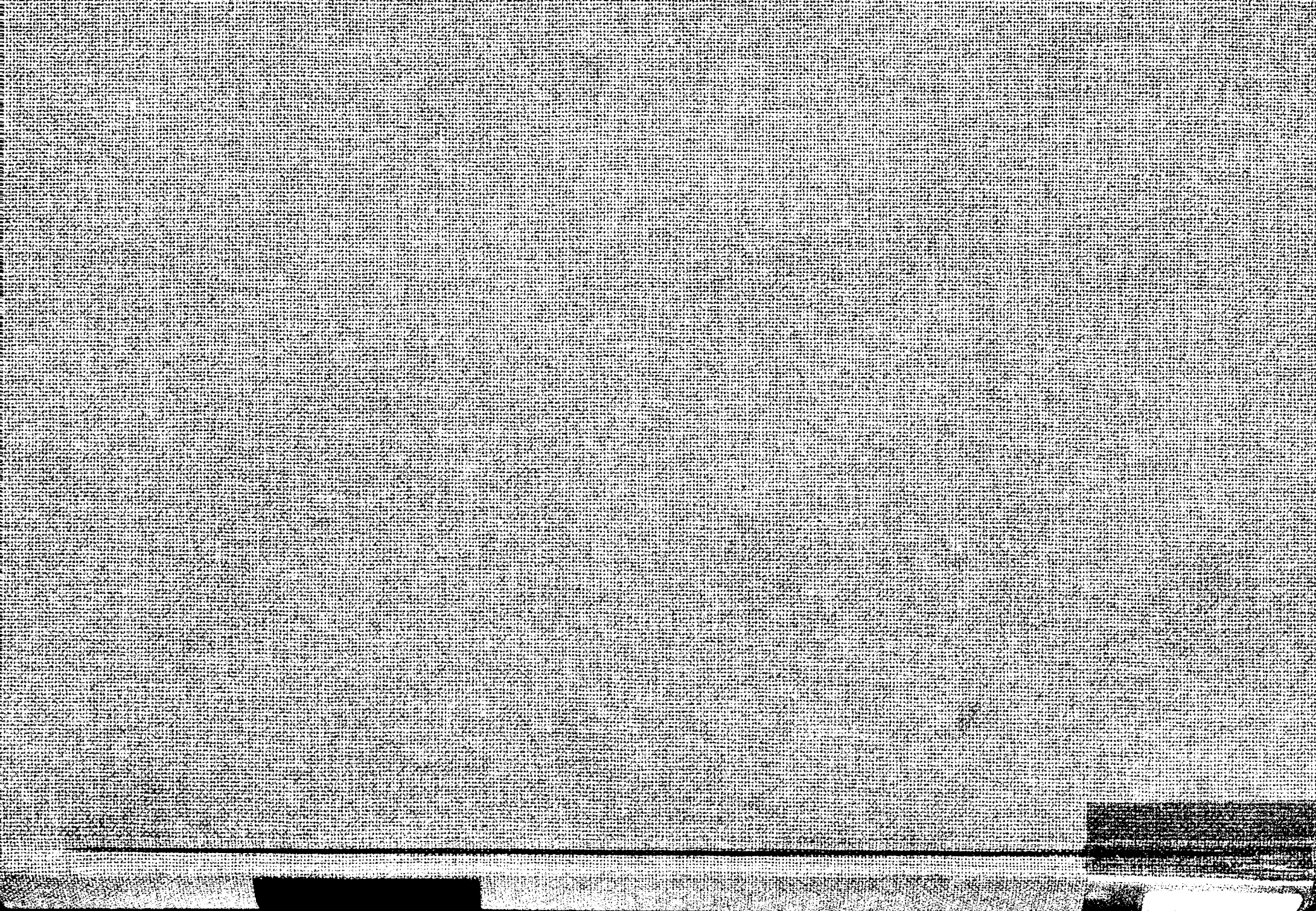

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MORE DISABLED THAN OTHERS

THE EMPLOYMENT OF DISABLED PEOPLE WITHIN THE EUROPEAN COMMUNITY : AN ANALYSIS OF EXISTING MEASURES AND PROPOSALS FOR THE DEVELOPMENT OF AN EC POLICY.

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Thesis presented with a view towards obtaining a doctorate from the Department of Law of the European University Institute.

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My one regret, however, is that in the course of my research I came into contact with so few people with obvious disabilities - and I was frequently moving amongst those responsible for promoting and guaranteeing the welfare of disabled people. The exclusion of people with disabilities at this level underlines the importance of the topic of this thesis.

However I remain, firstly and foremost, deeply grateful to all those individuals, too numerous to mention, who encouraged and assisted me in this research.

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MORE DISABLED THAN OTHERS

THE EMPLOYMENT OF DISABLED PEOPLE WITHIN THE EUROPEAN COMMUNITY: AN ANALYSIS OF EXISTING MEASURES AND PROPOSALS FOR THE DEVELOPMENT OF AN EC POLICY

Introduction

To be a disabled citizen of the European Community at the present time means to be disadvantaged. Naturally the degree of that disadvantage varies between individuals, even between individuals with similar impairments, but its discriminatory nature does not. The disadvantage stems primarily from the institutionalised forms of discrimination which people with impairments are forced to confront every day of their lives. These involve physical (architectural) barriers, assumptions of inferiority, inflexible structures and organisations, and the very conception of "normality". This discrimination touches every aspect of life - education, relationships, social activities, housing and employment, and marginalises some ten per cent of the Community's population, i.e. no less than 33 million people.

Up until now the adoption and implementation of measures to improve the quality of life available to disabled people and to promote their integration has been regarded as largely the prerogative of Member States. This approach can no longer be regarded as satisfactory in a period when the Community is increasingly coming to exert an influence over many of the areas which directly affect or influence the life of its disabled citizens: the establishment of the internal market, harmonisation of standards and goods, free movement of persons, vocational training and the mutual recognition of diplomas to mention but a few. It is the argument of this thesis that Community intervention, which respects the principle of subsidiarity, is now called for in certain fields of disability policy. The most obvious area for such intervention, given the primarily economic nature of the original EEC Treaty and much of the subsequent Community legislation, is the employment of disabled people - although it must be recognised that the desired economic integration cannot occur without complementary measures to promote social integration. The focus of this thesis shall therefore be the need, scope and possible content of a European Community policy to promote the employment of people with disabilities.

The thesis is divided into three sections. The first section, consisting of two chapters, establishes the relevant theoretical framework. Chapter one examines the concepts of "impairment", "disability" and "handicap", and seeks to show that much of the disadvantage associated with these traits result from the way they are (socially) constructed, rather than any intrinsic quality. Discrimination, in its multifarious forms, is identified as the main barrier to integration and achievement experienced by people with impairments, and it is therefore anti-discrimination legislation that must be the core of any policy to promote economic integration. Chapter two goes beyond anti-discrimination measures and acknowledges that for some people the elimination of discrimination will not be sufficient to allow them to compete with unimpaired workers, and seeks a theoretical justification for positive action in favour of individuals who are so challenged. A justification is eventually found in John Rawls' concept of social justice elaborated in "A Theory of Justice".

The second section, consisting of chapter three, involves a description and analysis of European Community initiatives in this field to date. These have consisted primarily of a series of action programmes revolving around networking and information activities. However recent years have seen the first steps being made towards the development of a global policy with the production of a recommendation on the employment of disabled people and a draft directive on the transport to work of workers with a mobility disability. It is argued that these initiatives shall be followed by further Community instruments to promote the economic integration of people with disabilities and that these will take the form of binding Community legislation.

The remaining four chapters make up the final section of the thesis. These chapters focus on the possible substantive content of a Community policy in specific areas. They all take a similar form - beginning with an introductory section considering the various forms of legislation and the specific problems encountered in formulating it in the area in question (anti-discrimination and quota systems) or the need for Community intervention (vocational training and transport to work); followed by a discussion of the possible substantive content of a Community initiative; ending with an analysis of potential legal bases, including those which will be established by the "Maastricht" Agreements if ratified. However, even where no eminently suitable legal basis is found it cannot be concluded that the Community will

not develop policy initiatives in a particular area in the future, since the extension of competences may render this possible.

The first chapter in this final section focuses on anti-discrimination legislation. The problems of formulating this kind of legislation with regard to disabled people are discussed and an analysis of how these have been dealt with in one particular jurisdiction is made. It is argued that because of the dominant role that discrimination plays in disadvantaging people with impairments, legislation to counter it should be at the heart of any policy to promote economic (and social) integration. This is followed by a chapter which considers the possible role of the quota system, generally the most popular and established measure used to promote the employment of disabled people in the Member States, at the Community level. Various forms of the quota system are analysed and the complexities and desirability of establishing such a system throughout the Community are considered. The third chapter addresses the issue of vocational training. The inadequacies of the training that is presently provided within the Community are noted, as are the benefits which could accrue as a result of Community involvement. Finally the issue of transport for workers with a mobility disability is tackled. This last chapter takes a slightly different form since, unlike the other areas which are considered, a draft directive exists in this field. The history, content and legal basis of this proposal are analysed and the Community initiatives which are planned for the future are discussed.

These four areas do not amount to the extent of potential Community initiatives. Other areas which have not been considered here, not least of all health and safety of disabled workers and social security and insurance payments related to disability, must also be included in any future Community policy. Unfortunately constraints of time prevented the examination of these vital areas - but their absence should not be taken as an oversight or representative of their insignificance.

The conclusion to the thesis is followed by a set of bibliographies, one for each chapter. Books or articles which have proved particularly relevant to more than one chapter may therefore be referred to twice in the bibliographies. Attempts have however been made to restrict this to a minimum.

SECTION I

A THEORETICAL BASIS

IMPAIRMENT, DISABILITY AND HANDICAP: SOME DEFINITIONS.

When talking about any topic it is important that the parties share the same terminology. This is particularly so for topics such as disability where terms which are commonly heard in everyday language are used, but which have a more precise meaning in the academic literature. For this reason I shall say a few words about the three terms "impairment", "disability" and "handicap". These words are used repeatedly in the thesis and it is important that the reader understands the difference between them.

The comments made below, particularly in relation to the difference between disability and handicap, may not seem immediately clear, and the ideas behind the distinction are elaborated on in the first two chapters of the thesis. Therefore I think that it is useful to read these few pages both before and after these chapters. The second reading will hopefully remove any remaining ambiguities in the reader's mind.

The terms have been defined by the World Health Organisation as follows:

Impairment: "A **permanent or transitory** psychological, physiological, or anatomical **loss or abnormality of structure or function**".

Disability: "Any **restriction or prevention of the performance of an activity**, resulting from an impairment, **in the manner or within the range considered normal** for a human being".

Handicap: "A disability that constitutes a **disadvantage** for a given individual in that it **limits or prevents the fulfilment of a role that is normal** depending on age, sex, social and cultural factors, for an individual".

These three definitions cover a lot of ground, moving from an underlying medical criterion to a meaning in relation to society. Whilst not wishing to accept the definitions uncritically, especially because of their negative emphasis, I shall be using the terms in the sense outlined here, and I think that it is worth elaborating on them a little.

I think that the most straight-forward of the three concepts is impairment. The impairment that a blind person has is that his eyes do not work; one of the impairments that a person with paraplegia has is that she has no control of or sensation in her legs. The term impairment also covers those with illnesses, ranging from lengthy and life-threatening cancer to a common cold. It needs to be noted though that the classification of traits as impairments is dependent to a large extent on cultural and ideological values. An example of this is

homosexuality, which has been regarded as a "normal" (Ancient Greece) and "abnormal" function at different times and in different societies (Barnes, 1991, p.24).

The impairment becomes a disability if it leads to an inability or difficulty in performing an activity in the manner or within the range considered "normal" for a human being. The concept of "normality" shows that disability, just like impairment, is a social construction, for what is considered "normal" will depend on the society, culture and period in which an individual lives[1] - it will also be dependent on the individual's age and sex, and possibly on a number of other factors.

This can be illustrated by considering how the expansion of public education meant that it was no longer "normal" for people to be unable to read and write, and that those who remained illiterate as a result of an impairment which meant that they had difficulty learning these skills became labelled as disabled. No doubt there are still certain parts of the world where, for certain social classes, or for men or (more likely) women, illiteracy is considered normal, and it is not regarded as a disability.

A disability becomes a handicap if it is a **disadvantage** that prevents the fulfilment of a role that is normal (depending on age, sex, social and cultural factors). Handicap is more than disability in that a person may be unable to perform an activity in a manner considered "normal" (and therefore be a disabled), but this need not be a disadvantage (and so it is not a handicap). For example, once again the impairment of a blind person is that his eyes do not work; one disability resulting from this is that he cannot see to read written text; that would be a handicap if the individual could not read braille and there was no available means of transforming a written text into braille. However, if the person can read braille, and has access to such a machine, the handicap is removed - but the disability remains. A second example would involve a person with paraplegia. The impairment is that the individual cannot use her legs; the disability is that she cannot walk and climb steps - although she can move over flat ground or slopes if she has access to a suitable wheelchair.

---

[1] Foucault has described how the concept of "normality" in relation to madness changed. In the Middle Ages insanity was regarded as a normal part of every day life and the insane were fully integrated into society. Gradually the conception of "madness" changed and the "mad" became labelled as "dangerous" and an unacceptable part of "normal" life, and so were consequently institutionalised. Madness and civilizations: a history of insanity in the Age of reason (1971).

Whether this constitutes a handicap will depend on the specific situation. For example, if the individual wished to go from the ground floor to the second floor of a building, and the only means of doing so was via a flight of stairs, she would be handicapped; if, however, she could use a lift or ramps, then there would be no handicap.

