights Perspective" (2002) 27 European Law Review 303, 306

been put forward that the wording "...where one person is treated less favourably than another is, *has been or would be* treated in a comparable situation" suggests that references to past and hypothetical comparators are allowed[239]. This allows for a much broader category of comparators; it allows for a comparison to be drawn with someone who was previously in the same situation and received better treatment or someone who would have received better treatment if they were in that situation. Due to the difficulties involved in comparing actual comparators, the use of a hypothetical comparator would probably be the most effective means of identifying a situation comparable to that of a particular individual with a disability. However, it will eventually depend on how strictly the definition of comparator is construed by the ECJ.

As direct discrimination applies to clear, straightforward cases of discrimination and has serious implications for the employer, it may be necessary to demonstrate intent in order to prove a *prima facie* case of discrimination. In gender discrimination case law, however, it has been held that it is enough that the effect of the measure is discriminatory[240]. It relation to justifiable defences, the prohibition on direct discrimination is absolute and no defence is prescribed. The ECJ's consistent approach has been that direct discrimination can only be justified where there is an 'express exception in the Treaty or secondary legislation' to be relied on[241]. Therefore it is safe to presume that direct discrimination on the ground of disability will only be permitted by those exceptions outlined in the Directive itself[242].

3.12 The prohibition of Indirect Discrimination

As well as direct discrimination, the directive also prohibits indirect discrimination, which *"shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having* inter alia *a particular disability at a particular*

[239] Waddington and Bell *supra* note 226, 592

[240] Case 69/80 *Worringham v. Lloyd's Bank* [1981] ECR 767. See Barnard C, "EC Employment Law", (Oxford: OUP, 2000) at 209.

[241] See Case 222/84 *Johnston v UK* [1986] ECR 1651 in the gender equality context and further Hervey, T., "Justification for Sex Discrimination in Employment" Butterworths 1993, cited in Quinn, Gerard and Quinlivan, Shivaun, "Disability Discrimination: the need to amend the Employment Equality Act 1998 in light of the EU Framework Directive on Employment" in Costello C and Barry E (Eds.), "Equality in Diversity-the New Equality Directives". Irish Centre for European Law 2003, 234

[242] Articles 2(5), 3(4), 4 and 7; See further Section 3.2 of this Chapter.

disadvantage compared with other persons"[243]. The addition of indirect discrimination significantly broadens the scope of the traditional formal concept of non-discrimination and moves it in a significantly more substantive direction. There is less reliance on individual litigation and as is evident from the definition ("persons having a particular disability"), there appears to be significant potential to accrue group benefits. Indirect discrimination need not be motivated by intent or malice on the part of the discriminator but the outcome is considered just as damaging as the effects of direct discrimination. A simple example of an indirectly discriminatory measure would be an employer who puts a blanket ban on dogs entering the building, which then prevents blind employees from bringing their guide dogs. Indirect discrimination has far reaching implications for anti-discrimination law as it acknowledges that intentional discrimination is not the only source of the basic problem and recognises that the larger problem stems from more subtle and unintentional mechanisms which work to the disadvantage and exclusion of certain groups[244].

The concept of indirect discrimination grew out of European sex-discrimination law in the landmark case of *Bilka Kaufhaus*[245]. In this case, it was held that part-time female workers were being indirectly discriminated against and the ECJ formulated a test for indirect discrimination based on sex. It was held that once adverse effect has been established it can only be justified if it can be proven that "the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex"[246]. Since then, the Court has continued to elaborate on and formulate the definition and test for indirect discrimination. This definition developed by the courts heavily influenced the subsequent legislative definition which first appeared in the Burden of Proof Directive 1997[247]. This definition requires strict statistical evidence to prove a

[243] Article 2(2)(b) Council Directive 2000/78/EC

[244] Loenen, Tita, "Indirect Discrimination: Oscillating Between Containment and Revolution" in Loenen, Rodriguez "Non Discrimination Law: Comparative Perspectives". Kluwer, 1999, 201

[245] Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Harzt* [1986] ECR 1607. This case concerned the exclusion of part-time workers from the pension scheme of a large department store. Although this policy applied to both men and women, it adversely affected more women than men as the majority of the part-time workers were female. The exclusion of part-time workers from this scheme was challenged as contrary to the right to equal pay for men and women enshrined in EC law.

[246] Ibid at paragraph 31.

[247] Article 2 (2) Council Directive 97/80/EC [1998] O.J. L14/6 provides that "indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially

case of indirect discrimination in the sense that it is required to prove that a *"substantially higher portion"* of one sex was disadvantaged. The use of statistical data normally makes it very difficult for the plaintiff to establish a case of indirect discrimination as most of the information will not be available to him or will have to be provided by the defendant[248]. The definition of indirect discrimination in the Framework Directive differs however as it does not require evidence of statistical information. Therefore the burden of proof is now simpler to meet. Even though statistical evidence is not expressly required, Recital 15 allows Member States to continue to rely on statistical evidence if they so wish[249]. There is a danger that if Member States continue to require statistical evidence in order to prove indirect discrimination, this could be a potential pit-fall for people with disabilities. The production of statistical evidence is already a difficult requirement to fulfil in the field of sex discrimination where statistics are readily available but on the ground of disability it would be a burdensome task as the statistical data is unlikely to be available[250]. The new definition also allows for the use of actual, past and hypothetical comparators as is the case with direct discrimination[251]. However, as with direct discrimination there may be problems identifying a comparator. Whilst traditional grounds of discrimination such as sex and race can be clearly divided into homogenous groups, this is not the case with disability as a result of the vast variety of impairments. Therefore it may be difficult to form a group of people with disabilities that have all experienced disadvantage in the same manner due to an 'apparently neutral provision, criterion or practice'.

The prohibition of indirect discrimination is of tremendous value in the disability context as it is capable of reaching more subtle forms of discrimination which are not

---

higher proportion of the members of one sex, unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex."

[248] Loenen *supra* note 244, 207

[249] Recital 15 of Council Directive 2000/78/EC provides "The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence."

[250] Whittle, *supra* note 238 at 309.

[251] Apostolopoulou, Zoe, "Equal Treatment of people with disabilities in the EC: What does "Equal" mean?" *supra* note 124 at 32.

normally covered by the prohibition against direct discrimination[252]. Much of the discrimination which arises on the ground of disability is as a result of long established practices and structures, which may not intentionally discriminate against people with disabilities but by their nature and structure result in inequitable treatment. Sheltered employment and segregated schools for example have the intention to 'help' people with disabilities but the end result is often increased separation and isolation from society. This segregation then further reinforces the stereotypical view of disability as abnormal and strange. Indirect discrimination may also be motivated by intentional intolerance, for example discriminatory policies such as refusing to provide an elevator or physical access to a building. The concept of indirect discrimination outlined in Article 2 (2) (b) of the Directive clearly covers both intentional and unintentional forms of indirect discrimination and it does not appear to require plaintiffs to prove a discriminatory intent[253]. Unfortunately the potential of the prohibition against indirect discrimination is weakened by its defences. The defence of occupational requirements and the specific derogation in relation to the duty to provide reasonable accommodation could result in preserving discriminatory practices if not interpreted strictly.

3.121 Defences to a claim of Indirect Discrimination

Under Article 2(2) (b) of the Directive, there are two possible defences available to the employer when subject to a charge of indirect discrimination. The first defence is of general application to all grounds including disability. It purports that the employer will not breach the principle of equal treatment if the offending neutral rule or practice is *"objectively justified by a legitimate aim and the means of achieving that aim are proportionate and necessary"*[254]. The objective criterion must be unconnected with anything remotely discriminatory. For example if an employer refuses to hire a blind person for a job as a bus driver, this can be objectively justified on the basis that as

---

[252] The Canadian Supreme Court recently recognised indirect discrimination as the major form of disability discrimination. See *Eldridge v British Columbia* (1997) 3 SCR 624

[253] EU Network of Independent Experts on Disability Discrimination, Baseline study: Disability Discrimination Law in EU Member States. November 2004, 14. Available online at: http://europa.eu.int/comm/employment_social/fundamental_rights/public/pubsg_en.htm#Disability
This is already apparent from the case law dealing with indirect discrimination on the ground of sex. See Case 96/80 *Jenkins v. Kingsgate* [1981] ER 911 where the Court looked at the intention of the employer and Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Harzt* [1986] ECR 1607 where unintentional indirect discrimination was recognised.

[254] Article 2(2)(b)(i) Council Directive 2000/78/EC

driving constitutes an essential function of the job, then to hire somebody who is incapable of performing this function would be a danger to public safety[255]. The question of whether a practice which is discriminatory in relation to disability can be justified by this defence will depend on the particular circumstances of each case and how strictly the provision will be interpreted by the courts. We can draw guidance from the experience of the European Court of Justice in developing the concept of objective justification with regard to gender discrimination law[256]. The ECJ has recently displayed a tendency to be lenient despite the strict wording of the objective justification test in sex discrimination law[257]. Observers attribute this leniency to the major financial impact the case law dealing with indirect discrimination has had on Member States and as a result the Court is now under political pressure to be more restrained[258]. Three broad areas of potentially acceptable justifiable factors may be identified in the case law of the domestic courts and the ECJ; personal factors, factors arising out of the internal organisation[259] and factors operating at the level of the labour market[260]. Personal factors may include the greater seniority of a given individual, superior qualifications for the job or greater productivity[261]. Criteria taken into account by the Court involve both economic and social factors[262]. As well as job and enterprise related reasons, public interest and the social policy of the Member State are taken into consideration[263]. In a disability context it is important that the assessment will be based on purely objective criteria and to remain alert to the susceptibility of subjective elements creeping into an assessment. This is a realistic danger as disability discrimination by its very nature is often the result of fear, prejudice and misconception[264].

---

[255] Whittle *supra* note 238 at 308.
[256] See the following cases: Case 170/84 *Bilka-Kaufhaus* ECR 1986, 1607 and Case 149/77 *Rinner-Kuehn* ECR 1989, 2743.
[257] Article 2(2) Council Directive 97/80/EC [1998] O.J. L14/6 on the burden of proof in cases of discrimination based on sex, "indirect discrimination shall exist [...] unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex."
[258] See Loenen, Tita *supra* note 244, 210
[259] See Case 170/84 *Bilka-Kaufhaus* ECR 1986, 1607
[260] See Case C-127/92 *Enderby v Frenchay Health Authority* [1993] ECR I-5535 where it was accepted that the labour market situation was a justification for a difference in pay between male and female workers.
[261] Barnard, Catherine, "Where Social Policy meets the Internal Market: A New Balance?" Lecture Series given at the Academy of European Law 6th Session, European University Institute, Florence 4-15 July 2005. Course Materials, 19
[262] See Asscher-Vonk, Irene P, "Towards one Concept of Objective Justification" in Loenen & Rodrigues "Non Discrimination Law: Comparative Perspectives". Kluwer, 1999 at 45.
[263] Ibid at 44, 45.
[264] See Whittle, *supra* note 238, 308

The second defence deals specifically with the concept of indirect discrimination in the context of disability. It provides that indirect discrimination shall be taken to occur unless *"as regards persons with a particular disability, the employer [....] is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice"*[265]. In essence this means that the offending measure will not breach the principle of equal treatment if the employer is providing some sort of reasonable accommodation as obliged by Article 5 of the Directive[266]. This defence is providing the employer with another opportunity, as well as the objective justification clause, to retain the disputed provision that is causing an adverse impact on persons with a disability. To illustrate the impact of this provision, Whittle[267] gives the example of an employment scenario in which being able to drive is advantageous to the job but not an essential function. If the employer imposes a requirement of a driving licence, then a blind person who may be able to perform the essential functions of the job will not be hired on the basis that he/she does not have a driving licence. In this situation the employer may be able to escape a claim of indirect discrimination if he accommodates the potential employee by reorganising work tasks or providing a driver on the relevant occasions. The provision of reasonable accommodation will then allow the employer to retain the disputed requirement of a driving licence. Therefore the root cause of indirect discrimination is not addressed, but rather cleverly bypassed. This example illustrates that this defence may actually allow for the continuance of some instances of indirect discrimination against people with disabilities, thus providing a lower degree of protection for the group[268]. Furthermore, this second 'let-out' clause for employers is problematic as it makes a number of questionable assumptions. First it assumes that national legislation actually provides for the obligation to reasonably accommodate, that such legislation is in

[265] Article 2(2)(b)(ii) Council Directive 2000/78/EC

[266] The insertion of this clause was as a result of demands by the UK government during the drafting of the Directive. The UK Disability Discrimination Act 1995 did not contain an express prohibition on indirect discrimination but did however contain an obligation to provide 'reasonable adjustments' and defined a failure to do so as discrimination. During Council negotiations, it was felt that the provision of 'reasonable accommodation' was a sufficient answer to a charge of 'indirect discrimination' since many of the obstacles that arise through indirect discrimination can be removed by invoking an obligation of reasonable accommodation on the employer, therefore Article 2(2)(b)(ii) was retained. See EU Network of Independent Experts on Disability Discrimination, Baseline study, *supra* note 253 at 14.

[267] Whittle, *supra* note 238, 310.

[268] Waddington and Bell *supra* note 226, 595

accordance with the requirements of the Framework Directive and that it has been complied with[269]. Secondly, it appears to assume that the only available response to indirect discrimination on the ground of disability is the provision of reasonable accommodation[270]. This assumption is quite dubious as there are significant differences between the two concepts, due essentially to the individualised nature of reasonable accommodation. Once an *individual* with a disability can be accommodated in a situation where there is an indirectly discriminatory measure in operation, then the reasonable accommodation duty is satisfied. This means that the offending measure will be allowed to continue to the detriment of people with disabilities as a group. This would appear to contradict the very purpose of indirect discrimination which is to eliminate subtle forms of discrimination which affect a wider group of people with disabilities[271].

3.13 The prohibition of Harassment and an Instruction to discriminate on the ground of disability

The Directive marks a significant breakthrough with regard to the prohibition of harassment on the grounds of *inter alia* disability. For the first time in European law the notion of harassment is defined and prohibited. It is another indication of the move towards a more substantive notion of equality in European anti-discrimination law. This is evidenced by the fact that a comparator is not required and the definition itself is quite broad[272]. In Article 2(3) harassment is defined as 'unwanted conduct' which would create a negative work environment. In the disability context harassment could include a situation where attitudes to a person's disability are the cause of the negative work environment[273]. The effectiveness of the provision could be limited as

---

[269] EU Network of Independent Experts on Disability Discrimination, Baseline study, *supra* note 253 at 15.

[270] Ibid.