It can be seen that I diverge slightly from the given definition here, in that handicap is defined by the W.H.O. as a disadvantage that "limits or prevents the fulfilment of a role". A "role" implies something more than the ability to read or move around different levels of buildings - it seems to suggest something broader, such as "worker", "home-maker", "parent" etc. I accept this, but I also believe that it is possible to consider an individual handicapped (or not handicapped) in relation to specific activities and specific locations as I have done here. In these particular cases it has been argued that the handicap can be removed by the appropriate environmental changes; people may well remain handicapped in other areas of their lives though, and therefore be prevented from fulfilling a certain role.

Although the W.H.O. definition implies that only an impairment which is also a disability can become a handicap, I would argue that an impairment can also be a handicap and that it need not always result in a disability. An example would be a facial disfigurement which does not restrict or prevent the performance of any activity in the manner considered normal for a human being, i.e. an individual with a facial impairment can walk, talk, think etc. in a "normal" manner. However, if that individual, as a result of discrimination, finds it difficult to obtain employment or socialise, then the impairment becomes a handicap, for it is a disadvantage which limits or prevents the fulfilment of a role considered normal i.e. employee, friend, lover etc. A second example would be a person with cancer. This is an impairment which may or may not result in either or both a disability or a handicap. When the cancer is in remission there will usually be no loss of functional ability - but, the individual will be handicapped if she is discriminated against because of the impairment (the cancer will be a disability as well if it results, for example, in fatigue, so that a person is unable to perform certain common tasks). The three concepts are therefore not dependent on each other. An impairment does not inevitably lead to either a disability or a handicap.

These comments help to reveal a very important distinction between disability and handicap. A handicap can be removed by a change in the environment in a way that is not

true for a disability. It is discriminatory treatment, in the forms, for example, of inaccessible buildings (physical environment) or false assumptions about inferiority or prejudice (attitudinal environment) which handicaps people. If the environment were structured differently handicap could be removed. This concept of discrimination shall be considered in detail in the following chapter.

A change in the environment of this nature, however, will not be enough to prevent a disability resulting from an impairment. Changing the environment can remove the "disadvantage" by enabling an individual with an impairment to perform a particular task, but that is not enough to enable the individual to perform the activity "within the range considered normal for a human being" - for example, it is not "normal" to read by using one's fingers to interpret braille. What is required in order to remove disability is a different kind of change in the attitudinal environment: the development of a new conception of "normality" as it was argued occurred in relation to literacy. For example if, at some stage in the future it was felt appropriate that where ever possible no one should work more than fifteen hours a week, then people who presently find it difficult to work longer than that as a result of their impairment (which leads to fatigue, but to no other loss in functional ability) would cease to be labelled as employment disabled, for they would be fulfilling a "normal" role, i.e. "worker".

These comments reveal that both handicap and disability are social constructions, and can be removed by different kinds of social construction. They also reveal that it is far easier to remove a handicap than a disability - we can use our existing concepts and definitions to change the environment, and if the will exists progress can be made; to remove disability we have to reconceptualise our world. This thesis does not, for the most part, attempt to reconceptualise our world - it is concerned with removing the handicap from disability, and reducing the effect of the disability resulting from the impairment. It is not the aim to remove the link between disability and impairment - even the most ambitious lawyer could not expect the law to achieve this.

DISABILITY AND DISCRIMINATION: A THEORETICAL APPROACH.

The aim of the two chapters contained in this section is to provide a theoretical framework upon which the remainder of the thesis, which concentrates on substantive issues of law, can be based. This first chapter looks at the problem of discrimination directed at people with disabilities in the sphere of employment and considers the need for legal measures to counter this phenomenon. The chapter is divided into two parts. The first half deals with the concepts of "disability" and of the "disabled person" as social constructions, whilst the second half involves a consideration of the concepts of discrimination and equal treatment, and their significance in relation to disability. In the first section it shall be argued that it is not only the physical or mental impairment which can act as a barrier to (lucrative) employment for people with disabilities, but that it is also the different and often subtle forms of discrimination which this group is exposed to that frequently present the major difficulty. Given this, many of the traditional forms of attempting to integrate disabled people into the labour market through providing specialised vocational training and rehabilitation (i.e. measures which act on the supply side of the equation) are inadequate and incomplete, and there is a need for legislative intervention to address the fundamental problem of discrimination.

Following this examination of the concept of disability I shall go on to draw parallels between the position of disabled people and other groups who traditionally suffer from discrimination. Through such a comparison a better understanding of the particular problem of disability employment discrimination can be gained, and a preliminary step can be made towards establishing where and how existing theory and practice can be applied to this topic, and where they diverge; for, although disabled people share many similarities with both women and members of ethnic minorities in this respect, there are also numerous differences which will influence the formulation of any (legislative) solution. It will be considered where these differences exist and mention will be made of the problems they present for the adoption of anti-discrimination legislation.

In the second part of the chapter the various forms of disability employment discrimination and the concepts of equal treatment will be considered. In analysing the forms of discrimination reference will be made to the model of disability developed in the first section of the chapter, and it will be argued that the peculiarities of disability, and particularly the resulting loss of functional capacity that can occur, means that special considerations apply to disability employment discrimination.

Finally various concepts of equality will be analysed. It will be considered how far they can provide a justification for legislative intervention to eliminate or compensate for the disadvantages and problems resulting from disability and handicap. It will be argued that formal equality alone, which does not recognise the disadvantage which can be caused by impairment, can provide little assistance to disabled people. A broader concept of equality of opportunity is of more use, but since it only looks to the curable environment it also neglects many of the difficulties intrinsic to impairment. It will be argued that the concept of equality of results is of most assistance, since this looks to the actual distribution of resources, rather than the competition, and in this way the role of impairment can be accounted for.

"Disability" as a Social Construction.

In this first part of the chapter I wish to address the idea of disability. I attempt to reconceptualise the idea of disability and, in so doing, to show that discrimination against people with impairments is both widespread and largely tolerated by society and the law. My concern here is with employment, although the argument that I make can be extended to all other spheres of life. I shall argue that physical and mental disabilities and handicaps are constructed in certain ways so that they lead to unfavourable consequences which are not caused directly by the impairment - for example, the prescription by regulation or custom of certain ways of working (whether that be full-time work, or performing specific tasks in particular ways) so that where adaptations are made to these "normal" procedures to allow impaired individuals to work, the affected workers are regarded as separate and "abnormal", rather than as carrying out the

work in an accepted way. I wish to illustrate how "disability" and "handicap" are in fact social constructions and result from a series of artificial constraints which are imposed upon people with impairments. Both "disability" and "handicap" are the product of a discriminatory relationship between an impaired individual and a given society, and it is the way that people with impairments experience the world, and are experienced by the world, which causes them to become disabled or handicapped, rather than this being a direct result of the impairment.

The meaning of "social construction" in relation to disability and handicap can be illustrated through Bogdan's and Taylor's analysis of the term "Mental retardation":

"As a concept mental retardation exists in the minds of those who use it as a term to describe the cognitive states of other people. It is a reification - a socially created category which is assumed to have an existence independent of its merits"[1].

My aim is not to describe the forms of discrimination which people with impairments are exposed to - this shall be done in relation to employment at a later stage - but rather to explore the way in which impairment is transformed into disability and handicap.

Once these ideas have been elaborated I shall go on to make the argument for legal intervention as a first step towards countering this phenomenon, at least with regard to handicap, and consider the similarities between disabled people and other groups which are discriminated against.

1. A Theory of Disability:

1.1 Functional-limitation model v. Minority group model.

There are two competing models of disability. The first model, which one can refer to as the biological-inferiority or functional-limitation model encompasses a medical definition of

[1] Robert Bogdan and Steven J. Taylor, "Inside Out: The Social Meaning of Mental Retardation", p.7, quoted in Claire H. Liachowitz, (1988. p.3).

disability. It holds that the problems of disability result from the physical or mental impairment which the individual has, and are largely unconnected to the surrounding environment. Since the problem is located in the impaired individual, solutions must also be sought primarily through individual efforts[2].

A slightly more sophisticated version of this model is based on an economic definition of disability[3]. This recognises that a link exists between the individual and society in that employment problems may stem from faults in the economy as well as in the impaired worker. However physical and mental limitations and lack of adequate job skills are still perceived as the major obstacle to the employment of disabled people.

The functional-limitation model is the traditional approach which has dominated the formulation of disability policy for years, and which has provided a theoretical justification for practices such as the institutionalisation and segregation of people with disabilities. In the sphere of employment policy this model has led to an almost exclusive focus on rehabilitation and vocational training and to income maintenance programmes involving payments to people who, given the opportunity, would be able to undertake renumerative employment.

The alternative concept is the minority-group model of disability. This is a socio-political definition which argues that disability stems primarily from the failure of the social

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[2] For examples of literature which adopts the functional-limitation approach see E.E. Jones, A. Farina, A.H. Hastorf, H. Markus, D.T. Miller, R.A. Scott and R. de S. French, "Social stigma: The psychology of marked relationships". New York: Freeman (1984), cited by Fine and Asch (1988. p.9) who state that the work views "obstacles as being solely the person's biological limitations, rather than the human-made barriers of architecture or discriminatory work practices".
Also Janoff-Bulman and Frieze, "A theoretical perspective for understanding reactions to victimization", Journal of Social Issues, 1983, 39(2), pp.1-17, of which Fine and Asch state that "disability is assumed a biological injustice and the injustices that lie in its social treatment are ignored".
This model is also assessed in Stubbins, J. "The Clinical Attitude in Rehabilitation: A Cross-Cultural View" New York, World Rehabilitation Fund, 1982.

[3] For a good example of academic literature which is based on such a model of disability see Monroe Berkowitz and M. Anne Hill (eds.) Disability and the Labor Market: Economic Problems, Policies and Programs (1986).

environment to adjust to the needs and aspirations of disabled people, rather than from the inability of disabled people to adapt to the environment. The argument here is that it is **discrimination**, in both the physical and attitudinal environment, prejudice, stigmatisation, segregation and a general history of disadvantage, which we have come to associate with disability (but which need not be), which is the major problem for disabled people. According to this perspective the difficulties confronting disabled people come from the disabling environment rather than from within the individual. This can be seen as a fundamental reconceptualisation of disability and, since it focuses in deficiencies in the environment instead of those in the individual, as the functional-impairment model does, it has wholly different policy implications. If the problem lies in the environment and society, it is these elements which must adapt, until a world exists which is suitable for those who deviate from the expected physical and mental "norms".

While both of these models contain some valid points, I find neither of them wholly acceptable. A moment's reflection will reveal how limited the functional-impairment model is, and how truly discriminatory and hostile our environment is for numerous people with disabilities. However, the problems related to disability do not arise solely from the environment; there remains the impairment which can be a source of difficulty itself. Problems such as physical pain, fatigue and epilepsy do not result from the environment (although their extent and impact can be minimised by the environment), but directly from certain kinds of impairments, and they can prevent an individual from benefitting from certain opportunities. I believe that the pure minority-group model pays too little attention to this fact.

1.2 The adapted model of disability.

What is called for is a new, multi-dimensional model incorporating elements of both these models. This may at first seem difficult, since the two views represent conflicting conceptions of the causes of disability, one locating the problem within the individual and the other locating the problem within the environment. However, if one accepts that our environment as it presently stands is discriminatory, whilst recognising that, through changing

it, all the problems of impairment cannot be removed, I believe that a bridge between the two can be effected.

In creating a synthesis of the two models, I would place more emphasis on the minority group model than on the functional impairment model. This is because I believe that, on the whole, far more problems are caused for disabled people by the disabling environment than by impairment. Disability need not be as much of a handicap as it is at present, and there exists scope for numerous environmental changes to be made.

A second practical reason for stressing this part of the synthesised model is that, compared to the functional impairment aspect, it is relatively neglected. Existing policy usually takes the functional impairment model into consideration to a much greater extent than it does the minority group model. By placing the emphasis on this dimension of the adapted model steps can be made to compensate for this neglect.

Such a model is capable of recognising that disability stems primarily from the failure of a given environment to take account of the needs and capabilities of disabled individuals, rather than from the inability of disabled people to adapt to the demands of society, but that the latter factor also makes a relevant contribution. Under this model disability is seen as representing a dynamic relationship between individuals with impairments and their surroundings, so that the emphasis is switched from the individual to the broader social, cultural, economic and political environment. This has the advantage of not focusing on the alleged inabilities or limitations of an individual, and has the potential to allow for the consideration of the capabilities of those concerned.

It can be seen that this is also a socio-political model and, although it diverges from the pure minority-group model in its acknowledgement of the importance of impairment per se, it does recognise that many of the problems which disabled people experience can be understood within a minority group framework. Society, as well as the impairment, determines the ultimate meaning of disability in an individual's life through its inability to adapt to the impaired individual.

Tentative steps have already been made towards developing such a model by writers such as Hahn (1982,1983) in the United States, and Oliver et al. (1991) and Shearer (1981) in Britain. However, the consequences of such an approach for the formulation of legislation to promote the economic and social integration of people with disabilities do not appear to have been thoroughly examined.

Hahn (1985. p.304) argues that the adapted model will mean:

"... governments have an obligation to identify functional impairments that appear to reflect inescapable necessities of everyday life and those that represent stereotypical and stigmatizing perceptions of disability".

It can be seen that all three of these models - functional-limitation, minority group, and the adapted model - are consistent with the W.H.O. definition of "disability", since the definition does not specify the manner in which the "restriction or prevention" should result from the impairment.

1.3 Consequences of the adapted model of disability for legislators.

I shall now go on to consider some of the consequences for legislators of the adapted model of disability. Following that I shall consider the similarities and differences between disabled people and other groups in society which experience discrimination.

Possibly the most important consequence is simply the recognition that it is the social context which, in addition to the impairment, shapes the meaning of disability in a person's life. Even profound impairments can be prevented from becoming disabilities and/or handicaps through the appropriate organisation of society, and a reorganisation of society can transform a trait which is regarded as normal into a disability, and vice-versa.

Scheer and Groce (1988) recount the experiences of profoundly deaf people on the Massachusetts island of Martha's Vineyard. From the seventeenth to the early twentieth century a large number of islanders were born with a recessively inherited form of profound congenital

deafness. This significant impairment did not become a handicap for these individuals, as the majority of the hearing population became bilingual in both English and sign language. Scheer and Groce compare this to the situation of Americans living near the Mexican border who find it advantageous to become bilingual in English and Spanish. The deaf people on Martha's Vineyard played a full part in island life and worked, married, voted and undertook other civic responsibilities in the same way as the hearing islanders. This adaptation prevented an impairment which is a significant handicap in our society from becoming one on Martha's Vineyard. If one can argue that it was actually regarded as "normal" that people should be unable to hear on the island, then one can also say that deafness was not even a "disability" for the people concerned. However, it seems a little difficult to make this argument since the majority of islanders could hear, and they were presumably aware that this level of deafness was not reflected on the mainland. Nevertheless, I think that it is even possible to make this argument.

Just as society can prevent an impairment becoming a handicap, it can also transform an impairment into a disability or a handicap. Until about a century and a half ago illiteracy was widespread in Europe and, in most social classes, was in no way regarded as a disability or a handicap, but rather as the "norm". Illiteracy was drastically reduced through the provision of free basic education for children; as a result those who were unable to learn to read and write because of a mental impairment found themselves labelled as deviant and disabled. The expansion of primary education created people with learning disabilities.

Handicap and disability are social constructions. This suggests, firstly, that it is appropriate to regard disabled people as similar to certain other groups, such as women and members of ethnic minorities, since the way that these groups have been socially constructed is also discriminatory, and that there is a value in comparing the situations of these groups and, secondly, that since legislation as a tool of public policy has played a role in defining disability in the past, so too can it play a role in the future in easing the situation for disabled people. The

implication being that legislation[4] has a contribution to make to the effort to combat the discrimination which people with disabilities face, and that an approach which focuses exclusively on the individual is at best short-sighted and at worst positively damaging. It is argued therefore that anti-discrimination legislation, which focuses on the collective, has a major part to play in any disability policy, and must compliment existing individualistic strategies. But this is not to say that the removal of all discrimination (which is of course not achievable through legislation anyway) would solve all the employment problems disabled people face. The adapted model of disability makes it clear that impairment also plays a role in causing disadvantage.

Oliver and Barnes (1991) claim that anti-discrimination legislation can make a contribution to countering institutional disability discrimination in four ways:

1. It can send out a message that disability discrimination is unacceptable. This may have a symbolic value in itself, for it is not clear that disability discrimination is regarded in the same critical light as, for example, sex or race discrimination.

2. It can accord disabled people equal treatment with other groups who experience discrimination. In fact, however, there are numerous groups which are victims of discrimination, and which are not accorded the protection of the law in this respect. Legislation naturally differs between countries, but groups such as homosexuals and elderly people are also frequently not covered by anti-discrimination legislation.

3. It can offer disabled people redress against those who fail to remove disabling barriers or adapt restrictive environments - assuming, of course, that the legal procedures ensure that aggrieved parties can effectively exercise their rights.

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[4] However, since legislation alone does not create disability (although legislation could create handicap by, for example, barring all people classified as disabled from holding certain positions) neither can it remove disability - but it can contribute to this process by, for example, using anti-discrimination laws which help to change people's attitudes. This is the "symbolic value" of legislation.

4. It can force the pace of change towards forms of welfare provision which are no longer discriminatory, but instead are truly enabling.

It is unrealistic, however, to expect this bifocal adapted model to provide a reference point able to provide a simple policy solution for the problems related to disability as the other two models seem to (they would say, in every case, change the individual or change the environment). A second consequence of this model then is that it requires that for every aspect of the policy related to disability both the sources of the problem and the extent to which environmental or individual changes can contribute to a solution be considered. Only on this basis can an effective policy be developed. This is not a simple process, but it would be naive to expect a simple solution to such a complicated problem. This process has the advantage of also allowing for a normative element to be introduced into the debate, in that it recognises that the social and economic integration of disabled people requires an element of compromise - disabled people should not expect massive and expensive adaptation of the physical environment to occur immediately, and the employers and the general public should no longer expect disabled people to silently acquiesce in the face of discrimination and segregation, and accept that disabled people have a right to expect change.

2. Disabled People and other minority groups[5].

A comparison of the position of disabled people and other minority groups will now be engaged upon. This will help to reveal the traits associated with impairment which expose those who possess them to discrimination, and to establish both where common ground exists with other minority groups and the factors that distinguish disabled people from those groups.

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[5] In this section, as elsewhere, I shall refer to women as minority group. I recognise that numerically speaking women are far from a minority group. However, it seems appropriate to apply a minority-group analysis to women in the light of the processes of discrimination and disadvantage which they are exposed to.

The comparisons are classified under three headings. Under the first heading the similarities between disabled people and other minority groups will be considered. It will be revealed that even where similarities do exist this does not necessarily mean that disabled people receive similar treatment under the law to other minority groups.

Secondly what I have called "partial similarities" will be considered. Because of the diverse nature and effects of impairment many characteristics are not shared by all disabled people, as skin colour can be by certain ethnic minority groups or religious holidays are by members of a particular religion. This heading then is meant to cover the areas where people with certain kinds of disabilities share common ground with some other minority groups.

The final heading covers areas in which disabled people differ from other minority groups.

As well as comparing the various minority groups, comment shall be made on the significance and implication of the similarities or differences for the formulation of disability anti-discrimination legislation.

2.1 Similarities between disabled people and other minority groups.

2.1.1 Assumption of Inferiority.

For many years discrimination against members of ethnic minority groups was justified on the ground of their alleged genetic inferiority, and discrimination against women by their alleged lesser intelligence and physical weakness. Whilst such crude views are generally unacceptable today, and the relevance of womens' physical capacity is only limited, the discrimination which disabled people are exposed to continues to be justified on the grounds of their physical or mental inferiority. Whilst scientific research and political action has served to refute, or at least seriously reduce these assumptions of inferiority in relation to other groups, and to the recognition that it is culturally imposed values that act as barriers, this is not yet the case in relation to disabled people, and the role which the environment plays in disabling individuals goes largely unrecognised. In this respect, arguably, disabled people are in a similar

position now to that which women and ethnic minorities found themselves in a number of decades ago in Europe and North America.

It is important to distinguish this alleged inferiority from the functional disability which results from impairment: the former involves a false assumption based on incorrect information, whilst the latter is a restriction in the ability to perform tasks in certain ways caused by an impairment.

It can be argued that the law, by neglecting to intervene to counter discrimination, is silently condoning this assumption of inferiority. There is a risk that this inaction will be interpreted as a message that disabled people are not worthy of the same protection that the law frequently offers to women and members of ethnic minorities, and that it is acceptable to discriminate against disabled people because their differentness merits this.

If anti-discrimination legislation were to be adopted it would, in relation to the problem of assumed inferiority, have a symbolic value. It would make it clear that society does not regard discrimination as an appropriate reaction to impairment, and by setting this standard it could help to refute the assumption of inferiority.

2.1.2 Emphasis on low-status work.

Where employment is available to disabled people it is often poorly-paid and low-status. This is an experience which is shared by most other easily identifiable minority groups, such as women and members of ethnic minorities, who are also under-represented in the higher echelons of the labour market. In the case of disabled people at least, this emphasis on low-status work is often officially sanctioned by legislation and government policy. Where employment subsidies are available they are frequently so low as to be attractive only to employers offering poorly paid work, and in Britain at least, certain low-status jobs are reserved

specifically for registered disabled people[6]. In contrast official policy directed at women and ethnic minorities often aims at providing them with the skills to compete for attractive jobs in areas in which they have been traditionally under-represented[7].

The concentration of the disabled people who are in open employment in low-status and poorly paid work emphasizes the need to focus on the kind of employment which becomes available, as well as on opening up the labour market to people with disabilities.

It is also possible to argue that disabled people, just like many ethnic minority groups, are treated as an exploitable economic resource. Ever since the First World War period, if not before, many disabled people have been "employed" in sheltered workshops[8] doing mundane and repetitive tasks for which they receive a minimal wage[9]. This is done in the name of rehabilitation, however, since very few people actually progress beyond this protected environment into open employment[10] it is not, at least in terms of total rehabilitation, very successful. The work that is done though, is often of value to industry, which enters into contracts with workshops for specific products.

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[6] The Disabled Persons (Employment) Act 1944 s.12 and the Disabled Persons (Designated Employment) Order 1946 SR & O No.1257 designate that only registered disabled people can be employed as passenger lift attendants or car park attendants.

[7] See for example the British Sex Discrimination Act, ss.47-48.

[8] For example, a report recently published by the Commission of the European Communities places the number of disabled people employed in sheltered workshops at 140 000 in Germany, 80 719 in the Netherlands and 71 953 in France. Sheltered Employment in European Community, Commission of the European Communities, 1992.

[9] In West Germany the average monthly salary in 1986 for workers in sheltered workshops was 228 DM.

[10] In the early 1980s, for example, less than 1 per cent of workers employed in sheltered workshops in Britain found jobs in the open labour market per year. Michael Floyd and Klaus North (eds.) Disability and Employment, Anglo-German Foundation for the Study of Industrial Society, 1984.

2.2 Partial Similarities (Areas in which some disabled people are similar to some minority groups).

2.2.1 Physical Appearance.

Many members of minority groups possess physical characteristics that set them apart from the rest of the population. These often lead to them being labelled as deviant[11] and becoming the victims of discrimination. This is clearly true of physical characteristics such as skin colour and sex, and it is frequently true of disability. The implication is that those disabilities which are the most visible should attract the most discrimination; in fact, though, it is not clear that this is the case.

Unlike race and sex, which are generally obvious at first sight, there are many hidden disabilities, such as epilepsy, mental illness and respiratory and cardiac disorders. These can also lead to discrimination which may be of a different nature from that experienced by those with more visible disabilities. Hidden disabilities are likely to be less well understood, less likely to provoke sympathy (possibly a mixed blessing anyway) and, as a result, more likely to provoke a negative reaction when discovered[12].

There are a number of minority groups, such as homosexuals and members of certain religions, which are also either not easily identifiable, or not identifiable at all, from their physical appearance. Those with hidden disabilities may have more in common with these

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[11] I think that it is fair to say that this label is attached to homosexuals, and, at times, to members of ethnic groups and followers of minority religions. It is less suitable when applied to women, who are identified simply as "different" rather than "deviant" - although this clearly does not prevent them from suffering from discrimination.

[12] This can clearly be seen in the literature which analyses non-disabled people's reaction to epilepsy. Schneider (1988. p.66) cites numerous works which address the problem of stigmatisation associated with epilepsy. Shearer (1981. p.49) also quotes disabled people with experiences of both visible and invisible disabilities, who state that it is much "easier" to have a disability which people can see: "'Normals' can assess and cope with tangible practicalities much better than the mental and emotional ambiguities of sensory handicaps".

minority groups, than with groups which are obviously identifiable as a result of some physical trait.

The fact that some people cannot be identified as disabled on the basis of their physical appearance is important for policy-formation. If anti-discrimination legislation were restricted only to cases where an individual was obviously identifiable as disabled then a large number of people with disabilities would clearly be excluded. To cover all those with invisible disabilities it is necessary to extend the protection of the law to include those who are assumed to be disabled, and are discriminated against as a result. It is only by establishing such a broad conception of the favoured group that the protection of those who are not easily identifiable as disabled can be ensured. In addition, since there is a real risk that some people will be wrongly assumed to be disabled and therefore be subjected to discrimination, it seems only just to include such people within the scope of any anti-discrimination legislation. This is more important in relation to disability than it is with respect to sex or race, since it is less likely that someone will experience discrimination as a result of a false assumption of sex or race. Therefore it is the assumption of disability and the resulting discrimination which should trigger the protection of the law. This is in fact the case with respect to American disability anti-discrimination legislation (see chapter four for more information on this).

2.2.2 Functional Abilities.

The adapted model recognises that impairment can result in a reduction of functional capability, and therefore that certain activities are, at least at present, foreclosed to all people with certain kinds of impairment[13]. It is necessary to distinguish this point from alleged inferiority (see above), where people are discriminated against and stigmatised because of a false belief in their inferiority. In this sense discrimination on grounds of disability can be clearly distinguished from discrimination based on race or religion, where a person's functional

[13] An example of this would be the case of someone who is prone to epileptic fits whilst awake; such a disability would prevent an individual from driving safely, and would render it impossible for him or her to take up a position as a taxi-driver or bus driver.

abilities are usually irrelevant. Parallels can be drawn with differentiations made on the basis of sex or age, where perceptions of a person's capability will often influence the discriminator. This has a particular relevance for disability for it raises the issue of the relation of the functional capacities of an individual to the environment. If the inequality resulting from disability is to be redressed it may require changes to that environment. At times members of other minority groups also require such changes in order to accommodate them; however, the frequency with which the issue of the adaptation of the environment is raised with respect to disability means that it takes on a particular importance and, it will be seen, creates a particular form of indirect discrimination - "unequal burdens".

The situation of those disabled people who require accommodations to the workplace in order to take account of their reduced functional abilities can be compared to the situation of followers of minority religions. There accommodation is also frequently necessary - and indeed the concept of accommodation arose originally in relation to religious minorities in the United States. Accommodation for such groups is clearly not required because of reduced functional ability, but because of the need to take account of particular forms of worshipping, such as recognising religious holidays, forms of dress and special diets. Nevertheless, the two groups can be regarded as similar in their need for accommodation. The few pieces of disability anti-discrimination legislation that have been adopted pay great attention to this particular aspect of disability discrimination[14].

It should be noted, however, that by no means all disabled people require an accommodation to be made to allow them to carry out a particular job. For such people the only barrier is prejudice, and they are in the same position as every other minority group member who is qualified for a job but denied the chance to do it solely because of the unfavourable attitudes others associate with their status as a member of a particular minority group.