[271] Despite these negative aspects, Whittle points out that there are also practical benefits for both employers and people with disabilities. There is the possibility that it will encourage employers to think more in terms of accommodating the needs of workers with disabilities in order to avoid a claim of indirect discrimination. Therefore employees with disabilities may end up with a greater chance of being accommodated. See Whittle *supra* note 238 at 311.

[272] See Article 2(3) Council Directive 2000/78/EC which states "Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct.....takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States."

[273] Quinn, Gerard and Quinlivan, Shivaun, "Disability Discrimination: the Need to Amend the Employment Equality Act 1998 in light of the EU Framework Directive on Employment" supra note 241 at 236.

a result of the considerable discretion allowed to Member States in defining it. This discretion is conveyed through the definition of harassment in Article 2(3) with its explicit reference to national codes and practices and the vague formulation of its terms[274]. The prohibition of an instruction to discriminate is located in Article 2(4) and in the context of disability, it seeks to prevent an employer from discriminating on the ground of disability through an intermediary e.g. an employment agency. In this way it is hoping to prevent employers using employment agencies as a means of limiting the number of people with disabilities who could be eligible for consideration as potential employees[275].

3.14 The Burden of Proof

If a case of discrimination goes before the courts, the Directive allows for a sharing of the burden of proof. This means that once a *prima facie* case of discrimination has been established by the complainant, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment[276]. This applies to both direct and indirect discrimination. The rationale for the lower level of proof required from the alleged victim in discrimination cases is based on the fact that instances of discrimination are inherently difficult to prove[277]. Despite this acknowledgement, the Framework Directive and anti-discrimination laws in general function by firstly requiring the alleged victim to prove a *prima facie* case of discrimination. Therefore in order to begin operating, they are reliant on finding an objectionable practice[278]. This could be a hindrance to the effective implementation of the Directive as it will be dependent on the will (financially and emotionally) and the ability of an individual to take a case.

If the plaintiff is successful in finding such an objectionable practice and subsequently proving a *prima facie* case of discrimination, a remedy must be provided. The Framework Directive allows Member States discretion in ensuring that violations of the principle of equal treatment are satisfactorily remedied. However, it insists that sanctions must be "effective, proportionate and dissuasive"[279]. These terms are not

[274] Apostolopoulou, Zoe *supra* note 124 at 34.
[275] Whittle *supra* note 238 at 316
[276] See Article 10 Council Directive 2000/78/EC.
[277] European Commission. *Equality and Non-Discrimination* Annual Report 2005 at 9.
[278] Baker, Lynch, Cantillon, Walsh, *supra* note 4 at 129.
[279] Article 17 of Council Directive 2000/78/EC provides that "Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive

defined in the Directive but according to the Commission, the remedy in the majority of cases will involve individual monetary compensation[280]. The extent of such monetary compensation is also unclear but guidance from the European Court of Justice in gender discrimination cases would suggest that purely nominal sums would not satisfy the Directive's requirements of 'effective and dissuasive' sanctions[281]. Individual monetary compensation may result in justice for the individual victim of discrimination but this type of sanction will not transform existing structures to prevent such patterns of discrimination and inequality arising again. Other possible sanctions which involve the prevention of future instances of discrimination would certainly be more "effective and dissuasive", for example, the imposition of an obligation on the discriminator to prevent or reduce such discrimination occurring again or the adoption of anti-discriminatory codes of practice. Italy provides a good example of the effective use of sanctions, where enterprises found guilty of discrimination on the grounds of racial or ethnic origin, religion or nationality can have tenders, supply contracts or financial assistance from public bodies withdrawn[282].

3.2 Exemptions to the non-discrimination principle in the context of disability

There are a number of derogations to the principle of equal treatment in the Directive. I intend to examine what exceptions are relevant in the context of disability and what implications these have for claims of discrimination on the ground of disability. It is worth noting that in the context of gender discrimination, exceptions to the equal treatment principle have been interpreted quite strictly by the ECJ.

---

and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive." It is still too early to assess whether or not the various sanctions available in the various Member States meet this requirement. See European Commission *Equality and Non-Discrimination* Annual Report 2005 at 21.

[280] Ibid.

[281] For example see Case C-271/91 *Marshall v. Southampton and South West Hampshire Area Health Authority* (Teaching) (No. 2) [1993] ECR I-4367 where the UK upper limit on compensation was held not to constitute a proper remedy. Hence, it would appear that Member States may not put an upper limit on the amount of compensation paid to victims of discrimination. See European Commission *Equality and Discrimination* Annual Report 2005 at 9.

[282] See European Commission *Equality and Discrimination* Annual Report 2005 at 21.

3.21 Article 2(5) Exceptions necessary in a democratic society

The first exception, located in Article 2(5) is commonly referred to as exceptions necessary in a democratic society[283]. It states that *"this directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others"*. Whittle[284] has highlighted two important concerns for people with disabilities based on this provision. Firstly, in relation to the "protection of health", there is a possibility that employers may use this to the disadvantage of people with disabilities by claiming that an individual could pose a health and safety risk to themselves or work colleagues. Secondly, the reference to the "protection of the rights and freedoms of others" is also open to exploitation by employers especially in relation to the obligation to provide reasonable accommodation enshrined in Article 5. This has been recently illustrated in an Irish case which successfully invoked the right to property as a means of refuting equality legislation. In *Re: Article 26 and the Employment Equality Bill (1998)*[285] the Supreme Court of Ireland decided that the obligation placed on employers in the draft employment equality Bill to provide "reasonable accommodation" to employees with disabilities violated the employer's right to private property and was therefore void[286]. This case highlights the potential risks associated with such a provision which protects the "rights and freedoms of others". Unfortunately, the interests of public security, public order and public health have often been used as tools to justify the exclusion of people with disabilities and other sensitive groups from the labour market[287]. Therefore this provision must be construed strictly in order to prevent similar occurrences in other Member States.

---

[283] It is worth noting that this provision is unique in EU law and is closely modelled on Article 8(2) of the European Convention on Human Rights. See Mark Bell, "Sexual Orientation in Employment: An Evolving Role for the European Union" in R. Wintemute and M. Andenaes (Eds.) "Legal Recognition of Same-Sex Partnerships", Oxford: Hart 2001, 674

[284] Whittle *supra* note 238 at 318.

[285] [1997] 2 I.R. 321

[286] The final provision that appeared in the Employment Equality Act of 1998 contained the obligation to provide reasonable accommodation but subjected it to a very low financial cap of a 'nominal cost'. This unfortunately reduced considerably the effectiveness of the reasonable accommodation provision in Irish law. This has now been changed to a limit of 'disproportionate burden' in order to implement the provisions of Article 5 of the Framework Directive. See further Section IV: Article 5 of the Framework Directive: The Concept of Reasonable Accommodation.

[287] Apostolopoulou, Zoe, *supra* note 124 at 27.

3.22 Article 3(4) The Armed Forces

Secondly, Article 3(4) provides that Member States may, at their discretion, not apply the non-discrimination principle outlined in the Directive to the armed forces on the ground of disability. The rationale for this exception is explained by Recitals 18 and 19. Recital 18 states that the armed forces are not under a requirement to employ persons who do not have the *'required capacity'* to carry out the range of functions that will be necessary. It is presumed that the term 'required capacity' relates to the essential functions of the job and therefore would surely include the possibility of reasonable accommodation. Taking into account the possibility of reasonable accommodation, it is submitted that a blanket ban on people with disabilities joining the armed forces is unnecessary. There are many varied aspects of work in the armed forces, in fields such as administration, legal and management, which do not involve physical activity; therefore with reasonable accommodation it should be feasible to employ certain qualified persons with a disability, depending of course on the nature of the impairment, the essential functions of the job etc. It is unfortunate that this exemption is so exclusionary in nature that it completely rejects the possibility of an assessment of the specificities of each case. The Directive justifies this ban by acknowledging the need of Member States to safeguard the combat effectiveness of their armed forces[288]. This type of provision clearly does not actively discourage the segregation and exclusion of people with disabilities from the labour market.

3.23 Article 4 Occupational Requirements

The third exception can be found in Article 4 of the Directive which allows an exception for occupational requirements of the job[289]. It allows difference in treatment based on the fact that a person has a disability *"where by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate"*. This provision could be used by employers as a basis for not employing a person with a disability by claiming that *not* having a disability is an

[288] See Recital 19 of Council Directive 2000/78/EC

[289] The text is based upon the general exception which was first introduced by Article 2(2) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions.

occupational requirement of the job[290]. Here we can use again the example of a blind person not being hired for a job as a bus driver. Obviously the ability to see is an essential function of the job and therefore an occupational requirement, hence it is not discriminatory to refuse to employ a blind person to perform this type of work. The occupational requirement must however always be proven to be legitimate and proportionate[291]. The identification of the 'essential functions' of the job will play an important role in determining what amounts to an occupational requirement. It is important that this provision will be interpreted strictly in order to avoid segregationist tendencies of employers[292] as it could be all too easy to claim that not having a disability is an occupational requirement in order to avoid employing a person with a disability or to circumvent the obligation to provide reasonable accommodation. The ECJ will therefore have the task of clearly defining the jobs for which disability and the other grounds under the Directive are essential and determinant conditions.

3.24 Article 7 Positive Action

Finally, there is the exception contained in Article 7 which refers to the controversial issue of positive action. This provision recognises that the principle of equal treatment alone may not be enough to achieve real equality in practice, therefore it provides in Article 7(1) that Member States are not prevented from *"maintaining or adopting specific measures to prevent or compensate for disadvantages linked to* inter alia *disability"*. It is obvious from the wording of the provision that there is an inherent recognition that inequality can be a direct result of historical disadvantage associated with a particular group. The inclusion of an explicit article on positive action in the Directive has been controversial in the sense that it is difficult to reconcile with the

[290] It has been claimed that this provision can also be applied vice versa in the context of disability. It could allow an employer to discriminate in favour of people with disabilities where he can show that having a disability constitutes a genuine and determining occupational requirement, for example a job in a disability NGO. See Whittle *supra* note 238 at 319

[291] Scrutinising the legitimacy of the employer's requirements could give rise to difficulties at the interpretation stage. Should legitimacy be assessed in relation to the importance of the requirement or its nature? These questions will essentially be left to the judge to decide. The concept of what may be determinant and essential requirements is relative and therefore subject to changes in ideas and society. For further discussion see Marie-Ange Moreau, "Justifications of Discrimination" at 159. Report submitted to the regional congress held in Stockholm 4-6 September 2002 under the auspices of the International Society for Labour Law and Social Security. Available in English at: http://www.juridicum.su.se/stockholmcongress2002/

[292] EU Network of Independent Experts on Disability Discrimination, Baseline study, *supra* note 253 at 20.

non-discrimination principle. It goes beyond traditional negative anti-discrimination provisions to actively promote equality by supporting measures which discriminate in favour of a particular group that has consistently suffered discrimination and disadvantage. As it does not ignore differences between individuals or treat everyone neutrally, it could be regarded as the antithesis to formal equality. Despite the dramatic potential of the concept of positive action, the wording of Article 7(1) is formulated in negative terms. Positive action is presented as an *exception* from the principle of equal treatment. It is a measure which is allowed but not required by the Directive, thus depriving it of hard-hitting effect. An equivalent provision exists in relation to gender discrimination and has been interpreted quite strictly by the courts. The jurisprudence of the ECJ indicates that positive action measures will be allowed prior to the point of employment selection but the use of positive schemes that produce an equal result through the use of mechanisms at the selection stage will not be endorsed[293]. Therefore if we are to infer guidance from these decisions and presume that positive action measures in favour of people with disabilities will be interpreted in a similar way, Article 7(1) may not be so effective in the disability context. Many people with disabilities rely on sustainable measures to ensure their equal status in the workplace, therefore if positive action stops prior to the point of selection, it may not be of much use in terms of a long-term equality strategy for people with disabilities.

Article 7(2) goes on to deal specifically with positive action in the context of disability. It stipulates that "With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment". This provision is an effort to reconcile the previous welfare approach to disability with the new non-discrimination approach in the Framework Directive. The second part of the provision is clearly referring to the use of employment quotas and similar schemes which have been used consistently by many Member States as a means of integrating people with disabilities into the

[293]Whittle *supra* note 238 at 319. See Case C-450/93, *Kalanke v Freie und Hansestadt Bremen* [1995] ECR I-3069 and Case C-409/97, *Marshall v Land Nordrhein Westfalen* [1997] ECR I-6363 where it was held that positive action measures aimed at results are inadmissible. For discussion see Fredman, S "After *Kalanke* and *Marshall*: Affirming Affirmative Action" (1998) 1 CYELS, 200.

workforce[294]. The rationale for the inclusion of the exception related to the protection of health and safety at work, however, has given rise to confusion. Officially the Commission maintains that the intention of this provision was positive and health and safety measures were seen as an added way of creating space in the workplace for people with disabilities[295]. It should be noted however that this type of provision is open to abuse. Critics have claimed that it could be relied upon by employers to exclude people with disabilities from the workforce by pleading health and safety concerns[296]. In any case it follows that this provision should be carefully scrutinised in the case of a negative interpretation.

Despite the lack of legally binding force in Article 7, the Directive clearly acknowledges that positive action measures for people with disabilities are crucial. By singling out the ground of disability, there is evidence of a clear recognition of the gross disadvantages people with disabilities face in the labour market. In addition, many people with disabilities are often unable to take advantage of the non-discrimination norm and are therefore dependent on positive rights. Therefore, if positive action is effectively utilised by Member States and broadly interpreted by the Courts, it has the potential to be an essential tool to combat the under representation of people with disabilities in the labour market[297].

3.3 Limitations and Ambiguities of the Directive in the context of Disability

3.31 Definitional Ambiguity

The Directive expressly prohibits discrimination 'on the grounds of disability'[298] yet there is no specific definition of what amounts to a 'disability'. This means that Member States have a wide margin of appreciation in this regard. It would appear that the intention of the legislators was to keep the focus on the phenomenon of discrimination as opposed to the concept of disability[299]. Reasons for this may include

---

[294] Whittle *supra* note 238 at 320

[295] EU Network of Independent Experts on Disability Discrimination, Baseline study, *supra* note 253 at 19.

[296] See Waddington and Bell *supra* note 226, 603-604

[297] An example of a Member State which has introduced new positive action measures for people with disabilities is the UK. The UK Disability Discrimination Act 2005, due to come into effect in December 2006, will introduce a duty on all public authorities to give due regard to the need to promote disability equality. For discussion see Colm O' Cinneide 'A New Generation of Equality Legislation? Positive Duties and Disability Rights' *supra* note 153, 219.