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[14] See, for example, the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 adopted in the U.S.A., discussed in chapter four.

2.3 Differences between disabled people and other minority groups.

2.3.1 Impact of impairment is not constant / Group of disabled people is not closed.

Hahn (1983. p.39) argues that disabled people, like many members of other minority groups, bear an indelible badge of identification that signifies their membership of a minority. Just as disabled people do not choose to adopt this mark in the first place, they cannot choose to dispose of it when it exposes them to discrimination, and in that respect they are similar to many other minority groups. Disability however, unlike race or sex, is not always a static and unchanging condition. The impact of an impairment can be reduced, or indeed even removed, and with it the disability, through rehabilitation or medical treatment. Indeed, as technology develops this is increasingly true for all forms of disabilities.

Furthermore the group of people with disabilities is not closed, as sex[15] and race groups are, in that any individual can, at any stage in his or her lifetime, acquire a disability. We all have the potential to enter this group and, as we get older, many of us will. As Byrne (1991.p.19) says of disability:

"It concerns a status which a person can fortuitously acquire or lose during a lifetime, greatly expanding the potential numbers".

One could argue that in this sense the group of disabled people is similar to the group of members of a particular religion or followers of an extreme political movement. However I think that this is also unrealistic, for there is an element of choice involved in the decision to enter these groups which is wholly absent in the case of disability.

It can be argued that the fact that anyone can become disabled, at any time, is relevant for the adoption of anti-discrimination legislation. This is based on the idea that everyone has a self-interest in ensuring that disabled people are not discriminated against because of the risk

[15] There are exceptions to this of course, in that people can change sex as a result of medical treatment. However these are so infrequent that I think that they can be realistically overlooked.

of becoming disabled in the future. Since we live in a society where employment is valued not only for the personal income which it generates, but also as a means of achieving status and self-respect, we can all recognise that most disabled people, just like most non-disabled people, desire to find interesting and well remunerated work. Individuals know that if they were to become disabled before or during their working lives they should not want to be hampered from achieving this aim by discrimination. Therefore, as a kind of insurance against becoming disabled themselves they should support disability anti-discrimination employment legislation. This kind of thinking seems to fit with the social contract theories, and an argument based loosely on the points outlined above is examined in much more detail with respect to Rawls' "Theory of Justice" and positive action in the next chapter.

However, where this argument is not based on social contract theory, but on an everyday situation, I find it unsatisfactory. We are not talking about a mythical state of nature or original position where an individual is denied knowledge of his or her own disability and assumed to be acting rationally and in their own interest. Although most people, if they live long enough, will become disabled, it is not necessarily true that this will occur during their working life. The occurrence of disability increases with age, and a non-disabled adult of working age is extremely unlikely to act in the rational manner prescribed by Rawls in his original position, and therefore feel that it is not necessary to support such legislation to insure against the chance of becoming disabled themselves. Therefore, although this point serves to distinguish disabled people from other minority groups, I do not think that it is as important for employment anti-discrimination legislation as it may at first seem.

It could be of importance, however, for other areas of disability policy. Since the incidence of disability does increase with age, and this is particularly true of certain kinds of disability such as heart disease, rheumatism, and muscular-skeletal disorders, training and positive action programmes should be designed to take account of this and provide adequate assistance for their potential clientele.

2.3.2 Unpredictable nature of disability.

A factor unique to disability is its unpredictability. There are a number of disabilities such as multiple sclerosis, muscular dystrophy and cystic fibrosis, which are progressive and where the functional capacities and life-situation of the individual affected will be ever changing.

In addition there are disabilities which fluctuate, which include many behaviourial disorders, cancer and mental illnesses.

Finally there are impairments which remain static; however, even in these cases the extent of the disability cannot be predicted with any reliability in the long-term, since developments in technology, rehabilitation and health care are continually reducing and nullifying the functional effects of impairments.

It is important to recognise though that such developments will not necessarily remove the disability or handicap. The technical means already exist, for example, to make all buildings physically accessible to people with mobility and sensory impairments, but this is not done, leading to the perpetuation of a disabling environment. These new developments also cannot compensate for the effects of prejudice and stigmatisation. Progress in technology, rehabilitation and health care, just like legislation, has a contribution to make to the removal of handicap and the countering of disability - but it cannot provide the solution alone.

In addition one must consider that similar impairments can lead to quite different functional difficulties depending on the individual involved and the surrounding environment.

In relation to employment the unpredictability surrounding disability and functional capability can act as a deterrent to employ disabled people, and impose extra information costs on employers (See Johnson and Lambrinos, 1983, for further comments on this).

This suggests that there is a need to inform employers and employees (and the general public) about the various kinds of disabilities, their consequences, and the adaptations necessary to accommodate them. Employers will generally either be well informed, or have access to information, about any special factors related to employing women and members of ethnic minorities but, because of the many forms which disability can take, it is unreasonable to expect

this to be the case with respect to disabled workers. The educating of employers and employees about disability must go hand-in-hand with anti-discrimination legislation. Legislation cannot provide this support for employers - although it can have a "symbolic" value as already mentioned - but it can provide the framework within which it is given.

2.3.3 Uncertainty as to who is disabled.

It is unrealistic to talk as if one can clearly divide society into those who are disabled and those who are not, in the same way that one can make a division between men and women[16]. Disability, rather than being a clearly defined state, represents a continuum. We are all more able at some activities than others, and it is not always the "able-bodied" who are more able than the "disabled". A man regarded as physically "normal" may not be able to do the same amount of physical labour as someone regarded as mentally disabled, whilst a woman regarded as intellectually "average" is not able to produce research of the quality of that of an academic who has multiple sclerosis; and yet it is the labourer and the academic who have been labelled as disabled. The boundaries of disability, therefore, are highly fluid - and vary according to the functional consequences of an impairment and the prevailing conception of "normality".

Furthermore disability is a state which many people can drift in and out of. This is untrue of other minority groups - one cannot drift in and out of being female, black, jewish, or, probably, gay. In fact this uncertainty as to who is disabled is probably not a problem with respect to anti-discrimination legislation. It has already been stated that it would be appropriate to extend the protection of such legislation to all those who are discriminated against because

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[16] Recent feminist literature has however argued that "male-female" is also a continuum rather than a dichotomy. This has been argued on biological grounds by O'Donovan, "Transsexual Troubles" in S. Edwards (ed.) Gender, Sex and the Law, Croom Helm, London, 1985, and in social constructionist terms by Foucault, The History of Sexuality, Volume 1, An Introduction. Penguin, London, 1990 and Laqueur, Making Sex: Body and Gender from the Greeks to Freud, Cambridge, Massachusetts and London, Harvard University Press, 1990.

of an assumption that they are disabled. It is therefore not necessary to establish in specific cases that an individual is in reality disabled.

This can be distinguished from laws which do require clearly defined boundaries, and where protection or benefit will only be extended to those who are (in the eyes of the law) disabled and therefore deserving. This often applies to laws which provide for positive action in favour of disabled people[17], and laws establishing entitlement to disability income support.

2.3.4 Group Identity.

A further factor distinguishing people with disabilities from groups such as ethnic minorities, women and members of particular religions, is the extreme difficulty disabled people face in establishing a group identity. Race, sex and faith have thus far proved a far stronger binding force than disability. There are a number of reasons for this, some of which are exclusive to disability:

i) Disabled people are often geographically and socially isolated from each other. They often lack common workplaces, a geographical community, voluntary organisations or a religion which brings them together in the same way that other groups are brought together by these factors.

Furthermore, disabled people often spend nearly all of their lives in the company of non-disabled people. Their immediate and extended family, workplace and social circle will often consist predominantly of such people. Members of no other minority group are isolated in the same way.

The exception to this are disabled people who live or work in segregated institutions consisting almost entirely of other disabled people. However, the experience of life in an

[17] This can clearly be seen in the case of Germany, where the Schwerbehindertergesetz defines who is severely disabled, and therefore entitled to the protection of the law. There are, of course, definitions of "disability" other than legal ones, and this is recognised, for example, in the numerous surveys based on self-reported cases of disability.

institution can itself be a barrier to group formation (and is certainly a barrier to employment), as will be seen below.

ii) Disabilities come in many diverse forms, and this can discourage the development of a group identity. Those with a physical or sensory disability, for example, may feel that they have little in common with those with mental disabilities. Where voluntary organisations representing disabled people have been formed they have tended to focus on one particular kind of disability, and it is only relatively recently that coalitions involving people with different kinds of impairments have begun to develop.

An exception to this are disabilities which result from a common cause, such as an industrial accident or hazard, medical negligence (for example, the thalidomide scandal) or war. Links are further strengthened if the individuals have other social or vocational factors in common. Prime examples would be groups of disabled veterans and miners disabled by black lung disease.

iii) A further barrier to group identity formation is the medicalisation, professionalisation and institutionalisation of disability[18]. Disabled people are usually cast in the role of patients and passive recipients of services. They are not encouraged to make important decisions about their own lives, as professionals direct their treatment, rehabilitation and post-rehabilitation activities. Disabled people are therefore often socialised into a lifestyle of dependency, which does not encourage political identification and action.

iv) The negative social status of being disabled can also be a disincentive to identifying oneself as disabled and acting collectively on that basis. To be disabled is usually to be deviant and inferior, and few people wish to accept this definition of themselves. There are few positive sources of identity for disabled people which can help to refute this view. Goffman, in his influential work "Stigma: Notes on the management of spoiled identity" (1963), argued that

[18] Shearer (1981) outlines this problem in chapters 7 and 8 of "Disability: whose handicap?"

disabled people, where they can, try to disassociate themselves from disability and to "pass" as normal, and this makes self-identification highly unlikely.

What is needed is a redefinition of disability which does not have these negative connotations. Ideally a "valorisation" of disability, along the lines of "Black is Beautiful" or the gay pride movement should occur - however, because of the reasons identified, it seems to be difficult to present disability in this light.

v) Disabled people are not encouraged to see their problems as resulting from the disabling environment, but rather as coming from within themselves. Unless a new definition of disability, based on the minority-group or adapted model is accepted, little point will be seen in group identification leading to political action with the aim of changing the environment.

vi) Finally the inaccessible physical environment itself can act as a barrier to the forming of a group identity, since it prevents and hinders many of those with mobility and sensory disabilities being able to meet and discuss their common situation.

This lack of group identity has important consequences for the policy-making process. When legislation which is directed at a specific group is adopted it is desirable that representatives of that group be consulted and enabled to play an active a role in the policy formation as possible. As a result of the lack of dialogue between disabled people it is difficult to gain a broad view of the opinions of this group and there is a risk that those consulted, either out of self-interest or ignorance, will only seek to enhance the position of the disabled people who they represent. Others who do not have sufficiently vocal representatives, which could be the case for adults with mental disabilities and illnesses, may find that their interests are not sufficiently considered by policy makers.

An interesting example of how this lack of group identity influenced, or perhaps failed to influence, policy-formation can be found in the history of the U.S. Rehabilitation Act of 1973. The initiative and pressure for this important piece of legislation did not come from within the American disability movement - indeed, in the early 1970s, there was not such a movement to speak of - but from the legislators themselves, who were advised by professionals

serving disabled people rather than disabled people. In fact it was the adoption of this law that actually contributed to the growth of an American disability rights movement, since it provided a focal point and "a good opportunity for establishing policy-oriented conditions of the new generation of grass-roots disability organisations" (Scotch, 1988, p.168). Disabled people were stimulated to organise to insure the section of the legislation relating to protection against discrimination (section 504) was actually implemented; for whilst the legislation was passed by an overwhelming margin in Congress there was a distinct reluctance to actually promulgate the regulations and grant the appropriations necessary to implement this particular section. This was only done after pressure was exerted by the newly formed and expanded organisations of disabled people.

Disability Discrimination and Equal Treatment.

Having argued that disabled people are a group which has traditionally been discriminated against in the sphere of employment and elsewhere, and that they share many similarities with other minority groups in this respect (and, equally important, that there are certain factors which are particular to disability), I will now engage in an analysis of the forms of employment discrimination and the related topic of equal treatment, and comment on some of the problems which seem relevant to disability discrimination and equal treatment for disabled people. Firstly, however, I shall comment on the relative neglect of this topic in the existing literature.

As a result of the long predominance of the biological-inferiority view it is not surprising to find that a concern for anti-discrimination measures and legislation in favour of disabled people is a relatively recent occurrence, and this is reflected in the dearth of legal texts and academic works on this problem. The Convention and Recommendation of the International

Labour Organisation on employment discrimination adopted in 1958[19], for example, expressly refer to a number of grounds for discrimination[20] but no mention is made of disability, whilst academic legal works which deal extensively with the problem of discrimination often pay little attention to discrimination on the basis of disability. The lengthy monograph produced by the Comparative Labour Law Group in 1978, entitled "Discrimination in Employment"[21], for example, devotes chapters[22] to various grounds for discrimination, and measures to counter this discrimination, but disability is only mentioned in passing.

In recent years this neglect has begun to be rectified. In 1983 the ILO produced both a Recommendation and a Convention dealing with the vocational rehabilitation and employment problems of disabled people[23] which referred to the need for equal opportunity[24] and, as early as 1973 a Federal statute was enacted in the United States, which at least partly addressed the problem of employment discrimination directed against disabled people[25]. Furthermore, in

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[19] Discrimination (Employment and Occupation) Convention Number 111 and Recommendation Number 111.

[20] In Article 1, para.1(a).

[21] Discrimination in Employment, Folke Schmidt (ed.), The Comparative Labour Law Group, Almquist and Wiksell International, Stockholm, Sweden, 1978.

[22] Chapters cover discrimination based on race, colour, ethnicity and national origins; sex; political, religious and private life; foreign workers; and the right to organise and the right to be a non-unionist.

[23] Convention Number 159 and Recommendation Number 168 concerning vocational rehabilitation and employment (disabled persons).

[24] Article 4 of the Convention and Section II of the Recommendation.

[25] The Rehabilitation Act of 1973. Public Law No.93-112, 87 Stat. 357 (1973).

1990, the Americans with Disabilities Act was adopted. This is one of the first pieces of anti-discrimination legislation to be directed specifically at disabled people anywhere in the world. Academic literature in law, but particularly in economics and sociology, is also now beginning to tackle this problem. This is especially true in the United States where, as a result of the relatively high profile which the disabled civil rights movement has, far more attention is paid to the problem than in Europe[26]. Indeed, European based literature continues, on the whole, to ignore this matter altogether, and to address itself to the important, but traditional, questions of sex (O'Donovan, Marshall, Vogel-Polsky), race (Lustgarten) and religious (McCrudden) discrimination[27]. As has already been seen, discrimination on grounds of disability differs in certain respects from the above mentioned grounds, and it is a failure of the modern literature that it neglects this topic.

3. Disability Discrimination

To discriminate means to distinguish (in terms of treatment) between two or more people or objects. The pejorative meaning of "discrimination" however is differential legal, social or economic treatment of persons which is motivated by irrelevant considerations. Seen in this way, the obligation not to discriminate equates with an obligation to treat equally unless there are relevant considerations which determine otherwise. This concept of relevancy (i.e. what is a relevant consideration which justifies treating people differently?) is highly important for determining the scope of not only the requirement not to discriminate but also the extent to which positive action is required, and whether the latter can be distinguished from the former.

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[26] This can be seen, for example, in the preponderance of American disability related literature in the attached bibliography.

[27] For an exception to this see Bynoe, Oliver and Barnes (1991).

This concept of relevancy shall be discussed shortly; firstly, however, I shall consider the various forms which discrimination can take when directed at people with disabilities.

I believe that disability employment discrimination can be classified under four headings. The first three relate to the pejorative meaning of discrimination, whilst the fourth refers simply to a justified process of differentiation.[28]

3.1 "Direct" Discrimination or the "less favourable treatment barrier".

This occurs where an individual's actual or perceived disability is the reason for their receiving less favourable treatment than that which would have been shown to a non-disabled person in comparable circumstances. The disabled individual concerned must be qualified for and capable of performing the work. Direct discrimination involves intent on the part of the discriminator. Examples of such discrimination would include an employer who refuses to invite for interview anyone revealing a history of mental illness on their application form, or a refusal to employ anyone with a visible or obvious disability to positions involving contact with the public or clients of the business.

If we return to the adapted model of disability again it can be seen that this form of discrimination is totally unrelated to any genuine functional limitation caused by impairment. This is a case of a discriminatory attitudinal environment inflicting disadvantage, and is therefore compatible with the minority-group, as well as the adapted, model of disability.

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[28] A U.S. case on disability discrimination also identified these four types of discrimination. The Court of Appeals referred to:
1. Intentional discrimination for reasons of social bias;
2. Neutral standards with disparate impact discrimination;
3. Surmountable impairment barriers discrimination or the duty to make reasonable accommodation; and
4. Insurmountable impairment barriers discrimination.
These classifications correspond to the four used below - Prewitt v. U.S. Postal Service 602 F.2d 292 (5th Cir. 1981).

3.2 "Indirect" Discrimination or "neutral conditions / disparate impact".

This involves the imposition of conditions or criteria with which a disproportionate number of disabled people cannot comply, and which result in many disabled people being prevented from benefitting from the employment opportunity. The offending conditions may appear to be neutral, and it is not necessary for an intention to discriminate to exist. There will be indirect discrimination if it is not necessary that an individual be able to meet the conditions or criteria in order to do the job adequately.

Examples include the imposition of maximum age limits, since it has been statistically shown that people with disabilities tend to be older when entering the labour market, or the requirement that all job applicants hold a driving license, where this is not strictly necessary, and which would discriminate against some people with physical disabilities and epilepsy. In times of high unemployment the tendency of employers to increase the minimum academic requirements for jobs indirectly discriminates against those with learning disabilities.

Anti-discrimination legislation helps to combat such practices by requiring that employers justify the use of exclusionary requirements[29] or failure to accommodate. It has therefore been argued by McCrudden in "Changing Notions of Discrimination" (1985) that the principle on which the concept of indirect discrimination is based differs from the simple non-discrimination principle which underlies the idea of direct discrimination in that it imposes positive as well as negative requirements, and in that it takes into account some of the prior existing disadvantages which minority workers bring into the workplace.

3.3 "Unequal Burdens" or "Failure to make reasonable accommodation".

This kind of discrimination, whilst not unique to disability, is more important in relation to disabled people than it is for other minority groups. It results from an interaction between an individual's impairment and the environment that differs from the interaction found in direct

[29] For examples of this see the UK's Sex Discrimination Act 1975 s.1(1)(b) and Race Relations Act 1976 s.1(1)(b).

and indirect discrimination, and involves a recognition that impairment may affect the ability to perform the job in a standard way. In the latter two kinds of discrimination an individual's impairment is irrelevant to the ability to perform the job, and it is given an undeserved significance by the discriminator. In the case of "unequal burdens" the impairment is relevant in that it can lead to an individual being faced with a barrier which prevents him or her from benefitting from an employment opportunity which is open to a non-disabled person. This type of discrimination disadvantages a disabled person because the employer fails to render the obstacle or barrier irrelevant by adapting the environment.

"Unequal burdens" discrimination often applies to those with a mobility or sensory impairment, where there is a need for an accommodation to enable the individual to do the job. Examples include the need to supply a sign language interpreter in order to enable a deaf person to participate in an interview, to adapt a work station, through the introduction of ramps and special toilet facilities, to enable a wheelchair user access, and to provide a machine capable of transforming written text into braille for a blind secretary.

Failure to make such accommodations would be judged discriminatory if it were reasonable, in all the circumstances, to expect an employer to do so. The difficult role of legislation is to define when such expectations are reasonable, and when the failure to accommodate does not amount to discrimination. One can draw certain parallels with the situation in which an employer has to make certain accommodations in order to employ women. These could involve providing additional toilet facilities (in cases where the present workforce is predominantly male) or childcare facilities. As already noted, the need to provide accommodation also arises with respect to religious minorities, where an employer may need to provide flexible working time to allow workers to worship or take religious holidays, relax dress requirements, or provide special food (which could also apply to vegetarians).

"Unequal burdens" also raises the question of what the role of the state should be in eliminating disability discrimination. Accommodation can be expensive, and the state could encourage or oblige employers to act by supplying grants or tax-credits for adaptations. It also raises the question of the position of an employer who refuses to take advantage of such funding

and fails to accommodate. Since this could be argued to involve intention it could transform an act that would normally be regarded as "unequal burdens" discrimination into direct discrimination.

Both elements of the adapted model of disability are relevant to indirect and "unequal burdens" discrimination. The impairment aspect is relevant in that it means that a disproportionate number of disabled people cannot comply with the criteria, such as holding a driving license or performing the work in a standard way; the role of the discriminatory environment is also relevant since the failure to adapt the environment transforms the impairment into a disability or a handicap. It can be argued that the minority-group model is also capable of encompassing indirect and "unequal burdens" discrimination since it focuses on the failure of the environment to adapt to accommodate those with impairments, rather than the activities foreclosed by impairment.

3.4 "Appropriate" Discrimination (Differentiation on the basis of functional abilities).

This occurs where a person is denied an employment opportunity because of their impairment, which is correctly judged to prevent them from carrying out the fundamental requirements of the job, and it is not reasonable to expect the employer to accommodate the disability. This latter condition is of course subjective, and it will depend on many factors as to whether it is reasonable to expect an employer to make an accommodation. The case of the individual with epilepsy being denied a chance to work as a taxi-driver which was referred to earlier would be an example of appropriate discrimination.

It is perhaps unsuitable to refer to this form of treatment as discrimination, since the term has come to convey such a negative meaning. In this particular case, however, it is being used in the original meaning to differentiate between two or more individuals.

This kind of discrimination relates to the impairment aspect of the adapted model of disability, which recognises that certain disadvantages result directly from impairment and are

not caused by the kind of discrimination outlined in the first two points. This is also compatible with the biological-inferiority model of disability.

It can be seen that the only model of disability which is broad enough to encompass all these kinds of discrimination is the adapted model with its recognition that disadvantage can result from both discrimination based on irrelevant considerations and impairment.

Having discussed the idea of discrimination, I shall now turn to the related topic of equal treatment, and once again consider the concept primarily in relation to people with disabilities and employment. In looking at the various concepts of equal treatment I shall discuss how far they relate to the adapted model of disability developed earlier.

4. Equal Treatment and Disability.

The Aristotelian notion of equality[30] requires that people who are equal should be treated in the same way and that those who are unequal should be treated differently in proportion to their inequality. Without any further explanation this notion tells us little for it begs the questions "Equal in what way?" and "Equal to whom?".

The Aristotelian concept of equality (as far as it goes) is compatible with one of the two concepts of equality identified by Dworkin. Dworkin (1977. p.227) refers to the right to equal treatment which is a right to an equal distribution of some opportunity or resource or burden,

[30] Formulated by Aristotle in Ethics, Book V, III, 113a-113b.

such as every citizen having the right to an equal vote in a democracy. The concern is with identifying people who are the same in the relevant respects, and who should therefore be treated in the same way, e.g. x, a non-disabled person and y, a disabled person, are both qualified and capable of carrying out a job as a teacher, and should be treated in the same way when deciding to whom to award the job.

This is not a notion of equality which can assist in determining the justification and need for positive action, such as is the case with Dworkin's second concept of equality: the right to treatment as an equal. Dworkin describes this as the right to be treated with the same respect and concern as anyone else, and states that this may mean that, because of an individual's particular situation (for example the possession of an impairment) he or she may need to be treated differently. This is derived from Dworkin's first concept of equality, and he regards it as the "higher" of the two. This notion that equality can also require different treatment shall also be briefly touched upon in this chapter. However the principal concern is with the more limited Aristotelian notion of equality, which is considered below.

Various conceptions of equality have been developed in an attempt to answer the questions "Equal in what way?" and "Equal to whom?".

4.1 Formal Equality.

This is a procedural notion of equality, which requires that the law should not distinguish between individuals. It is blind to the various advantages and disadvantages which individuals have, and does not require that the law intervene to compensate those who, as a result of natural or social conditions, find themselves in an unfavourable position. If one can use the analogy of a race, formal equality requires that all be free to enter the competition, but that, as a result of different advantages and disadvantages accumulated before the race, they need not all start at the same point. This is nevertheless an Aristotelian conception of equality since it regards all people who satisfy certain minimal standards as equal and entitled to equal treatment - for example, giving every individual who achieves a certain minimum educational qualification a right to university education. This though is only a superficial view of equality since it makes

no attempt to consider particular attributes of individuals which may be relevant in determining the treatment they should receive.

While this notion of legal equality is a necessary minimum for minority groups, it can offer little in terms of equality of results since it refuses to recognise that, as a result of (prior) disadvantage and discrimination, including those related to physical and mental impairment, an individual may not be in a position to compete for numerous opportunities. Formal equality allows the process of discrimination to continue in the forms of indirect and unfair burden discrimination. What is needed is something more substantive.

4.2 Equality of Opportunity.

Williams (1962) argues that where a good is distributed according to the criteria of merit, as opposed to the critera of need, it is appropriate to speak not only of the distribution of the good, but also of the distribution of the opportunity of obtaining the good. This, argues Williams, unlike the good itself, can be said to be distributed equally to everybody resulting in a concept of equality of opportunity. It is doubtful, however, if an opportunity can in reality be equally distributed.

Grey (1988), somewhat more concisely, states that equality of opportunity amounts to an equal chance for every person to qualify for the unequal rewards of society.

The equality of opportunity model, as generally understood, only looks to the curable environment, and aims to eliminate any differences between individuals which result from this environment. In this sense the model, theoretically at least, could be enough to counter the disadvantages of disability if they were due purely to the disabling environment. However the adapted model of disability which was elaborated earlier, whilst stressing the environmental causes of disadvantage, also recognises that certain disadvantages result directly from impairment. The equality of opportunity concept would require that disabled people be given an equal chance to qualify for desirable positions; however, as a result of a physical or mental impairment an equal chance may not be enough, for even when there is equality of opportunity,

there will not be identity in the ability to profit from that opportunity, and this is overlooked by the equality of opportunity model.

If one can return to the race analogy once again, equality of opportunity requires that, as far as possible, any advantage or disadvantage resulting from natural or social conditions be eliminated before the competition commences so that everyone begins from the same starting place. Once the race has begun no more intervention is allowed, irrespective of the position which the competitors actually find themselves in.

A physical or mental disability cannot always be rendered irrelevant by a guarantee of equality of opportunity in the same way that a person's ethnic origin can. Disability can create a disadvantage which needs to be continually countered; therefore it is not enough to ensure that disabled people start the race at the same place as everyone else, but also that steps are taken to ensure that they do not fall behind during that race. An element of extra assistance may be called for here, such as the payment of a subsidy to employers as an incentive to employ a disabled worker who is as productive as a non-disabled worker, but about whom the employer is uncertain. Such additional assistance is not allowed for under the equality of opportunity model. In this sense one could argue that disabled people are similar to women, for there equality of opportunity also does not equate with identity in the ability to profit from the opportunity, and extra assistance may be required to enable women to progress in the employment market - for example, the provision of schemes for women who take time off work to raise a family which allow for (some of this) time to be counted towards seniority.

Grans[31] expresses this idea thus:

"Equality of Opportunity simply enables people with more income and better education [and, I would argue, an unimpaired body and mind] to win out over the less fortunate even where the competition itself is equitable. [It is] the right of every person to get ahead without

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[31] In "More Equality" 1973, pp.24, 63-64. Quoted in Bayefsky (1986. p.106).

hindrance by reason of race, sex, age and parental social position ... it is a libertarian principle which allows everyone the same liberty to strive for success".