[298] See Articles 1 and 2 of Council Directive 2000/78/EC

[299] See EU Network of Independent Experts on Disability Discrimination. Baseline Study, *supra* note 253 at 11.

the expansive and complex nature of disability. The term 'disability' covers a huge range of impairments ranging from the physical and intellectual to emotional capacities. These specific impairments then differ further in relation to the nature, duration and type. Therefore the task of creating a definition of disability to encompass all categories and degrees of disability and then attempting to reach agreement among the Member States would have been a very onerous one indeed[300]. Another reason for the absence of a definition may be that it was considered that a definition of disability could limit the benefits of anti-discrimination law by restricting it to certain kinds of disability or to disabilities reaching a certain degree[301]. In any case, the lack of a definition leaves open very wide interpretative possibilities as to who is actually covered by the Directive. As noted above, discrimination is prohibited on the 'grounds of disability' not against 'persons with disabilities'. This means that it may be possible that people who do not have a disability can claim that they were discriminated against on the 'grounds of disability'. This could be the case where a person is treated in a discriminatory manner because of an assumption that they have a disability (e.g. persons with a facial disfigurement), or as a result of a susceptibility to a disability (employers could access this information through medical or genetic testing and discriminate on this basis), or through association with those who have a disability (e.g. parents and carers)[302]. It is not yet clear whether all these categories are covered by the Directive but due to the lack of a definition there is no reason why it cannot be argued. It has been recommended that it would be in keeping with the spirit of the Directive to interpret 'discrimination on the grounds of disability' as also covering these categories[303].

The absence of a definition of the ground protected from discrimination is a characteristic common to all Community equality directives[304]. There is also no definition provided for the other grounds cited in the Directive; age, religion or belief

---

[300] Waddington rationalises that a definition of disability was excluded for this very reason. She claims that it may have been necessary to exclude a definition as otherwise it would have been impossible to secure agreement among Member States to include the ground of disability in the Directive, See Waddington L, "Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion" in Anna Lawson and Caroline Gooding (Eds.) 'Disability Rights in Europe; From Theory to Practice' Hart Publishing 2005, 118.

[301] See EU Network of Independent Experts on Disability Discrimination. Baseline Study, *supra* note 253 at 11.

[302] Ibid at 12.

[303] Ibid at 85.

[304] Waddington, L *supra* note 300, 117.

and sexual orientation. Similarly the 1976 Equal Treatment Directive[305] prohibits discrimination on the "grounds of sex" without defining what is meant by 'sex'. Despite the fact that the concept of sex may seem relatively straightforward compared to the concept of disability, it has nevertheless been the subject of case law before the ECJ. For example, in *P v S and Cornwall County Council*[306] the Court was called upon to consider the definition of 'sex' in determining whether discrimination on the grounds of having undergone transgender surgery amounted to discrimination on the grounds of sex. Therefore it can reasonably be predicted that the Court will also be required to develop in a piecemeal fashion a definition of disability and the other undefined grounds in the Framework Directive[307]. In particular disability appears to be ripe for conflicting interpretations. Each Member State currently has differing definitions of disability ranging from no definition[308] to a strictly medical definition[309] to a definition which incorporates the social model of disability[310]. The Directive allows this freedom of interpretation to continue and does not set any common criteria or standards. This discretion cannot remain unlimited since the emergence of different definitions throughout Europe could undermine the aims and purpose of the Directive and hinder its effective implementation. How disability is defined also has significant implications for the way rights are enforced. If some people with disabilities are unable to enforce their rights as set out in the Directive because they do not fit under the national legislative definition of disability, then this will defeat the purpose of the

[305] See Article 2(1) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions.

[306] Case C-13/94 [1996] ECR I-2143

[307] Waddington L *supra* note 300, 117

[308] For the purposes of non-discrimination law some Member States have opted not to define disability, for example Belgium, the Netherlands, Denmark, Finland, Greece and Italy. There are good reasons for adopting this policy as it circumvents many technical problems related to who fits under the definition of disability. In this way a choice of no definition may avoid exclusion and instead attempt to protect everyone against disability based discrimination.

[309] See Section 1 of the UK Disability Discrimination Act 1995 and in Germany, § 2 SGB IX. Both definitions perpetuate the individual and medical model of disability and are very narrowly construed. The UK definition in particular has proven to be a barrier to litigation. See EU Network of Independent Experts on Disability Discrimination. "Definition of Disability" by Theresia Degener at 9.

[310] See Section 2 of the Irish Employment Equality Act 1998. Disability is broadly defined within a medical context and has been successful in practice. It has not yet resulted in a person being denied the chance to litigate a case for a failure to prove their disability. In the case of *A Complainant v. Café Kylemore* DEC-S2002-024 where the definition of disability was challenged, it was agreed that an alcoholic was disabled for the purposes of the legislation. This displays a tendency towards a wide interpretation of disability in Irish law. It has been held that the Irish definition comes closest to truly endorsing the social model of disability. This is due to the fact that it makes no assumptions about the effects of a given impairment, thus it does not portray people with disabilities as helpless or needy. See EU Network of Independent Experts on Disability Discrimination, "Definition of Discrimination" *supra* note 309 at 10.

Directive. For example in the UK, one of the most common reasons for disability discrimination claims to be lost is that the complainant has not proved they are a person with a disability for the purposes of the legislation[311]. The UK is the sole example of a restrictive definition of disability in Europe[312], however in the U.S, the ADA has also been severely limited by restrictive judicial interpretations of the concept of disability[313]. Based on these experiences there is a legitimate argument for the creation of a European wide definition of disability, grounded on a social perception of disability, to serve as a model for Member States when implementing disability discrimination legislation[314].

3.32 (Not so) Minor Limitations

One of the most immediate limitations of the Directive is its formulation as a "framework" Directive. A framework Directive by its nature lays down minimum requirements and in theory paves the way for Member States to expand and develop on these core requirements to adopt more favourable provisions[315]. This is confirmed by Article 8(1)[316] which clearly encourages Member States to take the initiative and to actively pursue a policy of equal treatment beyond that which is outlined by the Directive. In order to prevent Member States from negatively interpreting the minimal requirements approach there is a non-regression clause contained in Article 8(2) which forbids reliance on the directive for a reduction in the level of protection against discrimination already afforded by Member States in the field of disability and

---

[311] Gooding, Caroline, "British Anti-Discrimination Law and Disability; Overview and Legal History". Paper delivered at the Disability Discrimination Summer School 2005, National University of Ireland, Galway, 5. This definition will be broadened slightly with the introduction of the UK Disability Discrimination Act 2005.

[312] The motivation for the use of a restrictive definition was the potential cost involved for employers complying with the Disability Discrimination Act 1995; therefore it was decided to curb this cost by limiting the size of the protected group. See Brunel University, "Definitions of Disability in Europe: A Comparative Analysis" *supra* note 143 at 74.

[313] See Bickenbach, Jerome, "Disability and Equality" (2003) 2:1 Journal of Law and Equality, 7-15 See also the following cases: *Sutton v United Airlines* 527 US 471 (1999) and *Murphy v United Parcel Service* 527 US 516 (1999).

[314] See further EU Network of Independent Experts on Disability Discrimination. "Definition of Disability" by Theresia Degener. Available at: http://europa.eu.int/comm/employment_social/fundamental_rights/public/pubsg_en.htm#Disability

[315] This has happened in Belgium and the Netherlands. See the Belgian Act to Combat Discrimination and to Amend the Act of 15 February 1993 to Establish a Centre for Equal Opportunity and to Combat Racism and the Dutch Act of 3 April 2003 to Establish the Act on the Equal Treatment on Grounds of Disability or Chronic Illness.

[316] Article 8(1) of Council Directive 2000/78/EC states "Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive".

the other grounds covered by the Directive[317]. Therefore in relation to the ground of disability, it can be argued that the intention of the legislator was to establish a minimum level of protection against employment-related disability discrimination with the anticipation that many Member States would utilise this opportunity to go beyond this level and provide higher degrees of protection against discrimination generally[318]. This was certainly a very optimistic stance taken by the legislators. Currently many Member States are being investigated by the Commission for having failed to transpose the Directive correctly or failing to meet implementation deadlines[319]. There is a danger that some Member States, due to a lack of previous disability discrimination legislation, will only implement the bare provisions required by the Directive. The Commission has expressed disappointment that Member States did not make a greater effort to transpose the Directive on time and did not live up to obligations made in 2000[320].

Another practical limitation of the Directive in relation to disability is that it is a multi-ground statute. Disability is protected from discrimination along with age, religion or belief and sexual orientation. The rationale for the insertion of these grounds of discrimination in a multi-ground statute as opposed to a single ground statute has been attributed to social and political factors. Differing levels of political pressure to combat discrimination against respective grounds was a major factor in determining the type and level of protection eventually prescribed. Among the groups lobbying for Article 13 and the subsequent Directives[321], certain campaigns were more organised and sustained than others. In particular the race campaign was the strongest[322] and this resulted in a specific single ground statute prohibiting race

---

[317] Article 8(2) of Council Directive 2000/78/EC. See also Recital 28 which states "This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State."

[318] Waddington, L *supra* note 300 at 133.

[319] In December 2004, the Commission referred 5 Member States (Austria, Finland, Germany, Greece and Luxembourg) to the European Court of Justice for not communicating transposition of the Framework Directive.

[320] Fiona Kinsman, DG Employment & Social Affairs, "General Overview, Scope of the Directives and Current State of Transposition" at 8. Paper presented at the conference 'Fight against Discrimination: The Race and Framework Employment Directives' Academy of European Law, Trier 5-6 March 2004. Available at www.era.int

[321] The prime agents lobbying for Article 13 were a variety of NGOs and the European Parliament. See Section I: 1.33.

[322] The Parliament had consistently called for Community legislation against racial discrimination since 1991 and there was a specific NGO campaign for such a Directive since 1992. See further Lisa

discrimination in employment, social protection and advantages, education and access to and supply of goods and services[323]. Therefore in terms of equality directives, the Framework Directive was preceded by a race specific directive and a series of long-standing gender specific equality directives[324]. One cannot deny that a single statute directive on disability discrimination would have been more effective for a number of reasons. Firstly it may allow for the development of specific measures which are of particular relevance to disability. Considering the particular nature of disability and the difficulties involved in interpretation this would be extremely useful. Another advantage of a single statute directive would be the extension of the current scope of the Framework Directive to protect discrimination on the ground of disability in areas of life outside of the employment sphere[325]. In addition, a multi-ground statute inevitably results in an equality hierarchy with some grounds of discrimination receiving more attention than others. With regard to the Framework Directive, commentators have noted that disability and age tend to be at the bottom of the equality hierarchy[326].

3.4 Concluding Remarks

As a result of the 'framework' nature of the Directive, the responsibility for implementing an anti-discrimination policy that will achieve the goals of the Directive, reduce instances of discrimination against people with disabilities and improve their employment opportunities will rest principally with the Member States. They have a wide discretion to implement the goals of the Directive and it is hoped that this freedom will not be abused. The goals of the Directive are admirable and it arguably opens up new opportunity structures for people with disabilities in Europe. However, legislation alone is not enough and it needs to be complemented with

---

Waddington and Mark Bell, 'Reflecting on Inequalities in European Equality Law' 28 E.L.R (2003) 349 at 367.

[323] Council Directive 2000/43/EC implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origin, O.J. 200, L 180/22.

[324] See Section I: The Emergence of Disability Rights in the EU, note 53.

[325] It should be noted that there is nothing cited in the Directive which prevents Member States from extending the scope of the Directive to cover fields outside of employment.

[326] See generally Waddington and Bell "More Equal than Others: Distinguishing the European Union Equality Directives" (2001) C.M.L. Rev. 587 and Bell and Waddington, "Reflecting on Inequalities in European Equality Law", (2003) 28 European Law Review 349-369 for a detailed discussion of the existing equality hierarchy in European Equality law after the adoption of the 2000 Equality Directives.

supportive policies from national authorities and civil society[327]. The potential of the Directive will also depend to a great degree on the self-activity and mobilisation of European citizens with disabilities themselves. Of importance here will be the amount of information and awareness-raising campaigns, practical and financial support from self-organised groups, as well as the initiatives of individuals who see themselves as discriminated against, for example through individual law suits or collective actions[328].

The next section will deal with the most promising element of the Directive with regard to disability discrimination: the obligation to provide reasonable accommodation in Article 5. The Commission in its proposal for the Framework Directive noted that a core element of the elimination of disability discrimination is 'the reasonable accommodation of the needs and abilities of disabled people.'[329]

[327] A European Community Action Programme (2001-2006) was also adopted in November 2000 to support the effective implementation of the 2000 Equal Treatment Directives. The Action Programme has three main objectives. These are 1) To improve the understanding of issues related to discrimination 2) To develop the capacity to tackle discrimination effectively 3) To promote the values underlying the fight against discrimination. The six year programme aims to target all stakeholders who can help shape in the development of appropriate anti-discrimination legislation and policies across Europe. It is an indication of the Commission's acknowledgement that legislation alone is not enough to combat discrimination and that other measures such as awareness raising and education are essential See http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm

[328] Hvinden B (2003) "The Uncertain Convergence of Disability Policies in Western Europe", supra note 1 at 619.

[329] See Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM (1999) 565 at 4.

IV. ARTICLE 5 OF THE FRAMEWORK DIRECTIVE: THE CONCEPT OF REASONABLE ACCOMMODATION

"It is the failure to make reasonable accommodation, to fine tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them."[330]

Reasonable accommodation is a concept that was previously unrecognised by European anti-discrimination law. It has been introduced for the first time by Article 5 of the Framework Employment Directive which regards the obligation as necessary "in order to guarantee compliance with the principle of equal treatment"[331]. It is considered to be the most innovative part of the Directive with regard to the ground of disability[332]. Internationally it is now recognised as a fundamental instrument to combat discrimination on the ground of disability. It is recognised for example by the UN Committee on Economic, Social and Cultural Rights. According to their interpretation of the International Covenant on Economic, Social and Cultural Rights, the term "disability based discrimination" includes "any distinction, exclusion, or denial of reasonable accommodation based on disability..."[333] Also the European Social Charter[334] recognises that law prohibiting discrimination on the ground of disability in employment should require an obligation of 'reasonable accommodation'[335].

The purpose of the obligation to provide reasonable accommodation is to allow otherwise unqualified people to take full part in employment opportunities by

---

[330] La Forest J in *Eldridge v British Colombia (Attorney General)* [1997] 3 SCR 624 at 681.
[331] Article 5 Council Directive 2000/78/EC.
[332] See EU Network of Independent Experts on Disability Discrimination. Baseline Study-Disability Discrimination Law in the EU Member States. November, 2004, 86; Whittle, Richard "The Framework Directive for Equal Treatment in Employment and Occupation: an Analysis from a Disability Rights Perspective" (2002) 27 European Law Review 303, 312; Wells, Katie "The Impact of the Framework Employment Directive on UK Disability Discrimination Law" 32 Industrial Law Journal 2003, 253.
[333] General Comment No. 5 (1994), Persons with disabilities, UN Doc. E/C.12/1994/13.
[334] Turin, 18.X.1961, Article 15 of the Charter deals with the right of persons with disabilities to vocational training, rehabilitation and resettlement, whatever the origin and nature of their disability. The Revised Social Charter, Strasbourg, 3.V.1996 and Article 15 proclaim the right of persons with disabilities to independence, social integration and participation in the life of the community. The Charter is a legally binding Treaty covering economic, social and cultural rights adopted under the aegis of the Council of Europe, which many EU Member States have ratified.
[335] See European Committee of Social Rights Conclusions XVI-2, Vol. 1 & 2 (covering Article 15 of the Charter)

modifying the work environment to a reasonable extent[336]. The essence of the requirement is that employers must make modifications and adjustments to the workplace and to policies, practices, and rules by which work is done or workers are regulated to enable a particular qualified individual with a disability to perform a particular job[337]. Thus far the concept has usually been utilised in anti-discrimination law as a means of increasing the participation of people with disabilities in employment and is widely regarded by experts in the field as the key to achieving this aim[338]. As has been demonstrated in previous sections of this thesis, the prohibition of discrimination against people with disabilities has proven to be of a slightly more complex nature compared to other non-discrimination laws, on the grounds of race or sex for example. While these laws all have a similar aim in common in the promotion of equal treatment, the process of achieving this aim differs on the ground of disability. The reality is that there are many more barriers to employment for people with disabilities, ranging from the physical and attitudinal to the systemic. Misinformed social representations of people with disabilities and negative perceptions about their employment potential can be just as great a barrier to employment as the lack of physical access to the workplace. In addition, systemic barriers such as those that prevent people with disabilities from acquiring a proper education and attaining critical skills are major obstacles to participation in the workforce. The combination of these barriers often renders it close to impossible for a person with a disability to enter into the labour market. The rationale behind reasonable accommodation is the removal of these barriers in order to create a situation where people with disabilities will have equal access (in the sense that they will be on an equal footing with people who do not face such barriers) to employment opportunities.

Accommodations may involve physical modifications to the workplace such as a ramp for a wheelchair bound employee; assistive technologies such as the provision of instructions or documents in Braille for a blind person or a sign-language interpreter for a deaf person. Other more inexpensive accommodations could involve flexible working hours or the adaptation of duties. It should be underlined that

---

[336] Burgdorf, Robert L., "U.S. Anti-discrimination Law and Disability- Focus on Title 1 of the Americans with Disabilities Act" *supra* note 35 at 37.

[337] Ibid.

[338] See for example, Gerard Quinn and Shivaun Quinlivan, "Disability Discrimination: the need to amend the Employment Equality Act 1998 in light of the EU Framework Directive on Employment" *supra* note 241 at 213.

reasonable accommodation is not a new phenomenon in society[339]. It has long been provided for non-disabled people in the form of escalators, seating, public toilets, artificial lighting and so on in various public spaces to accommodate their needs and generally make life more comfortable. In the workplace, employers have long catered to the needs of employees by providing office furnishings, equipment, accessories, services and other benefits all of which are based upon assumptions of the 'standard' worker[340]. Therefore, Burgdorf argues that reasonable accommodation for workers with disabilities is essentially the same as the kind of accommodation provided generally but is tailored to the individual needs of the particular worker concerned[341]. Consequently, the provision of accommodations for people with disabilities should not be regarded as a burden on employers, but rather as an essential device to achieve equality which does not require anything beyond that which has already been provided to other members of society[342].

The concept of reasonable accommodation has long been criticised as being incompatible with formal anti-discrimination law in the sense that it promotes differential treatment rather than the traditional form of equal treatment. Many commentators have even claimed that it should be correctly regarded as a form of positive action[343]. Certainly the avoidance of unnecessary differential treatment is an

---

[339] See Jolls, Christine, "Accommodation Mandates", 53 Stanford Law Review 223 (2000). See also Lisa Waddington and Aart Hendriks, "The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination" The International Journal of Comparative Labour Law and Industrial Relations, Vol. 18, 2002, 403-427 at pp.416-420 where the authors maintain that the reasonable accommodation requirement is part of a long-standing wider body of labour law in Europe which requires employers to make adaptations to the workplace thus guaranteeing access to the labour market for certain groups. They discuss examples in the areas of child labour, health and safety law, pregnancy and elderly workers.

[340] Furthermore in the EU employers are obliged to accommodate workers who wish to take parental leave. See Directive 96/34/EC on the Framework Agreement on Parental Leave, [1996] O.J. L145/9, as amended and extended to the United Kingdom by Directive 96/75/EC [1998] O.J. L10/24. It has been claimed that this could be regarded as a type of reasonable accommodation. See further Lisa Waddington and Aart Hendriks *supra* note 338, 419-420.

[341] See generally Robert J. Burgdorf Jr., "'Substantially Limited' Protection From Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability", 42 Villanova Law Review 409, 529-32 (1997)

[342] Employers are already under an obligation to accommodate people with disabilities under the Health and Safety Directive 89/391/EEC (Council Directive 89/391 of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L183 29.06.1989, p.1). In the original proposal for the Framework Directive, the Commission remarked that a reasonable accommodation provision would reinforce and supplement this obligation. See Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM (1999) 565 at 9. It is important to note however that the reasonable accommodation obligation is not the same as general accessibility and health and safety standards required by employers and they may not rely on these standards to escape the duty to reasonably accommodate.

[343] This debate has been most polemic in the U.S. See for example Samuel R. Bagenstos, "'Rational Discrimination', Accommodation and the Politics of (disability) Civil Rights", 89 Virginia Law

important element of non-discrimination but in many cases treating a person with a disability and a non-disabled person equally could result in the erection of insurmountable barriers for people with disabilities. Where a person's disability does situate them differently regarding equal opportunities, identical treatment may be a source of discrimination and different treatment may be required to eliminate it[344]. Reasonable accommodation has therefore been introduced to provide a solution to this "dilemma of difference"[345].

In the final part of this thesis, I will firstly trace the origins of the concept of reasonable accommodation and explain how it came to be included in the Framework Directive. I will then analyse the terms of Article 5, considering whether the provision is sufficient to achieve its desired effect: the increased participation of people with disabilities in the labour market. Thirdly, I will consider the position of reasonable accommodation in the existing EU anti-discrimination framework and what the implications are for the direction of EU anti-discrimination law in general. Finally I will consider what notion of equality is inherent in the concept of reasonable accommodation and whether it is an effective means of achieving equality in practice for people with disabilities.

4.1 The Emergence of the Concept of Reasonable Accommodation

Even though the concept of reasonable accommodation is now commonly utilised as a tool to combat disability discrimination, it is interesting to note that it first emerged with regard to religious discrimination in many countries. In the United States, the phrase 'reasonable accommodation' first appeared in guidelines published by the US Equal Employment Opportunities Commission (EEOC) implementing Section 703(a)

Review 825 (2003); Sharon Rabin-Margalioth, "Anti-Discrimination, Accommodation and Universal Mandates-Aren't they all the same?" 24 Berkeley Journal of Employment & Labor Law 111 (2003); Christine Jolls, "Anti-Discrimination and Accommodation", 115 Harvard Law Review 642 (2001); Samuel Issacharoff & Justin Nelson, "Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?" 79 N.C.L. Rev. 307 (2001); Karlan & Rutherglen, "Disabilities, Discrimination and Reasonable Accommodation" 46 Duke Law Journal 1 (1996). See further section 4.31 for a more detailed discussion.

[344] Burgdorf Jr, Robert L, Paper delivered at the conference "Equality and Disability: Exploring the Challenge and Potential of the Framework Directive 2000/78/EC" 29-30 April 2004 at Louvain-la-Neuve, Belgium. See also Thüsing, Gregor "Following the U.S Example: European Employment Discrimination Law and the Impact of Council Directives 2000/43/EC and 2000/78/EC" The International Journal of Comparative Labour Law and Industrial Relations, Volume 19/2, 187-218, 2003 at 196, who claims that people with disabilities "require not equal treatment but advancement in the sense of an appropriate degree of assistance".

[345] See Minow, M, "Making all the difference, Inclusion, Exclusion and American Law." (1990) Cornell University Press, Ithaca.

of the 1964 Civil Rights Act, which sought to define an employer's obligation not to discriminate on the grounds of religion[346]. It was later decided that the EEOC did not have the statutory authority to establish such a duty to reasonably accommodate[347] and this resulted in an amendment to the Civil Rights Act which defined religion to include religious practices 'unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business'[348]. This definition has been interpreted strictly by the US Supreme Court and it has held that anything more than a *'de minimis'* cost amounts to an undue hardship[349]. This has resulted in a very slight legal obligation for employers to accommodate their employee's religious needs. We shall see further on that reasonable accommodation has been given a much broader meaning in the context of disability discrimination legislation in the US.

In Canada the duty also developed out of case law dealing with discrimination on the grounds of religion. The promulgation of the Canadian Charter of Rights and Freedoms resulted in the development of a significant body of case law of the Supreme Court of Canada seeking to develop a policy on fighting discrimination while simultaneously integrating minority groups[350]. This in turn led to the development of the obligation to provide reasonable accommodation[351]. The duty has now been extended to apply to other grounds of discrimination in Canada[352]. The Canadian Human Rights Act 1997[353] covers discrimination on the grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been

---

[346] 29 C.F.R. § 1605.1 (1995). According to these guidelines, an employer was required to 'make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business'.

[347] *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir, 1971)

[348] Title VII § 701(j), 42 U.S.C § 2000(e)j.

[349] See *Trans World Airlines, Inc. v Hardison* 432 U.S. 63 (1977) at 84. The rationale behind this strict test is that it was considered that a legal regime which accommodates religious practices would be contrary to the prohibition in the American constitution against the establishment of religion. See Karlan & Rutherglen, *supra* note 234, 7.

[350] Moreau, Marie-Ange, "Justifications of Discrimination" *supra* note 291 at 166.

[351] Ibid. See the following cases for examples of reasonable accommodation in circumstances of religious discrimination: *Sehdevc v. Bayview Glen Junior School* (1988) 9 CHRR D/4881 (Ontario) where an employer rescheduled courses for an orthodox Jewish mechanic to a time that did not conflict with his beliefs; *Pandori v. Peel Board of Education* (1990) 12 CHRR D/ 364 (Ontario) where Sikhs were exempted from wearing uniform to enable them to wear the kirpan.

[352] See *British Columbia v. BCGSEU* 9 Sept 1999 CSC no. 26274 for a quantitative assessment of the role of reasonable accommodation.

[353] See Section 2 of the Human Rights Act 1997.

granted. There is an obligation to provide reasonable accommodation with regard to all these protected grounds[354]. Thus far the Canadian courts have applied the principle in cases involving religious[355], age, sex[356] and disability discrimination[357].

Even though the right to be accommodated only applies to the ground of disability under the European Framework Employment Directive, it is a tool which can also be very relevant to other groups that suffer discrimination. It is worth noting that the reasonable accommodation principle had already arisen in relation to religious discrimination within the jurisprudence of the Court of Justice during the 1970s[358]. Therefore it is not unreasonable to expect that the duty could be extended to other grounds of discrimination protected under EU law[359]. If the duty to reasonably accommodate people with disabilities as provided for in the Framework Directive is proven to be successful, it will be interesting to see if the possibility to extend the duty to other grounds will be considered.

4.11 From the Americans with Disabilities Act 1990 to the European Framework Directive 2000

The US was one of the first legal systems to embrace the concept of reasonable accommodation in the context of disability. It emerged as an integral part of its pioneering disability discrimination legislation. This legislation consists of the Rehabilitation Act of 1973[360] and the Americans with Disabilities Act 1990[361]. These two Acts exist side by side and have a wide ranging scope which between them covers federal government and those institutions and firms which have dealings with

---

[354] The duty of accommodation was included in Section 2 by a 1998 Amendment to the Human Rights Act. Bill S-5 (S.C. 1998, c.9).

[355] See *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, where conditions of employment requiring the appellant to work Friday and Saturday were in conflict with her religious creed. The appellant was then subsequently dismissed as she could not work Saturdays. The Court of Appeal held that there was not sufficient evidence of undue hardship on the business and reasonable accommodation had not been adequately considered. See also *Alberta Human Rights Commission v. Central Alberty Dairy Pool*, [1990] S.C.R. 489.

[356] See *Waplington v. Maloney Steel Ltd.*, [1983] 4 CHRR D/1262 (Alb.).

[357] See *Grismer v. The British Columbia Council of Human Rights*, [1999] 3 S.C.R. 868, where it was held that a failure to consider an individual assessment for a person with a visual impairment when refusing to issue a driving licence amounted to discrimination.

[358] Case 130/75, *Prais v. Council* [1976] E.C.R. 1589; [1976] 2 C.L.M.R. 708. The complainant was unsuccessful but the principle running through the judgement clearly reflects the duty to accommodate. Cited by Richard Whittle *supra* note 238 at 313.

[359] It is arguable that reasonable accommodation is already provided to pregnant workers under the Parental Leave Directive 96/34/EC. See *supra* note 340.

[360] Pub.L. No. 93-112, 87 Stat. 357 (1973)

[361] Pub.L. No. 101-336, 104 Stat. 327 (1990)

it, all employers with 15 or more employees, providers of public transport and the occupiers of premises to which the public is given access such as shops, restaurants etc.

The term 'reasonable accommodation' was first used in the disability rights context in interpreting the Rehabilitation Act 1973. In 1977 the Office of Federal Contract Compliance Programs (OFCCP) of the U.S Department of Labor issued regulations to implement section 503 of the Rehabilitation Act[362]. These regulations required federal contractors[363] to "make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business"[364]. In the years that followed, this led to a series of regulations requiring reasonable accommodation in other fields such as education, health, welfare and housing[365]. However it was not until the Americans with Disabilities Act (ADA) 1990 that the first explicit statutory reasonable accommodation requirement in the employment context was established. Title I of the ADA describes the failure of an employer to make a reasonable accommodation as amounting to discrimination. Accordingly it defines discrimination as including:

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

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant[366]."

The Act defines the term "reasonable accommodation" by listing examples. It states that reasonable accommodation may include "(A) making existing facilities used by

---

[362] 29 U.S.C. § 793.