As Bayefsky (1986. p.106) comments: "Free to try. Born to lose".

Nevertheless, a great deal of progress can be made simply by pushing the equality of opportunity model to its limits. Since it can cover any steps that aim to correct or compensate for the disabling environment, it can encompass measures which are often labelled as "positive action". These include measures such as reduced entry conditions for training courses or jobs where disability has prevented an individual from obtaining the qualifications or experience normally required, subsidies to employers to compensate for the extra cost of initially employing or training a disabled worker where that individual is capable of attaining the proficiency and skills of a non-disabled worker, or the provision of specialised equipment to enable a disabled person to take up training or employment. All of these measures are justified by the concept of equality of opportunity outlined above since they aim to enable a disabled individual who, with assistance, is capable of working as well as a non-disabled individual to achieve this. I therefore think that it is appropriate to refer to such measures as steps designed to equalise opportunity to compete rather than as positive action, which removes some, or all, of the necessity to take part in the competition. A more detailed explanation of the concept of positive action will be provided in the following chapter.

It should be noted however that this concept of equality of opportunity is based on the underlying assumption that merit, in terms of efficiency, is the appropriate basis on which to divide resources - including employment and training opportunities. If one does not accept this assumption, then the implications of the equality of opportunity concept are quite different for the nature of the competition is altered. This point shall also be considered in the following chapter, where a Rawlsian approach to the problem shall be discussed.

4.3 Equality of Results.

Under equality of results it is not the procedure or the competition which is considered, but the actual distribution of resources or rights. In Bayefsky's words, this principle asks whether the actual distribution of benefits parallels the distribution of those attributes which are judged to be relevant; if not, equality of results requires redistribution so that in fact equals will have equal shares and unequals unequal shares in proportion to their (in)equality.

Following this argument Nagel (1977. p.9) states:

"I am suggesting that for many benefits and disadvantages, certain characteristics of the recipient are relevant to what he deserves. If people are equal in the relevant respects, that by itself constitutes a reason to distribute the benefit to them equally".

McCrudden (1982) states that from this principle comes the argument that minority groups have somewhat different needs from the rest of the population and therefore that resources should in some cases be distributed unevenly in their favour on account of this.

Here then, we have a concept of equality which fits our adapted model of disability, for it goes beyond the equality of opportunity concept in that it recognises that the presence of an impairment can at times also be relevant. This clearly provides a justification for measures to counter the unequal burden form of discrimination as well as direct and indirect discrimination. It can also provide a justification for "positive" or "affirmative" action that goes beyond steps designed to equalise the opportunity to compete. This can be seen from a more extensive examination of the concept of equality of results.

Bayefsky argues that equality of results may be subdivided into a weak and a strong version, or into two kinds of results. The weak form involves the provision of temporary assistance or the provision of goods to bring about real equality of opportunity. Using the race analogy again, this would mean that not only would everyone start the race at the same place, but that interference would occur to ensure that they did not get too far ahead or fall too far behind because of any naturally or socially caused advantage or disadvantage. The race would

be "handicapped", so that everyone would be expected to finish at roughly the same time. In fact this contradicts fundamental liberal principles, since, in reality, it ceases to be a race as the outcome is already known.

The strong form requires simply that resources and rights be distributed so as to bring about a justified and deserved end. Finally then, our imaginary race is cancelled and we go straight to the distribution of prizes.

The equality of results model, either in its weak or strong form, seems the appropriate one for the adapted model of disability in that it directs us towards not only discrimination, but also towards the disadvantage that can be intrinsic to disability. Unlike the equality of opportunity model it attempts not only to eliminate socially generated disadvantages, but also to compensate for inherent ones. However, this model also places us in a dilemma which has not thus far been considered.

Equality of results provides a justification not only for anti-discrimination measures, but also for positive action. These two kinds of measures have traditionally been regarded as separate and justified on different grounds[32], and whilst anti-discrimination measures are generally politically acceptable, positive action is much more controversial. The equality of results model as explained thus far does not enable us to distinguish between the two, since it looks to ensuring that everyone finishes the race at the same time or it goes directly to the prize giving.

In fact equality of results with respect to anti-discrimination legislation is compatible with the Aristotelian notion of equality - for example treating x, a non-disabled employee, and y, a disabled employee, two equally skilled and reliable workers, in the same way when decisions about a promotion are made, even though y has worked for the firm for a shorter period, as a result of receiving a longer period of training necessitated by the disability (here two people,

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[32] The large number of academic works which concentrate on finding a justification for positive action, whilst assuming that anti-discrimination measures are acceptable confirm this. Examples include Goldman, Nagel and Vogel-Polsky.

who are in fact equal in the relevant respects, are being treated equally). But equality of results is not compatible with this Aristotelian notion of equality when applied to positive action. In this case it can mean treating people who are unequal in the same way. For instance, in an adapted version of the example given above, promoting both y and x where y is in fact less skilled than x, and is only being promoted because s/he is disabled and benefitting from a positive action programme.

Whereas equality of results is quite acceptable within a liberal political system[33], (and this is a relevant restriction, for we are concerned with the situation in the Member States of the European Community, the legal systems of which are based on liberal ideals) with respect to anti-discrimination measures (i.e. in its limited version, which provides for treating equals in the same way), it is not acceptable, at least in a pure form, with respect to positive action. Using Aristotelian terms once again, it is acceptable as far as it involves treating people who are equal in all relevant respects in the same way, but not acceptable in that it can also require that people who are unequal be treated in the same way. Here we finally face the questions of "Equal in what way?" and "Equal to whom?". An answer is necessary to distinguish when equality of results is being used to justify anti-discrimination measures (treating equals in the same way) and when it is being relied on to justify positive action (treating unequals in the same way). I would argue that, in the case of employment, we should regard as equals people who are capable of carrying out the fundamental tasks of any particular job equally well if the necessary accommodations are made to the job (e.g. physical alterations to the workplace, modifications in the working time, allowance for extra training time etc.). The concept of doing work "equally well" is naturally highly subjective, and perhaps I have only substituted one question - "How does one measure if work is being done 'equally well'?" - for another - "Equal to whom?". However, defining the concept of "equally well" is not a debate which I propose to enter here, and I believe that the arguments that follow are capable of standing without a precise definition of this concept being given. Nevertheless this test may in fact be quite easy

[33] For an expansion on the meaning of the term "liberal political system" see Rawls, Theory of Justice.

to apply where work is measured simply in terms of output of goods of a sufficient quality, such as piece work, although where the criteria used give greater scope for subjective assessments this test will clearly be more problematic.

In many ways the policy implications of the limited version of the equality of results theory differ little from those of the equality of opportunity theory for both look to correcting disadvantages resulting from the environment, such as unsuitable training modules, inaccessible workstations, and inappropriate tools (although I believe that the former theory does allow slightly more intervention). The justification for this intervention is however different. A person who is not capable of carrying out the fundamental tasks of a job particularly well or at all should not be regarded as equal to someone who is skilled in that area, and this is true whether the less talented individual is disabled or not. However, in as far as that inability is caused by impairment, that individual may merit special treatment, possibly including appointment to the position in question, and this can also be regarded as being justified by the equality of results theory, although it now involves treating people who are not equals in the same way.

Pure equality of results, which would lead to positive action is far removed from the liberal free-market principles of the Member States of the European Community and, in order to rely on it as a justification for positive action in favour of disabled people, it must be compromised. Compromising the principle, however, does not mean that it ceases to be of relevance to the adapted model of disability. Its value lies in the fact that it directs us to look at the results - in this case, the allocation of jobs to people with disabilities - rather than simply the competition that can, at most, ensure that all socially caused disadvantages are removed to encourage (but, in the case of disabled people, not ensure) equal opportunity. By retaining this element, account can still be taken of the disadvantages caused by impairment. A detailed discussion of the justification for positive action is, however, outside the scope of this chapter, and the problems briefly discussed above shall be returned to in the next chapter.

Conclusion.

The focus of this paper has been disability discrimination. Through the development of a new model of disability, incorporating elements of both the functional limitation and minority group model, I have shown that the problems related to employment for disabled people stem from two sources: put simply, impairment and discrimination. Whilst the existing disability policies tend to address the former problem, the latter is frequently overlooked. The model of disability which has been developed, however, shows that discrimination, in its numerous forms, is an important barrier to the economic and social integration of disabled people. It is therefore necessary that any disability policy addresses the element of discrimination.

Disabled people are similar to other minority groups which are victims of discrimination in many ways, and a comparative approach can reveal the extent of these similarities and enable one to comment on the appropriateness for disabled people of existing policy and legislation directed at other minority groups. Such an approach also helps to reveal the peculiarities of disability, and particularly the importance of the reduction of functional abilities, and, at times, the consequent need to adapt the environment. This leads to a form of indirect discrimination which is not usually experienced by other minority groups - namely "unequal burdens".

In the area of employment it is important to consider how far the responsibility placed on employers to take steps to counter the disadvantage of disability should go. In deciding on this one needs to consider what equal treatment means, the extent of the obligation to provide equal treatment, and whether this can mean treating people with different needs and abilities in different ways. Whilst an equality of opportunity model is sufficient to provide a justification for requiring that socially caused disadvantages experienced by disabled people be removed, it cannot provide a justification for measures to counter all the disadvantages caused by impairment. Such action can only be justified by the equality of results model. An in depth analysis of the equality of results model has not been engaged in here, and the question of justification for positive action will be considered in the next chapter.

Since it is argued that discrimination constitutes the main problem, it is appropriate to make anti-discrimination legislation the core of any disability policy. The practical problems of formulating such legislation will be addressed in a further chapter. Specific positive action measures, and particularly the quota system for the employment of people with disabilities, which look more to compensating for impairment than to eliminating discrimination, will also be considered elsewhere. The question of whether such measures are more appropriately dealt with at the Community level or the national level will naturally also be considered. But whether at the Community or national level, it is only within a framework of combatting discrimination that any disability employment policy can work, and this is apparent from the adapted model of disability developed in this chapter.

POSITIVE ACTION AND DISABILITY: A JUSTIFICATION.

Having addressed the need for measures to counter the existing discrimination which people with disabilities face in the previous chapter, I shall now go on to consider the role of positive action in promoting the employment of disabled people[1]. In so doing I shall elaborate on the points made at the end of the previous chapter in relation to positive action and consider in more depth the theoretical justifications for such measures in relation to disabled people. Once again I shall draw on the adapted model of disability developed earlier which identifies two sources from whence the problem stems: discrimination in the attitudinal and physical environment, and a restriction in functional capacities arising from an impairment. I argued in the previous chapter that measures to counter existing discrimination were best regarded as justified by equality of opportunity and a limited conception of the theory of equality of results, whilst measures which were directed specifically at the reduction in functional capacity were often best justified by a broader conception of the equality of results theory. It is not enough, however, to state that some disabled people, as a result of their condition and the consequences which arise from it, are disadvantaged and unable to compete equally in the labour market and therefore deserve to benefit from positive action. In this chapter I shall consider in more detail possible arguments as to why the disadvantages caused by disability justify such intervention.

There are three broad justifications for positive action[2]: firstly, that it is a tool for **compensating** individuals or groups for unjust disadvantages or lost opportunities imposed on them in the past; secondly, that it serves a **socially useful** purpose - for example, the utilitarian argument that everyone in society benefits when members of certain disadvantaged

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[1] It is important to note here that the terms "disabled people", "people with disabilities", "handicapped people" etc. are being used in this chapter to signify only those with employment-related disabilities or handicaps. I am not concerned with those people for whom an impairment is no barrier to employment. However, because of the pervasiveness of disability it is unlikely that a person will only be disabled in one sphere of his or her life.

[2] These three classifications and the following argumentation are based on that applied by McCrudden in Rethinking Positive Action, Industrial Law Journal, 1986, Vol. 15, p.219. They have been adapted to fit the particular circumstances of disability.

groups are appointed to senior positions because they bring a new and valuable insight that was previously unavailable; and thirdly, that it helps to achieve a more just distribution of rewards and resources, and thus helps to achieve a more just society. In this chapter the validity of these justifications in relation to disabled people shall be considered. The suitability of various kinds of positive action will not be addressed here since this chapter is concerned with theoretical justifications rather than substantive measures, which are the subject of the remainder of the thesis.

Before looking at the three justifications for positive action I shall say a few words to explain what I mean by the term "positive action".

By "positive action" I do not mean measures designed to equalise opportunities i.e. measures designed to enable disabled people to compete on equal terms with non-disabled people. This would include, for example, the lowering of entry requirements for access to training courses or certain positions in recognition of the fact that disabled people have not had an equal chance in the past to achieve the standard qualifications. This could be either as a result of receiving an inferior education or of a reduced ability to achieve certain qualifications (which are not essential in order to carry out the fundamental tasks of the training or the job) caused by impairment. It would also cover the provision of specialised equipment or adapted work schedules to enable a disabled person to carry out the training or the work.

"Positive action" goes beyond these equalising measures. It involves favouring a disabled person who, as a result of an environment or impairment related disadvantage, which cannot be compensated for in any way (for example, by specialised equipment, extra training etc.), is less able or less skilled than a non-disabled person, and who is likely to remain so, over a more skilled or able person. It involves, for example, preferential hiring, the provision of extra holiday time, or the payment of wages as if the disabled worker were as productive as a non-disabled worker. It recognises that the impaired worker is of an inferior quality, and will probably always remain so, and requires that that worker be nevertheless advantaged in certain ways.

In a society where employers frequently attempt to select the most skilled workers when making appointment decisions[3] the application of such a concept of positive action could clearly have important implications. The purpose of this chapter is to consider whether the application of such a concept can be justified with regard to disabled people.