[363] Having contracts or subcontracts of $2,500 or more. The minimum contractual amount was increased to $10,000 in 1992. See E.U Network of Experts on Disability Discrimination: "Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Directive: Learning from Experience and Achieving Best Practice" by Lisa Waddington at 15. See: http://europa.eu.int/comm/employment_social/fundamental_rights/public/pubsg_en.htm#Disability

[364] 41 Fed. Reg. 16, 148 (1976) (codified at 41 C.F.R. § 60-741.6(d) (1993)).

[365] For more detail, see further E.U Network of Experts on Disability Discrimination, Lisa Waddington *supra* note 363 at 15.

[366] 42 U.S.C. § 12112(b)(5)(A)

employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities[367]." This definition was intended to be merely illustrative and is therefore not exhaustive. The definition is supplemented by regulations issued by the U.S Equal Employment Opportunity Commission (EEOC) which set forth a more detailed, concise and proper definition of the concept[368]. The EEOC's Interpretative Guidance to the ADA also goes further than mere definition to explain the rationale behind the concept of reasonable accommodation. It states that "the reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated"[369]. The additional elaboration and explanation of key definitions in the ADA by the EEOC has naturally aided significantly the development and interpretation of reasonable accommodation in the U.S.

It was to the ADA that many other Anglo-Saxon jurisdictions turned to for guidance in the development of statutory concepts that would form their domestic disability discrimination legislation. This influence has resulted in the adoption of reasonable accommodation provisions world-wide[370] and was also instrumental in the adoption of Article 5 of the Framework Employment Directive at EU level.

---

[367] 42 U.S.C. § 12111(9)

[368] According to the EEOC regulations the term "reasonable accommodation" means:
(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. 29 C.F.R. § 1630.2(o)(1) (1993).

[369] 29 C.F.R. 414-15(app. to pt. 1630) (commentary on § 1630.9) (1993). Cited in E.U Network of Experts on Disability Discrimination, Waddington, L *supra* note 363 at 18.

[370] See for example Article 5(2) of the Australian Disability Discrimination Act 1992, Article 29 of the New Zealand Human Rights Act and Article 9 of the South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000.

4.2 Article 5 of the Framework Employment Directive 2000/78/EC: Interpretation and Analysis

It is widely accepted that the Americans with Disabilities Act directly influenced the drafting of Article 5 of the Framework Directive[371]. In particular, the term "reasonable accommodation" was determinant of the terminology used in the Directive. As a result of the success of the ADA, there was a high level of familiarity of the concept among Commission staff and disability non-governmental organisations. In addition, some Member States already had the duty in their national legislation since the mid-90s, specifically, Ireland, the UK and Sweden[372]. The combination of these factors was influential in the final decision to include the reasonable accommodation duty in the Directive. The rationale for inserting Article 5 is explained explicitly by the European Commission in the explanatory memorandum to the proposal for the Framework Directive in which it explains the newly transformed approach to disability discrimination[373]: "the new approach focuses on both prevention and removal of barriers that deny equality of access to people with disabilities in the labour market. A core element of the new approach is the elimination of such discrimination primarily through the reasonable accommodation of the needs and abilities of disabled people"[374]. Recital 16 of the Preamble[375] also throws some light on the nature of Article 5 and how it should be interpreted. It clarifies from the outset that the duty to accommodate is part of the non-discrimination provisions and underlines its importance in fighting discrimination against people with disabilities[376]. From this starting point let us begin an examination of the exact terms and conditions contained in Article 5 itself.

---

[371] Waddington, Lisa "Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion" *supra* note 300, 125.

[372] See Section 16 of the Irish Employment Equality Act 1998 as amended by the Equality Act 2004; Section 6 of the British Disability Discrimination Act 1995, last amended by Disability Discrimination Regulations 2003; and Section 6 of the Swedish Act 1999:132 on the Prohibition of Discrimination in Working Life of Persons with Disabilities, amended by Act 2003:309. (Official Title: Lag (1999:132) om forbüd mot diskriminering i arbetslivet av personer med funktionshinder.) The reasonable accommodation provisions of the ADA were also influential in the drafting of these laws.

[373] See Section I: 1.3 for a detailed examination of the transformation of European disability policy that eventually led to the inclusion of disability in the Framework Directive and the insertion of Article 5.

[374] Section 2 COM (1999) 0565 final

[375] When attempting to understand a provision of the Directive, the relevant provisions of the Preamble often act as a useful interpretative guide. While not legally binding, they provide some useful explanations and insights.

[376] Directive 2000/78/EC Recital 16 "The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability".

Article 5 reads as follows: "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, *reasonable accommodation* shall be provided. This means that employers shall take *appropriate measures,* where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a *disproportionate burden* on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned." (Emphasis added by author)

It is important to stress from the beginning the individual nature of the duty of reasonable accommodation. This is apparent on a literal first reading. The Article refers to an accommodation needed in a "particular case" to facilitate a "person with a disability". An individual analysis is necessary in order to find the most appropriate accommodation as each person with a disability has different needs and requirements depending on the nature of their impairment. Also the extent of the accommodation or adaptation required will depend on the nature of the employment concerned. Therefore it is important to remember that reasonable accommodation will always involve an individual assessment and a tailored individual solution[377]. It is also apparent from a literal first reading that there are a number of significant terms which will be determinant in deciding what amounts to a reasonable accommodation. These terms are unfortunately only given limited elaboration in the Directive. This lack of guidance could give rise to a number of difficulties when interpreting Article 5.

4.21 Who is entitled to a reasonable accommodation?

A contentious issue which may arise from the outset is the deceptively simple question of *who* is entitled to a reasonable accommodation. It is clear from the wording of Article 5 that it is only "persons with disabilities" that are covered by the Directive. However, in order to avoid a situation where the obligation to provide reasonable accommodation could be used as a tool to require the employment of individuals who are not qualified for the job, Recital 17 of the Preamble permits that an employer is not obliged to employ someone who is not capable of performing the essential functions of the job. It states specifically that the Directive "does not require

[377] See E.U Network of Experts on Disability Discrimination, Lisa Waddington, *supra* note 363, 8.

the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the *essential functions* of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities." (Emphasis added by author) Therefore the obligation of reasonable accommodation is clearly connected to what constitutes the 'essential functions' of the job. If a person with a disability is capable of performing the essential functions of the job, with or without reasonable accommodation, then he or she stands to benefit from the protection offered by Article 5.

To sum up, the Directive only prohibits discrimination against those individuals 'qualified' i.e. 'competent and capable' to perform the essential functions of the post. Those 'qualified' individuals will be made up from two categories; people with disabilities who can perform the job in its current form and those persons with disabilities whose impairment prevents them from performing the job in its current form, but who could perform the job if it were adapted appropriately through the making of a 'reasonable accommodation'[378]. Therefore the identification of what constitutes the 'essential functions' of the job will be of great importance in deciding whether it is possible to make an accommodation in the first place and secondly what kind of accommodation is required. If the essential components of the job have to be identified then it will be easier to determine if it is possible to adapt duties in such a way that an individual with a disability can do the job. However, there are no guidelines provided in the Directive as to the meaning of 'essential functions' or any assistance as to how it should be interpreted. Research has shown that many Member States do not distinguish between the essential functions of the job and other more marginal functions[379]. This gap is worrying. It may allow too broad a discretion on the part of the employer and discourage effective attempts to find appropriate reasonable accommodations.

4.22 What is implied by the term "reasonable accommodation"?

In order to provide a suitable reasonable accommodation it is first necessary to examine what is required by the Directive. What is considered to be "reasonable" and

[378] See E.U Network of Experts on Disability Discrimination, Lisa Waddington, *supra* note 363, 45

[379] See EU Network of Independent Experts on Disability Discrimination. Baseline Study-Disability Discrimination Law in the EU Member States. November, 2004, Part 3, *supra* note 253.

what are the limits of a "reasonable" accommodation as intended by the Directive? As we have noted above, Article 5 was strongly influenced by the Americans with Disabilities Act 1990. Therefore, it may be useful to examine the meaning of "reasonable accommodation" in the context of this statute. Under the ADA, a "reasonable accommodation" was originally regarded as any modification or adjustment that was effective in enabling an individual with a disability to perform the essential functions of a particular job[380]. The reasonableness did not refer to its cost or inconvenience to the employer but rather to its potential to provide equal opportunity, reliability and efficiency[381]. If one were to interpret Article 5 in this light, it would appear that the limits of what is "reasonable" should be construed as the most effective way to allow a person with a disability to have access to the workplace, taking into account the particular characteristics of the individual concerned and the optimum way to achieve equality of opportunity. In this regard, some commentators have suggested that the term "effective accommodations" is more appropriate than "reasonable accommodation"[382]. Therefore, it would appear that the question of what is reasonable should be considered separately to the question of whether an accommodation amounts to a disproportionate burden on the employer. Disproportionate burden refers to the upper limits of what is reasonable for the employer. If the accommodation results in such excessive cost and disruption to business as to outweigh the benefits of the accommodation, then it may be said to be disproportionately burdensome on the employer to make such an accommodation. For example, if a small employer is requested to make massive physical alterations to the workplace, which would result in huge costs and disruption to business, to accommodate one wheelchair-bound individual, it could reasonably be argued that this would be a disproportionate burden on the employer. However, physical access to the workplace is a reasonable demand for a wheelchair bound employee. Hence, it is apparent that the question of the reasonableness of the accommodation will not

[380] See E.U Network of Experts on Disability Discrimination, Lisa Waddington *supra* note 363, 63.
[381] Ibid.
[382] See Waddington L and Hendriks A, "The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination" *supra* note 339 at 410. However, it is worth keeping in mind that a recent US Supreme Court decision *US Airways v Barnett*, 122 S.Ct, 1516 (2002) addressed the issue of reasonable accommodation under the ADA and held that the word "reasonable" does not mean "effective" in ordinary English and that it is the word "accommodation" and not "reasonable" that conveys the need for effectiveness. The Court declared that "an accommodation could be unreasonable in its impact even though it might be effective in facilitating performance of essential job functions". This case marks a break away from the original meaning of the term "reasonable accommodation" in the ADA's legislative history.

always be compatible with the cost of the accommodation. However, if these issues are first considered separately, it may then be possible to broker a compromise between the employer and the individual with a disability. The most effective approach would be to firstly consider whether an accommodation is suitable, effective and workable in the particular circumstances of a case and then consider whether it is feasible and financially viable for the employer. Unfortunately the Directive does not enunciate on this distinction or provide further interpretative guidance.

According to the express wording of Article 5, a "reasonable" accommodation will involve "appropriate measures" on behalf of the employer to "enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training". Unfortunately the Directive only provides limited elaboration of what an appropriate measure entails. In Recital 20 of the Preamble, it describes appropriate measures as "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." As a result of the individual nature of reasonable accommodation and the need for an individual analysis in each case it is difficult for legislation to provide a definitive list of suitable accommodations. However as noted previously, the ADA defines reasonable accommodation by examples and is accompanied by comprehensive guidelines issued by the U.S Equal Employment Opportunity Commission. As a result of the absence of such detailed guidance in the Framework Directive, it will be left to the Courts to clarify what types of accommodations would and would not be suitable in certain circumstances. Based on experiences in the US and other jurisdictions,[383] it may be predicted that determining what amounts to a "reasonable" accommodation and the interpretation of what is deemed to be an "appropriate" measure in each particular case will be contentious issues for the judiciary.

4.23 Limitations to a Reasonable Accommodation

The extent to which one can demand or make a reasonable accommodation is of course not unlimited. According to Article 5, a refusal by an employer to make a

[383] In both the British Disability Discrimination Act 1995 and the Swedish Act 1999:132 on Prohibition of Discrimination in Working Life of Persons with Disabilities, the question of reasonableness has proved to be one of the most important and challenging parts of the legislation. See Andreas Inghammar, "Discrimination of People with Disabilities. Normative aspects of Disability and Work in a Swedish, English and EC Context" in Ann Nurmhauser-Henning (Ed.) 'Legal Perspectives on Equal Treatment and Non-discrimination' Kluwer Law International 2001 at 338.

reasonable accommodation for an individual with a disability will not amount to discrimination if the employer can show that such an accommodation would result in a "disproportionate burden" on its operations. The Directive does not elaborately define what is meant by a "disproportionate burden" but some limited guidance is provided in the Preamble. Recital 21 stipulates that in order to determine whether a measure will give rise to a disproportionate burden, "account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance." On the basis of this explanation, it is certain that the economics of the accommodation will be the primary factor taken into consideration by employers in determining whether a duty to make a reasonable accommodation should in fact be imposed. Wells[384] notes that it is unfortunate that the Directive does not attempt to point out to employers the potential benefits[385] involved in adapting the workplace to facilitate the employment of people with disabilities rather than focusing solely on the cost involved. For example certain accommodations also improve the productivity of other employees without disabilities. Ramps assist older workers, pregnant employees or employees with children and accommodations involving technology often improve job efficiency for all workers. If reasonable accommodation is construed as a negative obligation, this will naturally result in employers viewing it in a pessimistic light. This could preserve the traditional view that people with disabilities are costly to employ and thus result in increased instances of discrimination against people with disabilities rather than a reduction which is the aim of the Directive. However, Article 5 does provide that the burden "shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned." Recital 21, above, also refers to possibility of obtaining public funding or any other assistance. Therefore, financial involvement by the State may serve to facilitate acceptance of the duty to provide reasonable accommodation and

[384] Wells, K, *supra* note 332.

[385] Recent research has shown that reasonable accommodation can be positive for economic efficiency. For example the European Commission published independent research in November 2003 concerning the emerging business case for diversity. Benefits identified include corporate reputation, human capital and avoidance of costs related to workplace discrimination and harassment. See http://europa.eu.int/comm/employment_social/fundamental_rights/prog/studies_en.htm. For a recent review of the relationship between reasonable accommodation for people with disabilities and efficiency requirements see MA Stein, "The Law and Economics of Disability Accommodations" (2003) 53 Duke Law Journal 79.

anti-discrimination legislation in general[386]. It would ease the burden on employers thereby making it more difficult for them to argue that an accommodation amounts to a disproportionate burden and possibly act as an incentive to comply with the reasonable accommodation duty. If States were to get involved financially this would also assuage critics who question the appropriateness of imposing the cost of achieving a societal goal on private entities[387].

In contrast to other terms in Article 5 which were directly influenced by the ADA, this is not the case with the limit of "disproportionate burden". In the ADA the obligation of reasonable accommodation can only be revoked when the employer can show that such an accommodation would impose an "undue hardship" on the business[388]. The limit of "undue hardship" would appear to have a wider remit than the "disproportionate burden" limit in the Directive. The ADA defines "undue hardship" as "an action requiring significant difficulty or expense" when considered in light of an expanded list of factors[389]. Obviously, the presence of a broad statutory standard defining "undue hardship" offers a higher degree of protection. Unfortunately the Framework Directive is limited by the absence of such a comprehensive set of guidelines as those set out by the ADA. As no definitive rule has been set,

---

[386] Brunel University, "Definitions of Disability in Europe: A Comparative Analysis", *supra* note 143 at 76.

[387] This issue arose in Ireland in relation to the Employment Equality Bill 1996 which contained an obligation of reasonable accommodation on employers with a limit of "undue hardship". The Irish Supreme Court subsequently held the provision to be repugnant to the right to property enshrined in the Irish Constitution in *Re the Employment Equality Bill 1996* [1997] 2 I.R. 321. The reasoning given by the Court was as follows: "the difficulty with the section...is that it attempts to transfer the cost of solving one of society's problems onto a particular group. The difficulty the Court finds with the section is not that it requires an employer to employ disabled people, but that it requires him to bear the cost of all special treatment or facilities which the disabled person may require to carry out the work unless the cost of the provision of such treatment or facilities would give rise to 'undue hardship' on the employer." This decision resulted in the inclusion of a very restrictive provision on reasonable accommodation in the Employment Equality Act 1998 which provided for a significantly reduced cap of 'nominal cost' on the employer. This has now been changed to a 'disproportionate burden' in order to implement the Framework Employment Directive.

[388] ADA § 102(b)(5)(A), 42 U.S.C. § 12,111(b)5(A)

[389] 42 U.S.C. § 12,111(10) A. Subparagraph B elaborates on the factors to be considered:
(i) the nature and cost of the accommodation needed under this Act;
(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

"disproportionate burden" remains an open-ended concept which will be left to the judiciary to assess. What amounts to a disproportionate burden will depend on the facts of each particular case. The judiciary will have the difficult task to arbitrate and establish a fair balance between the economic imperatives of the employer and his business and the protection of the individual rights of people with disabilities. Unfortunately, economic justifications are systematically accepted at the European level by reason of the fact that economic development and competitiveness is supposed to be the prime objective of the European Union[390].

The most manifest limitation to Article 5 is that its terms are ambiguous and unspecified. Its effectiveness will depend greatly on the interpretation of national judges as it is up to them to assess the standards and limits of what is 'reasonable', 'appropriate' and 'disproportionate'[391]. Leaving the assessment of these essential terms to the national judge could be perilous due to their considerable freedom of interpretation in deciding disability discrimination cases. This is due to the fact that disability discrimination law is a fairly new concept in Europe; consequently there is not yet an established body of case-law or established guidelines. This freedom of interpretation could result in unpredictability in the assessment of what amounts to a reasonable accommodation and in widening gaps between the national approaches of the various EU Member States.

In conclusion, having examined the terms of Article 5 one may presume that there is a particular process required by the Directive in the provision of a reasonable accommodation. Firstly the person with a disability must be qualified to do the job. This process will involve identifying the 'essential functions' of the job. This must be followed by an analysis of whether the person with a disability can perform these 'essential functions' with or without an accommodation. Secondly, if an accommodation is required, then an appropriate accommodation must be identified. If no effective accommodation is found, then the employer can justify a refusal to accommodate. The identification of a suitable accommodation will normally require

[390] Moreau, Marie-Ange, "Justifications of Discrimination", *supra* note 291, 156. See Section I: 1.3 of this thesis for further elaboration on the economic aims of the EU.
[391] This ambiguity can be a typical feature of anti-discrimination law. Moreau aptly describes the law of discrimination 'as a law of eminently relative adjectives'. See 'Justifications of Discrimination' *supra* note 291, 161.

negotiation and co-operation between the employer and the individual with a disability in order to determine firstly what amounts to a 'reasonable' accommodation and secondly whether this amounts to a disproportionate burden on the employer. In calculating a disproportionate burden, the employer may take into account the cost involved, the size and resources of the business and the possibility of public funding. An open dialogue between the two parties is essential as the individual with a disability is in a better position to identify a suitable accommodation and the employer is more informed as the evaluation of what is an excessive cost or disruption to the business[392]. It is also important that the employer is made aware of the needs of the worker or job applicant. Otherwise he can rely on the fact that he was not informed as a defence. It can therefore be assumed that there is a burden of proof on the employee with a disability to show that a reasonable accommodation is possible and once such an accommodation is identified, the employer should bear the burden of proof of showing that it would result in a disproportionate burden[393].

4.3 Conceptual ambiguities

As a result of the brevity of the reasonable accommodation provision in the Directive, there are many ambiguities about its conceptual framework. There has been little specific guidance provided as to how it should be interpreted, which has led to confusion about its position in the existing structure of European anti-discrimination law. In this section I propose to examine the conceptual intricacies of Article 5 and hope to provide some clarification as to its functions and purpose within the current framework.

---

[392] Employers are already under an obligation to inform and consult with employees, who in addition have a right to express their views on company policies under the Council Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community. Open consultation and negotiation between the employer and the employee on reaching a decision about a reasonable accommodation will be mutually beneficial. It improves both the quality of life of the worker and the workplace in general, making it more open and accessible for all.

[393] The burden of proof is allocated in this way in relation to the reasonable accommodation provision in the ADA, therefore it can be reasonably presumed that it will be interpreted in a similar way at EU level. Furthermore, if the employer does not engage in an interactive process with the employee, the burden of proof shifts from the employee to the employer concerning the availability of an accommodation. See Blanck, Hill, Siegal & Waterstone, "Disability Civil Rights Law and Policy" (Hornbook Series: Hornbook 2004) at § 8.4 p8-26.

4.31 Reasonable Accommodation and the concept of Positive Action

As I mentioned at the outset, the concept of reasonable accommodation has often been considered as a component of positive action. Within the meaning of the Framework Directive, however, reasonable accommodation is not considered a form of positive action. The Directive does not expressly refer to the relationship between reasonable accommodation and positive action but it is implicit that they should be regarded as two separate and distinct instruments. This implicit separation is illustrated by the fact that reasonable accommodation is construed as an obligation whereas positive action is left to the discretion of the Member States[394]. It is endorsed by the Directive as a potential tool to combat discrimination but it is not mandatory and this considerably reduces its impact. This important distinction clearly sets the two instruments apart.

However as a result of considerable confusion in some jurisdictions as to the relationship between reasonable accommodation and positive action[395] it is worth addressing the issue of whether the concepts are in some way interconnected or exist as two wholly separate instruments. One must first look at the theory and motivation behind each mechanism in order to understand whether there is a link between them. It must be conceded that they are both similar in approach: both involve the employer actively providing and supporting measures to promote the equality of people with disabilities. However there are also important differences. Positive action involves the introduction of measures which go beyond the negative prohibition of discrimination and seek to alter the composition of the workplace or institution in favour of a particular group[396]. In essence it positively discriminates in favour of a particular group. A commonly used positive action measure in the case of disability has been strict employment quotas[397]. Reasonable accommodation on the other hand involves the imposition of a positive duty on the employer to facilitate a person with a disability into the workplace in order to *avoid* less favourable treatment, not in the

---

[394] Article 7(1) Directive 2000/78/EC dealing with positive action states "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member States from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1". The grounds referred to in Article 1 are disability, age, religion or belief and sexual orientation.

[395] For a review of the literature see *supra* note 343.

[396] This definition is partly adopted from C. Bell, A. Hegarty, S. Livingstone, 'The Enduring Controversy: Developments on Affirmative Action Law in North America' (1996) *International Journal of Discrimination and the Law*, 233, 234. See also Cathryn Costello, 'Positive Action' in Costello C and Barry E (Eds.) "Equality in Diversity-the new Equality Directives". Irish Centre for European Law 2003 at 177 for a critical appraisal of positive action measures in EU law.

[397] See Section I: 1.11 of this thesis for a discussion of the use of employment quotas in the case of disability.

sense that more favourable treatment or positive discrimination is required[398]. It is important to underline that reasonable accommodation does not aim to create an artificial opportunity where none might otherwise exist[399], rather the aim is to open up access to opportunities which have thus far remained closed to people with disabilities as a result of discrimination. This highlights the distinct and necessary function of reasonable accommodation within the non-discrimination framework and furthermore its dissimilarity from positive action. It is important that Member States also make this distinction in their implementation legislation and that the judiciary will interpret it correctly in order to avoid the confusion that has emerged in other jurisdictions.

4.32 Reasonable Accommodation and the existing anti-discrimination framework

One uncertain and unspecified aspect of the duty to provide reasonable accommodation is whether a failure by employers to abide by this obligation amounts to discrimination. The wording of Article 5 does not explicitly provide that an unjustified failure to comply with this duty should amount to discrimination. Therefore the ambiguity arises as to where does the concept of reasonable accommodation fit in the anti-discrimination framework outlined in the Directive? Firstly, can it be inferred that a failure to make a reasonable accommodation amounts to discrimination? If so, then what type of discrimination? As previously discussed, the Directive expressly prohibits direct and indirect discrimination on the grounds of disability[400]. Can a failure to provide reasonable accommodation come under either of these two categories of discrimination? Or would it be less problematic and more effective to construe it as a third and separate form of discrimination?

4.321 Does a failure to provide reasonable accommodation amount to discrimination?

As I have mentioned previously, the wording of Article 5 is largely based on the concept of reasonable accommodation in the Americans with Disabilities Act 1990. In the ADA, it is expressly stated that a failure on the part of the employer to make a

---

[398] Wells, *supra* note 332. This argument is supported by Recital 17 of the Preamble which emphasises that employers are not under an obligation to employ someone who is not capable of performing the essential functions of the job without prejudice to the obligation to provide reasonable accommodation.

[399] See Hendricks, Aart, "The Concepts of Non-Discrimination and Reasonable Accommodation" in the 1995 Report of the European Day of the Disabled, 'Disabled Persons' Status in the European Treaties-Invisible Citizens. (1995), 53 at 58

[400] Article 2 (2) (a) and (b) of Council Directive 2000/78/EC

reasonable accommodation for an otherwise qualified person with a disability amounts to discrimination[401]. On the contrary, this is not explicitly stated in the Framework Directive. The Commission's original proposal for the Framework Directive also classified an unjustified refusal to make such an accommodation as a form of discrimination, however the adopted text simply provides for an obligation to make such an accommodation with no reference to discrimination[402]. Nevertheless many Member States have made this link in their legislation[403]. It is submitted that on a purposive reading of the Directive, the failure to provide reasonable accommodation does amount to discrimination. It is clearly in keeping with the intention and spirit of the Directive, which is to combat discrimination. The concept of discrimination in the Directive is described in Article 2(1) which states "For the purposes of the Directive the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1". If we look simultaneously at the opening sentence of Article 5, which states "In order to guarantee compliance with the principle of equal treatment.....reasonable accommodation shall be provided", it is obvious that these two provisions share the same aim, which is to achieve equal treatment on the ground of disability. Whittle[404] also acknowledges that while the duty to accommodate is located outside the concept of discrimination as defined in Article 2, it is clear that the two are inextricably linked and Article 5 should be cross-referenced with the concept of discrimination in Article 2(1). Despite these interpretative possibilities, it would clearly have been more effective if the definition of discrimination was expressly extended to include employer refusals of reasonable accommodation. Having argued that a failure to provide reasonable accommodation can be interpreted as amounting to discrimination, let us examine if it fits within the existing dual framework of direct and indirect discrimination outlined by the Directive.

---

[401] ADA § 102(b)(5)(A), 42 U.S.C. § 12,111(b)5(A).

[402] It has been claimed that the reason for the separation of the reasonable accommodation provision from the non-discrimination provisions in the final text was not as a result of objections to the link between reasonable accommodation and discrimination but rather because it was felt out of place to over burden Article 2 on the general prohibition against discrimination with detailed rules related only to one ground among the many. See EU Network of Independent Experts on Disability Discrimination. Baseline Study *supra* note 253, 12

[403] See for example Sweden, § 6 of the Prohibition of Discrimination in Working Life of Persons with Disabilities (1999:132); Belgium, Article 2 § 3 of the Federal Law of 25 February 2003; the UK, Part II 3A(2) of the Disability Discrimination Act 1995.

[404] Whittle, Richard, *supra* note 238, 312

4.322 Direct Discrimination?

In order to prove direct discrimination it may often be necessary to demonstrate intent on behalf of the perpetrator[405] and to identify a "comparable situation". Therefore, in order to establish that a failure to make a reasonable accommodation is a form of direct discrimination, one could establish that the employer knew about the need for a reasonable accommodation to be made, which could have been done without excessive cost and refused to make that adaptation[406]. In order to fit this approach into the European Community framework, Waddington[407] claims that it would be necessary to explicitly provide for the "disproportionate burden" defence with regard to a directly discriminatory act involving a denial of reasonable accommodation. This is presently not provided for in the Directive, therefore it is not a likely possibility. With regard to the express definition of direct discrimination in the Directive, the identification of a "comparable situation" is necessary in order to prove discrimination took place[408]. Therefore, in order to bring a failure to make a reasonable accommodation within the definition as laid down in the Directive one must establish that an individual requiring an accommodation is in a "comparable situation" to those who do not require such an accommodation. This is difficult to demonstrate given that the reason for a reasonable accommodation in the first place is to remove the barriers, which obstruct an individual with a disability from being in a "comparable situation" with other workers.

From the outset the concept of reasonable accommodation is at odds with the notion of direct discrimination, which is expressed in formal equality terms. This means that it is based on the idea that an individual's personal inherent characteristics are rarely relevant and only in exceptional cases allow for different treatment. However as has been underlined throughout this thesis, failing to accommodate individual characteristics in the case of disability would result in denying a person with a disability equal employment opportunities. Despite these apparent difficulties, it is noteworthy that certain Member States have interpreted a failure to provide reasonable accommodation as amounting to direct discrimination[409]. In one sense

---

[405] E.U Network of Experts on Disability Discrimination, Lisa Waddington *supra* note 363, 80.
[406] Ibid.
[407] Ibid.
[408] See further Section III: 3.11
[409] Sweden, § 6 of the Prohibition of Discrimination in Working Life of Persons with Disabilities(1999:132); In Ireland the Labour Court held that a failure to provide reasonable accommodation amounted to direct discrimination in the case of *A Motor Company v. A Worker*

conceptualising a failure to provide reasonable accommodation as amounting to direct discrimination lends a powerful force to the reasonable accommodation duty. There are no justifiable defences provided for direct discrimination in the Framework Directive, hence it would raise the bar for employers and make it more difficult for them to escape liability.