1. Compensation.

This theory claims that positive action, usually including preferential hiring and access to training courses, is justified as compensation for those who have suffered as a result of discrimination in the past. Of the three justifications, this one seems to be the weakest. It is disputable as to whether this theory justifies positive action only for individuals, or whether groups sharing some characteristic(s) which have exposed members to discrimination can also be the beneficiaries of positive action. In both cases, however, there are serious problems with respect to disabled people. Furthermore, this concept totally ignores one important aspect of the adapted model of disability - the fact that impairment can lead to disadvantage. The compensation justification is dependent on the existence of prior discrimination which has caused disadvantage but takes no account of other causes of disadvantage. In this sense, then, it is seriously flawed, and can never provide a full justification for positive action in favour of all disabled people, in order to help ease the disadvantages of all aspects of disability. Nevertheless it has the potential, at least, to provide a justification for positive action to compensate for that element of disadvantage caused by prior discrimination, and this is addressed below.

1.1 Compensation for Groups.

Although the argument related to compensation for groups has the merit of attempting to provide a justification for positive action directed at all disabled people, it also contains several serious weaknesses.

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[3] Employment decisions can also be motivated by other factors such as nepotism and the desire to grant favours.

The argument claims that the inequality in the capacity of women and minority groups to compete for desirable positions results from the prior and existing inequality in the division of certain educational, social or economic advantages, and that this merits compensation in the form of positive action in favour of the groups in question. It is acknowledged that not all members of the group will have been denied a job, promotion or access to a good education, but it is claimed that all have at least been indirectly harmed since such practices and the stereotypes and prejudices associated with them have caused them to suffer a loss in self-respect, self-confidence, motivation, ambition and the like. Although this harm has been inflicted on all members of the group it is argued that it is not necessary to compensate each member individually through the provision of employment or training. Instead compensation can be provided by enabling only certain members of the group to benefit directly from desirable employment or training opportunities, as this will have the psychological effect on other members of the group of helping to restore self-respect and motivation.

There are a number of quite serious problems with this argument. Firstly, it is not clear that all members of the group have suffered the kind of indirect harm described above. There may be women or members of ethnic minority groups who have not responded to the discrimination by losing their self-respect and self-confidence. At least it seems very unclear that all women and members of ethnic minority groups will have reacted equally strongly to the discrimination surrounding them, meaning that some will have been affected detrimentally to a far greater extent than others. A theory based on compensatory justice should surely aim to compensate those who have suffered most, yet this group based theory fails to do this and, as will be seen shortly, may actually benefit most precisely those who have suffered least. Nevertheless, in an environment where discrimination against women and members of ethnic minorities is still fairly widespread[4] one can at least make the argument that all members of the affected groups have suffered in some way as a result of discrimination. O'Donovan (1977. p.78) for example, does this when she argues that all

[4] I think that it can reasonably be said that such an environment exists in most, if not all, Member States of the European Community. Employment surveys carried out in the Twelve consistently reveal the extent to which female and ethnic minorities are under-represented in high status and well paid jobs.

women have been stigmatised as a result of prior discrimination, and therefore all women are still affected by the consequences of the earlier prejudice.

These points should be distinguished from the argument that all disabled people have an interest in seeing an end to the discrimination which is directed at them as a group because of the present and future disadvantages caused to group members by discrimination, such as the unjust assumption of inferior ability or incapability which many disabled people experience. This argument is not dependent on the existence of lost self-esteem or lack of motivation being experienced by a large number of people with disabilities, although it is capable of incorporating this disadvantage. Women and other minority groups can naturally also experience this present and future disadvantage caused by discrimination, but it is not this disadvantage to which the compensation theory looks.

It is just not possible, however, to even make the argument that all disabled people have been disadvantaged as a result of prior discrimination. Whilst I would argue that all people who have been disabled for a substantial period of time have suffered from discrimination (although not necessarily always in the employment sphere) in a way that is not true of all women and members of ethnic minorities, in that they have been faced with a hostile physical environment in terms of inaccessible or inappropriate buildings, transport systems and equipment (which rarely applies to the two other groups) and attitudinal environment, and therefore, if one accepts the premises of this argument, deserve to be compensated, one cannot make this claim in relation to newly disabled people. Such people, who may have become disabled as a result of an accident or a gradually disabling condition will have never experienced disability discrimination prior to becoming disabled. They may have already received appropriate training and be in steady employment, and be able to continue in that work after the onset of disability. Others, however, may require retraining and the possibility of taking up another form of employment - and here the compensation argument can provide no justification for (positive) action which is obviously necessary. The fact that a person can become disabled at any stage in their life is therefore highly relevant here, and helps to undermine the compensatory justification for positive action for disabled people in a way that is not true for women and other minority groups.

There are, in addition, a number of other weaknesses with the group compensation theory. The theory argues that positive action is necessary to compensate groups for the loss of motivation and self-respect caused by discrimination. Even if one accepts that discrimination does have this effect on a large number of members of the minority group, it is not clear that positive action in the employment sphere would help to correct this problem, especially when there is no guarantee that those who have suffered most will also be benefitted directly through employment or training. In the case of disabled people it is difficult to accept that all disabled people, even those disabled for a long period of time, have suffered such damage as a result of discrimination. Many will have undoubtedly been disadvantaged in the area of employment, and elsewhere, by the discriminating inaccessible physical environment, but this could lead to anger and frustration rather than a loss of self-respect (a reaction to discrimination which could equally apply to women and other minority groups). Realistically then, one would have to broaden the concept of damage which merits compensation to even begin to regard this theory as a justification for positive action.

A further weakness with the compensation theory directed at groups is that, since it does not attempt to differentiate between individuals who have actually suffered and those who have not, membership of a group which was generally discriminated against being sufficient for access to positive action, it tends to benefit most those who were least disadvantaged. This is because they will be in the best position to meet the criteria for appointment to desirable positions. Those members who have suffered most from prior discrimination through, for example, the denial of access to certain educational or training opportunities, or being hampered from attaining appropriate or rewarding work, will have least to offer in the labour market and there is a real risk that they will be overlooked even when positive action programmes are adopted. In this way the ratio of past harm to compensation, which should be vital for positive action to be justifiable under this theory, is actually inverted. It is argued in the case of women and ethnic minorities that this means younger members of the group, who have had the chance to obtain an adequate education, will often benefit most, whilst older members, who may have actually suffered discrimination in the past, will receive relatively little benefit, at least directly. In fact this problem, which applies to all cases where positive action is directed at groups rather than

individuals, may not be so serious in relation to disabled people as it seems to be for other groups since it is relatively easy to ensure that those who are most disadvantaged - although not necessarily those who have suffered most from discrimination - benefit most from any positive action programme. Since this is a general problem rather than one specific to the compensation justification, it will be discussed later when a more satisfactory justification for positive action has been found.

Having shown that compensating groups for discrimination experienced in the past is a relatively poor justification for positive action directed at disabled people, I will now briefly consider the case for positive action directed at deserving individuals, which does not have the weaknesses referred to above.

1.2 Compensation for Individuals.

Many of those who support the compensation justification for positive action argue in favour of individual rather than group compensation, feeling that the latter is inherently unjust. Goldman, who supports this view, argues thus:

"compensation can be owed only to the individual members [of a group] who have been harmed and not to the groups as a whole. This seems especially clear when the injury in question is the unjust denial of a job or decent education; reverse discrimination is then intended as compensation in kind"[5].

By selecting only individuals who have actually suffered as a result of discrimination, the tendency to benefit most those who have suffered least, which arises when compensation is directed at groups, is avoided. However, compensation directed at individuals also has its weaknesses.

It has already been argued that the disadvantage which is seen as meriting compensation under this theory, namely that caused by prior discrimination, is quite narrow.

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[5] Goldman, Alan, Justice and Reverse Discrimination, Princeton University Press, Princeton, New Jersey, 1979, p.88.

This becomes an even greater problem when compensation is only directed at individuals, since there will be many people who have not suffered the degree of disadvantage caused in the specified manner which is necessary to merit positive action as compensation, yet, if they are denied access to this positive action, the discrimination they face will lead to precisely that harm which merits such intervention. It is clearly better to intervene to prevent this harm occurring than to compensate for it once it has occurred. A major weakness with the compensation theory is that it cannot, by definition, allow for pre-emtive positive action programmes. Secondly, as already mentioned, there are all kinds of disadvantage resulting from disability which are not seen as meriting compensation under this theory, and the theory is inadequate in this respect.

There is also a very serious practical problem with individual compensation - namely, the need to identify accurately deserving individuals. It is clearly far easier for the law to direct positive action at a group of people who are easily identifiable - women, those registered as disabled - than to require an investigation into the history of every potential beneficiary. Such an investigation, however, is required in the case of individual compensation, and it is unclear how a workable, reliable and cost-efficient system could be developed to do this. Goldman's suggestion that administrative boards be set up (p.98/99) is quite impracticable since not only would the workload involved, including analysing questionnaires and conducting interviews be overwhelming but, more importantly, it would almost certainly be impossible for such boards to distinguish between the disadvantage caused by prior discrimination (which merits compensation) and that caused by impairment. In addition there might be a reluctance amongst potential beneficiaries to allow their personal history to be scrutinised by such a board. It is unclear, therefore, if any individualised compensatory positive action programme could be established in practice.

Furthermore there are significant problems with all theories, whether they be based on compensatory justice or not, in which the emphasis is placed on the need to direct measures only at deserving individuals. The adapted model of disability referred to in the previous chapter made it clear that one of the problems facing disabled people is discrimination which inhibits equality of opportunity. Individuals are exposed to this discrimination because they belong to a group to which undesirable characteristics are

commonly attributed. In the case of disabled people these would be assumptions such as disabled people are incapable of performing certain tasks or understanding certain instructions. Out of this disadvantage imposed by the majority on all those disabled arises a group interest. Until these disadvantages are removed all disabled people share a common interest in the social and economic advancement of the group. This is so because all disabled people suffer from the ascription of negative characteristics which supposedly define the group, and because when enough disabled people are seen to occupy desirable positions, the self-esteem of other group members will tend to rise and steps will have been made to eliminate the prejudice and stigmatisation which leads to discrimination.

An individual approach would be less successful in combatting these global disadvantages for it would involve selecting specific disabled people for employment or training, with at least the implication that those individuals who are not selected are undeserving and less able. There is a risk, then, that such an approach could reinforce prejudices against, and so the disadvantages experienced by, disabled people who fall on the wrong side of the defining line. For this reason it is very difficult to separate the advancement of the group from the advancement of individuals.

The problems with the compensation justification, however, are still not exhausted, and in addition there are a number of weaknesses which apply to both the individual and group models.

1.3 Further problems with the Compensation Justification for Positive Action.

The problem of who compensation should be directed at has already been addressed; what has not been considered is who should make that compensation. Unless one restricts the application of the theory to cases of not only identifiable victims, but also identifiable perpetrators of discrimination, requiring that the latter compensate the former (and this would clearly provide a very limited basis for positive action), one must argue that society as a whole must compensate those who have suffered, for it would be wrong to require that certain individuals, who are not necessarily themselves responsible for the discrimination, and may not even have benefitted directly, should shoulder the burden of compensation. Society, as a whole, cannot compensate though; instead it is individuals who must give up

the opportunity to receive a certain education or training or to obtain a certain kind of employment, who must make the compensation. Furthermore, it is argued that the individuals who are forced to give up these opportunities are young, white (and non-disabled) males who cannot be held liable for discrimination in the past (Goldman, p.114, Nagel, Introduction to Equality and Preferential Treatment, 1977). This problem, that only some members of the majority group lose out and so the burden of compensation is not shared, applies to all justifications for positive action, and shall be returned to later; however, it seems particularly intractable here where the theory demands that society recompense aggrieved individuals or groups, but where in practice only unfortunate members of the majority group are called upon to make sacrifices. It is doubtful if these sacrifices by individuals can be seen as sacrifices by the majority group as a whole, since most of those not directly disadvantaged will remain unaffected.

This analysis has revealed that the problems related to the compensation justification for positive action are so overwhelming that it is practically impossible to rely on it, even if one restricts it to the area of disadvantage caused by prior discrimination (which is itself a problem, since it involves ignoring many of the disadvantages which result from disability and handicap, and does not take account of important aspects of the adapted model of disability). Unsophisticated arguments, directed at group compensation, overlook the fact that members of the affected group have not all suffered equally and, in the case of disabled people, need not have suffered at all, whilst the more sophisticated arguments recognise that certain individuals have suffered more than others, and that only such individuals deserve compensation, but a workable formula for deciding who to compensate seems impossible to produce.

2. Social Utility

This is a utilitarian argument whereby it is claimed that positive action is justified because it promotes what Fullinwider has called the "aggregate well-being of society"[6]. Those who benefit directly cannot claim a right to positive action, as is possible under the compensation justification; rather they benefit only because it is in the general interest that they receive preferential treatment. For this justification to be valid, therefore, an advantage to society accruing from the implementation of positive action must be demonstrable.

McCrudden, in an article entitled "Rethinking Positive Action" (1986) has listed a number of ways in which social utility may be served through a policy of positive action involving preferential treatment. However, all of these reasons can at least be queried in the case of disability:

2.1 Public Appointments.

It is argued that through employing minority group members in certain public positions, such as in the police force, education sector or the upper reaches of the civil service, the decision making process will be enriched, since the new appointees, as a result of their different backgrounds and experiences, can contribute a perspective that might otherwise be missed.

This claim, however, does not really stand up to close scrutiny for it is unclear what exactly it is that disabled people can contribute to the decision making process over and above that which non-disabled people can contribute. Is the only extra element a consideration of the problem from the point of view of disabled people by a person who should be well informed as a result of personal experience? For example, ensuring that notice is taken of the needs of disabled trainees when planning a new curriculum, or the needs of physically disabled workers are considered when an extension to the workplace is planned.

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[6] Fullinwider, The Reverse Discrimination Controversy, Rowman and Littlefield, 1980, p.18.