4.323 Indirect Discrimination?

Now, let us now consider if the concept of indirect discrimination, as laid down in the Directive, could be invoked to redress a failure to accommodate. There are close links between the concepts of indirect discrimination and reasonable accommodation. Both are strongly influenced by the notion of substantive equality and aim to combat more subtle and systemic forms of discrimination. Despite these similarities in ideology, they are quite different in nature. The concept of reasonable accommodation is of a very individualised nature. Each individual case is treated differently depending on the particular characteristics of the individual concerned and specific environmental factors. Indirect discrimination, on the other hand, aims to combat disadvantage experienced by a particular group of persons as a result of an apparently neutral provision, criterion or practice.

There is an express link drawn between the two concepts in Article 2(2)(b)(ii) of the Directive which provides that certain provisions or practices will not amount to indirect discrimination if the employer is obliged to make a reasonable accommodation. It is uncertain what this provision implies for the relationship between reasonable accommodation and indirect discrimination. It would appear to suggest that if the employer fails to make a reasonable accommodation then this will amount to indirect discrimination. Does this suggest that a failure to make a reasonable accommodation is a form of indirect discrimination? Or is it just recognition of the fact that reasonable accommodation is a method of combating indirect discrimination? Article 2(2)(b)(ii) has been interpreted as allowing a choice at national level between legislative provisions defining and prohibiting indirect discrimination and legislative provisions creating the duty to provide reasonable

---

ED/01/40. In Finland it has been claimed that it is possible to interpret a failure to provide reasonable accommodation as amounting to direct discrimination- see E.U Network of Experts on Disability Discrimination, Lisa Waddington *supra* note 363, 85.

accommodation[410]. In fact, the provision was only inserted at the request of the British government who wished to preserve their existing legislative framework[411]. Other Member States have also chosen to interpret a failure to provide reasonable accommodation as amounting to indirect discrimination[412]. This conceptualisation has been identified by experts as the weakest approach as it fails to fully grasp the current meaning of indirect discrimination in EU law[413].

As to the question of whether a failure to provide a reasonable accommodation could be construed as indirect discrimination under the definition provided in Article 2 (2)(b) of the Directive, it must be kept in mind that this is a new definition of indirect discrimination[414]. The definition focuses on a comparison between persons with disabilities and other persons, to identify if the former have been placed at a particular disadvantage. Member States have at their discretion the possibility of using statistical data as evidence. Therefore in order to claim that a failure to provide reasonable accommodation is a form of indirect discrimination, one must satisfy this test. Due to the individual nature of reasonable accommodation, it will prove difficult to form a homogeneous group of people with disabilities for the purposes of the definition. Each reasonable accommodation case is different depending on the nature and type of disability involved and external environmental factors. It may also be difficult to find data to support a claim due to the novelty of reasonable accommodation in EU law. Therefore, finding a suitable comparator in this scenario will not prove an easy task. Consequently, the determination of whether a failure to provide reasonable accommodation amounts to indirect discrimination under the Directive will depend firstly on how this new test for indirect discrimination will be interpreted by the Courts, at national and then European level. Then it may be possible to ascertain for certain to what extent the failure to provide a reasonable accommodation can be covered by the test and eventually whether it amounts to indirect discrimination.

---

[410] Wells, K, *supra* note 332.
[411] Ibid. See also Section III: 3.121.
[412] Spain: Article 37.3 of the Law 13/1982 refers to reasonable accommodation as a way to avoid indirect discrimination; Austria: the draft law of January 2004 to implement the Framework Directive makes it clear that a failure to provide reasonable accommodation is a form of indirect discrimination.; France: The Assemblée Nationale wishes to insert the duty to accommodate in the Labour Code which addresses discrimination and has stated that a refusal to accommodate would constitute indirect discrimination. Information provided by E.U Network of Experts on Disability Discrimination, Lisa Waddington *supra* note 363.
[413] E.U Network of Experts on Disability Discrimination, Lisa Waddington *supra* note 363, 90.
[414] See Section III: 3.12

4.324 Reasonable Accommodation Discrimination?

In light of these conclusions, it is clear that a failure to provide reasonable accommodation does not fit easily into the category of either direct or indirect discrimination as defined within the Directive. There are numerous reasons for this incompatibility. Firstly, it is conceptually a different type of provision. Article 5 does not express a negative prohibition on discrimination as do the provisions on direct and indirect discrimination; rather it imposes a positive duty on employers to provide a reasonable solution to the barriers and discrimination faced by people with disabilities. While direct discrimination encompasses a formal principle and thus has a consistent nature, reasonable accommodation is dependent on many variables, thus rendering it difficult to fulfil requirements, such as the identification of a 'comparable situation', as demanded by the prohibition on direct discrimination. Secondly, the failure to provide a reasonable accommodation is a disadvantage which is experienced on a very individual level; therefore it is particularly problematic to fit it under indirect discrimination which is a group based measure. As a result of this unique nature of reasonable accommodation, a different approach is required to achieve justice for the individual affected by a failure to provide reasonable accommodation. Therefore, it has been suggested that reasonable accommodation discrimination should be conceptualised as a form of discrimination *sui generis* with its own rules and defences[415]. This would be advantageous in the sense that it would provide for all the peculiarities associated with reasonable accommodation. For example if Article 5 had its own distinct rules with respect to the burden of proof and justifiable defences, it would certainly strengthen and reinforce the protection offered to individuals with disabilities. However, this would entail considerable expansion of the reasonable accommodation provision and inevitably involve creating a separate and special category of disability discrimination. This would not appear to be very feasible under the Framework Directive due to the fact that it is a multi-ground statute and confined to the employment field. As reasonable accommodation only covers people with

[415] Commentators that have argued for the separate conceptualisation of "Reasonable Accommodation Discrimination" include Catherine Casserley, "Reasonable Accommodation ". Paper given at the conference, "The fight against discrimination: the Equal Treatment Directives of 2000". Academy of European Law. Trier 1-2 Oct 2004 and Lisa Waddington and Aart Hendriks "The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination" *supra* note 339. It has been suggested that the law relating to reasonable accommodation in the Netherlands can be purposively interpreted as having a distinct *sui generis* nature. See E.U Network of Experts on Disability Discrimination, Lisa Waddington *supra* note 363, 85.

disabilities, it would be difficult to argue such expansion within the framework of the Directive. For these reasons and others it has already been proposed at the European level to adopt a disability specific directive to deal more comprehensively and effectively with issues associated with the particular nature of disability[416].

4.4 Reasonable Accommodation as a method of achieving Equality for People with Disabilities.

It has been demonstrated that reasonable accommodation is now an established concept in the fight against inequality and exclusion in many jurisdictions internationally. However, it is still only an emerging concept in Europe, having been introduced by the Framework Directive in 2000 solely in the context of disability. Therefore it is timely to examine how effective it is as a mode of achieving equality for people with disabilities.

Firstly it must be determined where it is situated in the existing European equality framework, which is broadly composed of formal and substantive equality. As discussed in Section II, formal equality requires all people to be treated equally and does not tolerate differential treatment with only very rare exceptions. It normally involves neutral policies which do not take into account 'irrelevant' considerations such as sex, race or disability. This type of policy would appear to be incompatible with the concept of reasonable accommodation which at its core involves allowing for and accommodating 'difference'. On the other hand, substantive equality recognises that inequality can be systemic and indirect, thus creating unfair conditions for already disadvantaged groups. This recognition means that substantive equality tends to advocate policies that seek to eliminate the structural factors that cause inequality, which may involve altering the systems that neutrally treat everyone the same[417]. People with disabilities have posed a challenge to the formal model of equality as facially neutral policies which have been designed with the needs of the dominant group in mind are inadequate to achieve integration and equality for all[418]. As I have emphasised throughout the thesis, the characteristic of disability cannot be ignored in order to achieve equal treatment for people with disabilities, rather it must absolutely

---

[416] A draft disability specific directive was published by the European Disability Forum in Spring 2003. See www.edf-feph.org to view the draft directive.

[417] Day, S. and Brodsky, G., "The Duty to Accommodate: Who will benefit?" (1996) 75 Canadian Bar Review 433, 29.

[418] Ibid.

be taken into account. Therefore reasonable accommodation would appear to be the solution to this conundrum. It recognises that equality cannot always be achieved by identical treatment and therefore aims to accomplish equality by instead acknowledging diversity and accommodating difference. Understood in this way it would appear to be clearly rooted in the substantive equality ideal.

However, critics have identified problems with the concept of reasonable accommodation which appear to be contrary to substantive equality ideology. Reasonable accommodation has been criticised as being assimilationist[419] and as failing to guarantee equal employment opportunities for all in the broader perspective of equality by reason of its individual nature [420]. A major conceptual difficulty is that the recognition of difference which is inherent in the notion of reasonable accommodation is constructed as a 'problem' that accommodation is seeking to fix. It reinforces the idea that 'normal' people are dominant in society and that adjustments will be made in order to fit people who are 'different' into this paradigm. While the notion of reasonable accommodation is without doubt a positive development within the traditional structure of equality, there is a danger that it may not confront "the imbalances in power, or the discourses of dominance, such as racism, able-bodyism and sexism, which result in a society being designed well for some and not for others.[421]" In order to really challenge these deep rooted mechanisms and attempt to achieve real equality in the process, transformation of the institutions and relationships which make up society must be the goal. Accommodation, as a result of its individual nature, does not require structural or societal change which would inevitably affect groups of persons but rather it requires adaptations to an existing structure or entity (subject to a limit that it is not overly burdensome) in order to fit 'different' individuals into the existing system in society. However, the complexity in the disability context is that as a result of the huge variety of disabilities, covering a broad spectrum of physical, intellectual and emotional impairments, both group and individual accommodations are necessary. Group-based adaptations such as accessible buildings, transportation and communication are essential for an inclusive society while individual measures are required where there are many variables to be taken into consideration, for example in the workplace where the relationship between

[419] See McLachlin J. of the Canadian Supreme Court in *British Columbia v. BCGSEU* 9 Sept 1999 CSC no. 26274 at paragraph 41.
[420] Lisa Waddington and Aart Hendriks, *supra* note 339, 414.
[421] Day and Brodsky, *supra* note 417, 30

factors such as the essential functions of the job, the particular type of disability and the environment must be determined.

Therefore it is apparent that the current form of individualised reasonable accommodation, as embodied by the Framework Directive, is insufficient to achieve full equality in practice for *all* people with disabilities. It needs to be supported by group-based measures in order to make institutions, services and society more open to a diverse range of people and abilities. Unfortunately, individual measures alone will not tackle deep seated prejudices and stereotypes about people with disabilities. In fact it has been noted that more often than not they may actually leave unchallenged and unaffected the underlying discriminatory policy which resulted in the initial exclusion[422].

4.5 Concluding Remarks

Article 5 has turned out to be one of the most challenging provisions of the Directive for Member States to implement. For most Member States it is a completely new legislative concept. Thus far implementation has been varying and inconsistent. Research has shown that many aspects of the obligation have not been well-catered for. For example, the various kinds of reasonable accommodations possible have not been clearly differentiated in legislation and issues such as the importance of individualising the search for an accommodation and the necessity of an interactive dialogue between employer and employee have also been poorly provided for under much statute law[423]. There is also no uniform approach as to whether a failure to provide a reasonable accommodation amounts to discrimination. These gaps are crucial as reasonable accommodation is regarded as the core provision in the Directive to combat disability discrimination and the way in which it will be handled will probably determine whether the Directive and consequently national legislation will be effective in combating discrimination on the ground of disability.

The concept of reasonable accommodation now underpins the heart of modern disability discrimination legislation. It is a legal concept, which if properly enforced, will finally give people with disabilities the opportunity to participate in economic and social structures, which have, until now, through their design and operation

---

[422] Lisa Waddington and Aart Hendriks, *supra* note 339, 415

[423] See EU Network of Independent Experts on Disability Discrimination. Baseline Study, *supra* note 253, 86.

locked such individuals out[424]. The introduction of reasonable accommodation to EU anti-discrimination law has significant implications for the future and it has been described as evidence of a different and more sophisticated approach to combating discrimination[425]. As I have discussed previously, due to the specific nature of disability, the application of the conventional equality ideal is problematic. The traditional anti-discrimination model does not fit and as I have demonstrated, genuine equality even involves going beyond the norms of a prohibition of direct and indirect discrimination. This is where the concept of reasonable accommodation becomes so important. It recognises the importance of respecting diversity in order to achieve equality. Not only does it respect difference, but it requires the would-be discriminator to accommodate this difference, therefore forcing him to reflect on barriers that inhibit equal opportunity[426]. This innovation signals a new direction for European anti-discrimination law in a more substantive direction. It is hoped that this focus will continue and that individualised reasonable accommodations will be supported by additional substantive group measures in order to tackle more structural forms of discrimination.

[424] See Olivia Smith "Disability Discrimination and Employment: A never-ending legal story?" (2001) 23 DULJ 148 at 153.

[425] Barbera, Marzia, "Not the same? The Judicial Role in the New Community Anti-Discrimination Law Context", 31 Industrial Law Journal 1 (2002), 82

[426] See Gerard Quinn and Shivaun Quinlivan, "Disability Discrimination: the Need to Amend the Employment Equality Act 1998 in light of the European Framework Directive on Employment" *supra* note 241.

CONCLUSION

"If the objective of eliminating disability discrimination is taken seriously, it is obvious that we are talking about social change on a very large and ambitious scale."[427]

Disability has already experienced quite a substantial shift in social paradigms. It moved from being viewed as a medical 'problem' of the person, which was dealt with by charity and welfare measures to an issue of rights whereby the 'problem' is not located with the individual but in the way society is constructed to the disadvantage of the individual. Despite this change in thinking and the subsequent adoption of anti-discrimination legislation, discrimination continues to be a daily occurrence for people with disabilities in all aspects of life. Without doubt, the rights-based approach has achieved major advances in the last 20 years. However, a difficulty in its approach lies in that it depends on viewing people with disabilities as a "discrete and insular group"[428]. The reality is that people with disabilities do not form a homogenous group at all, as evidenced by the major difficulties in forming definitions of disability in anti-discrimination laws world-wide. Disabilities are numerous in type, vast in number and are spread throughout a large proportion of the world population. No person is exempt from becoming disabled and disability has the power to affect anybody at any stage in life.

Recently, there has been a strong body of thought which argues that disability discrimination legislation needs to move away from the minority rights approach towards a more universalist view[429]. This view proposes universal design for all aspects of human activity including buildings, transportation, housing and workplaces so that environments and tools are suitable for as many people as possible[430]. This approach is based on the assumption that disability is a universal human condition which all people share to one extent or another and in this sense it moves away from

---

[427] Gubbels, André, Former Principal Administrator in the Disability Unit of the Directorate General for Employment and Social Affairs of the European Commission (1997 -2002) in "The Evolution of EU Disability Policy: from Charity to Rights", *supra* note 60.
[428] Bickenbach, JE, "Disability and Equality" (2003) 2:1 Journal of Law and Equality, 7-15 at 10.
[429] Fredman, S., "Disability Equality: A Challenge to the existing Anti-Discrimination Paradigm?" *supra* note 117 at 207.
[430] Ibid.

categorising people with disabilities as a separate group or class of people[431]. The universalist view can be observed in the World Health Organisation's International Classification of Functioning, Disability and Health[432] and it has recently been endorsed by the UN Ad Hoc Committee on the Rights of Persons with Disabilities[433].

The current disability strategy of the EU, with its emphasis on anti-discrimination legislation and particularly the concept of reasonable accommodation, focuses on special laws to 'fit' people with disabilities into society. This approach is certainly an improvement on previous welfare measures which often actively excluded people with disabilities from the community. However, a universalist approach would go even further as it aims to make society open and accessible to all. In this sense people with disabilities would have the same rights and advantages as non-disabled people, rather than be perceived as a minority group which receives 'special treatment'. Examples of this approach in practice could be comprehensive equality or non-discrimination laws which outlaw discrimination on all grounds. Currently at the EU level there are varying levels of protection for the different grounds covered by anti-discrimination legislation[434]. To even reach a point where the introduction of comprehensive legislation could be introduced, it is first essential that the EU extends its protection against disability discrimination to areas outside the employment field such as education, housing, transport and goods and services.

[431] See Bickenbach JE, *supra* note 428 at 11.
[432] WHO, "International Classification of Functioning, Disability and Health" (Geneva: WHO, 2001)
[433] See UN Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities (New York, 2003), 'Issues and Emerging Trends Related to Advancement of Persons with Disabilities' DocA/AC.265/2003/1, paras. 9-10. Cited in Fredman, *supra* note 117 at 207.
[434] For more detailed discussion, see Waddington, L. and M. Bell "Reflecting on Inequalities in European Equality Law" (2003) 28 European Law Review.

REFERENCES

Selected European Case-Law

Case C-173/99 *BECTU v Secretary of State for Trade and Industry* [2001] ECR I-4881

Case C-249/96, *Grant v South West Trains Ltd.* [1998] ECR I-621

Case C-13/94 *P v S and Cornwall* [1996] ECR I-2143

Case 342/93 *Gillespie & ors v. Northern Health and Social Services Board & ors* [1996] ECR 225

Case C-450/93 *Kalanke v. Freie und Hansestadt Bremen* [1995] E.C.R. I-3051

Case C-279/93 *Finanzamt Koeln-Altstadt v Schumacker* [1995] ECR I-225

Case C-399/92, *Helmig* [1994] ECR I-5727

Case C-127/92 *Enderby v Frenchay Health Authority* [1993] ECR I-5535

Case C-271/91 *Marshall v. Southampton and South West Hampshire Area Health Authority* (Teaching) (No. 2) [1993] ECR I-4367

Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Harzt* [1986] ECR 1607

Case 222/84 *Johnston v UK* [1986] ECR 1651

Case 96/80 *Jenkins v. Kingsgate* [1981] ER 911

Case 129/79 *Macarthys v. Smith* [1980] ECR 1275

Case 130/75 *Prais v Council* [1976] ECR 1589

Case 80/70 *Defrenne v Sabena* [1971] ECR 445; Case 43/75 *Defrenne v Sabena* (No. 2) [1976] ECR 455 and Case 149/77 *Defrenne v Sabena* (No.3) [1978] ECR 1365

Bibliography

Apostolopoulou, Z., "Equal Treatment of people with disabilities in the EC: What does "Equal" mean?" Jean Monnet Working Paper 09/04 NYU School of Law.

Baker, Lynch, Cantillon, Walsh, "Equality: From Theory to Action". Palgrave Macmillan 2004

Barbera, M., "Not the same? The Judicial role in the New Community Anti-Discrimination Law Context", Industrial Law Journal Vol.32, 82 (2002)

Barnard, C., "EC Employment Law", (Oxford: OUP, 2000)

Barnard, C., "The Changing Scope of the Fundamental Principle of Equality", (2001) 46 McGill Law Journal 955

Bell, M., "Anti-Discrimination Law and the European Union" (Oxford: OUP, 2002)

Bell, M., "Equality and European Union Constitution" (2004) 33 Industrial Law Journal 242-260

Bickenbach, Jerome E. "Disability and Equality" (2003) 2:1 Journal of Law and Equality, 7-15

Blanck, Hill, Siegal & Waterstone, "Disability Civil Rights Law and Policy" (Hornbook Series: Hornbook 2004)

Breslin & Yee (Eds.), "Disability Rights Law and Policy: International and National Perspectives" (Transnational Publishers 2002)

Brunel University, "Definitions of Disability in Europe: A Comparative Analysis", (London: Brunel University, 2002)

Burgdorf Jr, Robert L., "Disability Discrimination in Employment Law" Bureau of National Affairs Books 1995.

Connolly, U., "The Race Directive and the Framework Directive: an Analysis of their Effect on Irish Employment" (2001) Irish Law Times, Part I p206-210 & Part II p219-222.

Cooper, J and S Vernon, "Disability and the Law", London, Bristol, Pa: Jessica Kingsley Publishers 1996

Costello C. and E Barry (Eds.), "Equality in Diversity-the New Equality Directives" Irish Centre for European Law 2003

Council of Europe, "Legislation to Counter Discrimination Against Persons with Disabilities". Report drawn up by the working group on Legislation against Persons with Disabilities (P-RR-LAD), 2nd edition COE Publishing, Strasbourg, November 2003

Council of Europe, "Employment Strategies to promote Equal Opportunities for Persons with Disabilities on the Labour Market". COE Publishing, Strasbourg 2002

Council of Europe, "Assessing Disability in Europe-Similarities and Differences". Report drawn up by the working group on the assessment of person-related criteria for allowances and personal assistance for people with disabilities (partial agreement) (P-RR-ECA), COE publishing, Strasbourg 2002

Craig and DeBúrca, "EU Law, Text, Cases and Materials". 3rd Edition (Oxford: OUP, 2002)

Craig and DeBúrca, "The Evolution of EU Law" (Oxford: OUP 1999)

Dashwood, A and S. O Leary, "The Principle of Equal Treatment in European Community Law" (London: Sweet & Maxwell, 1997)

Day, S. and Brodsky, G., "The Duty to Accommodate: Who will benefit?" (1996) 75 Canadian Bar Review 433

Degner and Koster-Dresse (Eds.), "Human Rights and Disabled Persons, Essays and Relevant Human Rights Instruments" (Martines Nijhoff Publishers, 1995)

Dowling, M., "Disability Discrimination" (1999) 5 Irish Bar Review 121 (Vol.5 No.3)

Doyle, Brian J. "Disability Discrimination: Law and Practice" (4th Edition), Jordans, Bristol, 2003.

Düvel, Wiebke, Schömann, I, Clauwaert, S. "Non-Discrimination in the European Union: Implementation of Directives 2000/78/EC and 2000/43/EC", Brussels: European Trade Union Institute 2004

Fredman, S., "Discrimination Law" (Oxford: OUP 2002)

Fredman, S., "Equality: A New Generation?" (2001) 30 Industrial Law Journal, No. 2

Gooding, C. and A Lawson (Eds.)"Disability Rights in Europe: From Theory to Practice", Hart Publishing 2005.

Hahn, "Accommodations and the ADA: Unreasonable Bias or biased reasoning?" (2000) 21 Berkeley Journal of Employment and Labor Law 213

Hepple B and C Barnard, "Substantive Equality" (2000) 59 Cambridge Law Journal 562

Hepple B and E M. Szyszczak (Eds.) "Discrimination: The Limits of the Law" Centre for Study of Race Relations Law, University College London, 1992.

Hervey, Tamara "European Social Law and Policy". European Law Series. (Longman 1998)

Hervey, T and J Kenner (Eds.) "Economic and Social Rights under the EU Charter of Fundamental Rights-a Legal Perspective" (Oxford: Hart Publishing, 2003)

Hvinden, B., (2003) "The Uncertain Convergence of Disability Policies in Western Europe", Social Policy and Administration Vol. 37, No. 6, pp. 609-624

Jolls, C., "Anti-Discrimination and Accommodation", Harvard Law Review Vol. 115 December 2001

Karlan, P.S and G Rutherglen, "Disabilities, Discrimination and Reasonable Accommodation", 46 Duke Law Journal, 1996, 1-41.

Kimber, Cliona "Equality and Disability" (2001) 6 Irish Bar Review 494 [part 1]; 7 Bar Review 66 [part 2]

Loenen, T. and Rodrigues, P.R., "Non Discrimination Law: Comparative Perspectives" Kluwer Law International 1999

Mabbett, D., "The Development of Rights-Based Social Policy in the European Union: the Example of Disability Rights" (2005) 43 JCMS Number 1, 97-120

Machado & De Lorenzo (Eds.) "European Disability Law" (Fundacion ONCE, 1997)

McColgan, A., "Discrimination Law. Text, Cases and Materials", Hart, Oxford, 2000

McCrudden, C., "The New Concept of Equality", Academy of European Law, Trier 2003. Available at www.era.int

Moreau, Marie-Ange "Les justifications des discriminations", in Droit social, n°12, décembre 2002, p. 1112-1124

Nurmhauser-Henning, A., "Legal Perspectives on Equal Treatment and Non-Discrimination." Kluwer Law International 2001

O'Hare, U., "Enhancing European Equality Rights: a New Regional Framework", Maastricht Journal of European and Comparative Law Vol. 8, 144

Oliver, "Understanding Disablement from Theory to Practice." Palgrave Publishers, Basingstoke, 1996.

Pojman, Louis P. and Westmoreland, Robert (Eds.) "Equality: Selected readings" (New York, Oxford) Oxford University Press 1997

Quinn, G., "The Human Rights of People with Disabilities under EU Law", in P. Alston (Ed), 'The EU and Human Rights' (Oxford and New York: OUP 1999), 281-326.

Quinn, McDonagh and Kimber, "Disability Discrimination Law in the U.S, Australia and Canada". Oak Tree Press, Dublin 1993

Quinn and Degener, "Human Rights and Disability. The Current Use and Future Potential of UN Human Rights Instruments in the Context of Disability" HR/PUB/02/1, United Nations, New York and Geneva 2002

Schiek, D., "A New Framework on Equal Treatment of Persons in EC law?" (2002) 8 European Law Journal No. 2, 290-314

Shaw, J., (Ed) "Social Law and Policy in an Evolving European Union" (Oxford: Hart Publishing 2000)

Skidmore, P., "EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?" (2001) 30 Industrial Law Journal, 126

Smith, O., "Disability Discrimination and Employment: A never-ending legal story?" (2001) 23 DULJ 148

Thornton, P and Lunt, N, "Employment Policies for Disabled People in Eighteen Countries. A Review." York: University of York Social Policy Research Unit, 1995

Thüsing, G., "Following the U.S Example: European Employment Discrimination law and the Impact of Council Directives 2000/43 EC and 2000/78/EC". (2003) The International Journal of Comparative Labour Law and Industrial Relations, Volume 19/2, 187-218

Tridimas, Takis, "The General Principles of EC Law" (OUP, 1999)

Van Oorschot and Hvinden (Eds.) "Disability Policies in European Countries". Kluwer Law International 2001

Waddington, L., "The Expanding Role of the Equality Principle in EU Law". (2003) Policy Paper, Robert Schumann Centre of Advanced Studies, European University Institute, Florence. Available at: http://www.iue.it/RSCAS/e-texts/CR2003-04.pdf

Waddington, L. and M. Bell "Reflecting on Inequalities in European Equality Law" (2003) 28 European Law Review

Waddington, L. and A. Hendriks "The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination". (2002) 18 The International Journal of Comparative Labour Law and Industrial Relations, 403-427

Waddington L. and M. Bell, "More Equal than Others: Distinguishing the European Equality Directives" (2001) 38 Common Market Law Review, 587

Waddington, Lisa "Disability, Employment, and the European Community". Antwerpen: Maklu 1995

Wells, Katie "The Impact of the Framework Employment Directive on UK Disability Discrimination Law" (2003) 32 Industrial Law Journal, 253.

Whittle, R., "The Framework Directive for Equal Treatment in Employment and Occupation: an Analysis from a Disability Rights Perspective" (2002) 27 European Law Review, 303

Whittle, R. and M Bell, "Between Social policy and Union Citizenship: the Framework Directive on Equal Treatment in Employment", (2002) 27 European Law Review, 677

Whittle, R., "Disability Discrimination and the Amsterdam Treaty" (1998) 23 European law Review, 50

WHO, "International Classification of Functioning, Disability and Health" (Geneva: WHO, 2001)

European Documentation

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

Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation", COM (1999) 565 final

European Commission, *Equality and non-discrimination* Annual Report 2005

European Commission, Green Paper "Equality and non- discrimination in an enlarged European Union", Luxembourg 2004

European Commission, "The Employment Situation of People with Disabilities in Europe" Office for Official Publications of the European Communities, August 2001

European Commission, "Raising Employment Levels of People with Disabilities-The Common Challenge" Luxembourg: Office for Official Publications of the European Communities 1999

Communication on Equality of Opportunity for People with Disabilities COM (96) 406 final of 30 July 1996

White Paper: European Social Policy-A way forward for the Union, COM (94) 333 final

European Network of Independent Experts on Disability Discrimination: Baseline Study: Disability Discrimination Law in EU Member States. November 2004. Director: Professor Gerard Quinn NUI Galway, Ireland

European Network of Independent Experts on Disability Discrimination: "Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice" by Lisa Waddington 2004

European Network of Independent Experts on Disability Discrimination: "Definition of Disability" by Theresia Degener 2004

Web Sources

EIRO "Overview of the Implementation of the Framework Equal Treatment Directive" European Industrial Relations Observatory Online (EIRO) Publication Date 30/04/2004. http://www.eiro.eurofound.ie/2004/02/study/tn0402102s.html

EIRO "Workers with Disabilities: Law, Bargaining and the Social Partners" European Industrial Relations Observatory online (EIRO) Publication Date 28/02/2001 http://www.eiro.eurofound.ie/2001/02/study/tn0102201s.html

http://www.europa.eu.int
http://www.un.org/esa/socdev/enable/
http://www.edf-feph.org
http://www.era.int