If this is so, then this may not be a particularly strong argument for a general societal benefit. It is not society as a whole which benefits from the appointment of disabled people, but instead other disabled people who benefit as those disabled people in positions of authority ensure that the disability perspective is considered fully when decisions are being made. If one does not accept that disabled people should play a greater part in society, for paternalistic or economic reasons, then no benefit results. If one does accept that disabled people should play a greater part in society, then this can only be an additional argument, since enabling disabled people to take up desirable jobs is an end in itself.

In addition, it is not actually clear that appointing more people with disabilities to such public positions will ensure an increased awareness of the position of disabled people when decisions are made. The individuals appointed may not view their role as representing disability interests, and they may well know little about the needs of people with disabilities dissimilar to their own. This is often true of physically disabled people with respect to problems related to mental disability.

The alternative argument in relation to public appointments and social utility is to claim that there is something which disabled people particularly can add to decision making which will be of benefit to society more generally, such as a greater tolerance, or a deeper understanding of other's difficulties. There is, however, no evidence suggesting that this is the case, and it seems a difficult claim to support.

Therefore one cannot demonstrate that the appointment of disabled people to such positions will benefit society generally, and it is even questionable whether disabled people, other than those who are appointed, will actually benefit.

2.2 Role Models for other Members of the Minority Group.

The claim here is that by appointing members of minority groups to senior positions, role models will be provided for other, particularly younger members, and they will be motivated to attempt to achieve similar positions. However, it is not absolutely clear that this will always be the case.

If the individual appointed is not capable of doing the job, or is provided with inadequate support to enable him or her to do the job efficiently, exactly the reverse effect

will result, as well as it being a highly negative experience for the individual concerned. In addition those who are appointed to desirable positions during a period in which a positive action programme is in operation will not be regarded as having won the job on merit - whether this is in fact true or not - and this may reduce their potential to be effective role models. Furthermore, there is a risk that those who are appointed to desirable jobs could be stigmatised, and the general belief and the belief amongst the minority group that members of the group are inferior in some way and need special assistance in order to advance, could be reinforced.

Despite these criticisms, however, there may be some validity in the role model argument. It is perhaps more appropriate to compare the individual appointed with other members of the minority group to which he or she belongs, who may have no job or a relatively low-status one, than to make comparisons with other people holding similar positions. By making such a comparison one can argue that the individual has in fact won the position on merit, albeit that the group of competitors for the job was restricted to other members of (the) minority group(s). Furthermore, by actually doing the job successfully the individual can achieve status, and possibly also help to reveal the irrationality of discrimination directed at the minority group in question. In this way it may be possible for the individual to act as an effective role model.

This argument is therefore inconclusive, and once again one cannot claim a clearly demonstrable benefit resulting from positive action.

2.3 Prevents disparities of wealth / income developing, and so helps to counter disadvantage in the future.

Disability does involve extra costs[7] and can often lead to unemployment or poorly paid work, but the extent that these extra costs and employment related problems will cause deprivation to the disabled person will vary. It depends very much on the financial situation of the individual, which is determined by numerous factors:

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[7] See OPCS Surveys of Disability in Great Britain, Report 2: The financial circumstances of disabled adults living in private households, Chapter 4: "Disability related expenditure". HMSO, 1988.

i) whether the disabled person can find employment, and the level of pay received for this work.

ii) costs faced by the disabled person, both related to "normal" expenditure - for example accommodation, transport and utilities - and disability related costs.

iii) the level of social security and private insurance payments received.

iv) the cause of the disability - industrial accidents (covered by more generous social security and insurance schemes) and disabilities for which compensation has been awarded will tend to result in less financial hardship.

Positive action addresses only the first of these factors. Furthermore, simply because someone is disabled and may have a lower real disposable income does not necessarily mean that s/he will be substantially disadvantaged in later life. This depends on many other factors, including education, family expectations and the neighbourhood in which an individual lives. If the aim of any policy is to eliminate the risk of financial disadvantage resulting from disability, it must go much further than simply positive action in employment for disabled people, and indeed this would not be the most important element of such a policy[8]. As a sole justification for positive action, therefore, this is too weak; however as a partial justification it seems quite valid, and it does result in a demonstrable benefit.

2.4 Promotes Public Order and Industrial Peace.

This refers broadly to the utility of social harmony. It is based on the claim that tensions between groups will be reduced, and that civil unrest will be prevented as a result of positive action for minority groups.

This argument seems quite weak in relation to people with disabilities. We are not at the stage in Europe where disabled people are on the point of rioting or causing industrial unrest because their interests are being ignored, as was the case for blacks in the 1960s (and more recently in the 1990s) in the United States and, at times, in Europe today with respect to certain ethnic groups.

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[8] I would argue that ensuring that such individuals receive an adequate income should be the most important element of such a policy. It is not necessary that all or part of this income result from the employment of the disabled individual, although for numerous other reasons this is often desirable.

It is also often argued that there is a risk that positive action will actually cause social tension stemming from the resentment of those who perceive themselves as having lost out. In times of high unemployment particularly, those who are not favoured by positive action may feel that their jobs or employment chances are being threatened by minority group members, and this can cause friction.

In fact, this may not be as great a problem for disabled people as it is for women and other minority groups. Positive action in favour of the latter two groups has, at times, caused resentment, and legislation often stops short of mandating positive action in their favour as a result of this controversy, although it frequently states that such programmes are allowed and are not regarded as discrimination[9]. Positive action directed at disabled people, even including mandatory preferential hiring requirements, has usually escaped such controversy. One can only surmise why this should be so, but one possible reason is that many people see disabled people as deserving such preferential treatment in a way that is not true for other groups. This could result from sympathy, and the feeling that disabled people deserve a "break" because of their "bad luck" which means that they are not capable of competing equally with non-disabled people for jobs. Sympathy is not felt for women or members of ethnic minorities in this way; nor is their condition seen as a result of bad luck. Indeed women and ethnic minority members would be insulted by such reactions to their situations, taking pride in their identity as women, Asians, Turks or whatever. Not surprisingly, therefore, many disabled people are also offended by such attitudes[10], but they are placed in a dilemma: such attitudes, which contribute to the discrimination faced by disabled people, have positive side-effects, one of which I would argue is the tolerance of positive action programmes in favour of disabled people. If these attitudes cease (and this is a prerequisite for removing discrimination) disabled people run the risk that positive action in their favour will also become less acceptable. This is a dilemma which the disability movement has yet to resolve, and it is particularly apparent in the case of disability charities.

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[9] See, for example 15(2) Canadian Charter of Rights and Freedoms.

[10] See Able Lives, Women's experience of paralysis, Jenny Morris (ed.). The Women's Press Ltd., 1989, Chapter 4 "Images" and Pride Against Prejudice, Transforming Attitudes to Disability, Jenny Morris, The Women's Press Ltd., 1991, Chapter 1: "Prejudice".

Such charities often feel that they have to portray disabled people as deserving and needy in order to persuade the general public to make donations; yet this is exactly the image which must be destroyed if disabled people are ever to fully integrate into society.

It is possible to argue that other minority groups also face a dilemma with respect to positive action - namely that they need positive action in order to improve their employment position, but that such measures simultaneously encourage assumptions of inferiority and hamper the achievement of equality. Disabled people naturally face this dilemma too, but the difficulty I am referring to here goes beyond this, and covers the feelings of pity, sympathy and charity that disability often seems to provoke in others, and which renders positive action in favour of disabled people more acceptable to the general public than similar measures directed at other groups. Other minority groups are not, I believe, looked on in this light, and in this respect are already regarded as more equal - hence the readiness of others to challenge positive action in their favour, claiming it to be unnecessary.

As things presently stand, however, this "sympathetic" attitude probably benefits disabled people by increasing the acceptability of positive action, meaning that social tension is less likely to result from the adoption of such programmes in their favour.

However, the argument that such measures are necessary in order to guarantee public order and industrial peace seem weak since disabled people do not really pose a threat in this respect at present. Once again, only a minimal benefit is demonstrable.

2.5 Promotion of Efficiency.

It is claimed that positive action promotes efficiency in that it widens the available pool of labour from which employers may choose. If an employer is prejudiced against certain job applicants he or she is artificially restricting him or herself to selecting from only a section of the workforce, with the result that the most competent individual is not always appointed or promoted. If enough employers are behaving in this discriminatory manner it will result in higher production costs which will be passed on to the consumer. It is claimed that positive action forces employers to recruit from the full spectrum of the workforce, and this promotes efficiency.

This is a questionable argument. As McCrudden (1985. p.86) points out, discriminatory recruitment practices will in fact often result in as good a group of workers being hired, at a lower cost to the employer, as would be the case if positive action criteria were implemented. This is particularly so where the work involved is unskilled or semi-skilled and where it is only necessary that the employees have a certain degree of competence in order to do the job efficiently. The reverse side of McCrudden's argument would be that positive action results in an equally efficient workforce and therefore employers have nothing to lose by implementing it. However, if employers face higher costs as a result of adopting a positive action policy then efficiency will be reduced. Furthermore, where positive action is defined as including the appointment or promotion of an individual who is not the most capable, as it is here, then this argument relating to efficiency ceases to be true. Indeed, it may well not even apply to anti-discrimination measures, which have been argued to include disability awareness of the workforce, obtaining information about the disabilities and functional impairments of individual job applicants to discover if they present a barrier to employment, and the costs of making any necessary accommodations. This additional expenditure is unlikely to result in a more efficient workforce, and on economic grounds this is an argument against disability positive action and anti-discrimination measures.

Furthermore, it is possible to argue, as Goldman does (p.144), that discrimination of any kind, including reverse discrimination, is inefficient since criteria other than competence are involved in the decision to appoint. Finally, this seems a weak argument in times of high unemployment, such as many countries in Europe are experiencing at the moment, when there is already a wide choice of available labour from which employers can select. There seems to be no demonstrable benefit in this respect at all then.

2.6 Shifts some of the Burdens of Welfare from the State onto Employers / Consumers.

One could argue that this is a benefit of positive action, in that it helps to reduce public expenditure, leaving finances free for other projects or enabling savings to be made. This is a very short term view though. If employers are forced to employ disabled people who are either less able, or who require special adaptations to be made to the work station,

then, in the absence of financial assistance, employers will pass on the extra costs to consumers in the form of higher prices.

There is though a more fundamental objection to this argument. It seems very hard to justify this wholesale transfer of responsibility from the state to individual employers. Although employers do have a role as welfare agencies within the European Community, this is not their primary purpose. Employers, for example, are often involved in the organisation and financing of occupational pension schemes and providing support and employment for workers disabled whilst in their employment; however, they are basically profit-making institutions, and whilst it may make economic sense to provide their employees with financial protection and security as this will help to attract a better quality of worker, they cannot be expected to take responsibility unassisted for the employment and support of large numbers of disabled people. It is argued that responsibility for guaranteeing the welfare of more vulnerable members of society lies with the state, and it can not shirk its responsibilities by transferring them to employers. The state can, of course, provide assistance, including financial assistance to employers, whilst obliging or encouraging them to take on more disabled people, but in so doing it is not shifting the burden of welfare, and, if the assistance is adequate, neither will it be imposing unjust responsibilities on employers.

This is therefore also not a demonstrable benefit of positive action for disabled people that arises from the direct shifting of the burden of welfare from the state to employers. If positive action is to be implemented employers do need support from the state, and if this support is to be sufficient its provision cannot be seen as a way of reducing public expenditure.

It was stated at the beginning of this section that for the utilitarian argument in favour of positive action to be valid the benefits accruing to society had to be demonstrable. What this analysis has shown is that this is not the case, and that the utilities which can be claimed do not clearly outweigh the disutilities. Since this is apparent it seems unnecessary to discuss how one can balance accurately utilities and disutilities, which may itself be a problem as Dworkin has noted (1977. pp.233-238). The utilitarian argument, though it may be sound

in principle, is inconclusive in this particular case, and is therefore a weak basis on which to rely as a justification for positive action in favour of disabled people.

3. Distributive Justice

The third justification for positive action is also concerned with making society as a whole better off. The focus here, unlike the utilitarian argument, is on the position of the most disadvantaged members of society. The argument is that the government has a duty to intervene to increase the opportunities and improve the conditions of such citizens, and that this includes ensuring that they have access to (attractive) employment opportunities. Prior discrimination is only relevant in as far as it gives rise to present disadvantages. Positive action is thus seen as a means of achieving a socially desirable end.

It is claimed that society would become more just as inequalities in the distribution of wealth would be reduced and everyone would benefit from a standard of living which included access to decent education and medical services. This would help to ensure that the concept of equality of opportunity had some meaning, so that positive action would become less necessary[11]. This concept is reflected, to varying degrees, in all Member States of the Community in progressive tax systems, minimum wage levels, social security payments, and public education.

True equality of results, however, is not satisfied by this partial tampering with the distributive mechanisms of society. It requires far greater equality in terms of the allocation of jobs and income, as well as in numerous other areas. It has already been stated in the previous chapter that pure equality of results has no role to play in the political and

[11] Although, because of the reduction in functional ability which can be caused by impairment, some disabled people will always need to benefit from positive action if they are ever to occupy certain positions.

economic system of the Member States of the European Community. It is a theory which requires that people who are not equal in their ability to contribute to productivity nevertheless receive an equal, or indeed, more than equal, share of the profits. However, it was argued that the theory was still useful, since it directed us towards the actual distribution of social and economic resources, rather than the method of that distribution as is the case with the equality of opportunity model. In order for the equality of results model to be of relevance to the European situation it must therefore be modified so that it can be applied to a liberal system, although the focus on the results of the distribution must remain. An approach which seems to meet these criteria, whilst not having the numerous disadvantages of pure equality of results, is that proposed by John Rawls in "A Theory of Justice".

3.1 Rawls and "A Theory of Justice"[12].

Rawls' theory is based on the traditional concept of the social contract, which he develops within a liberal framework. He argues in favour of a set of principles, the principles of social justice, which should be used to determine the distribution of advantages within a just society. These principles are the ones which rational individuals would agree to in an "original position of equality".

Rawls means something very specific by the term "original position of equality". This position serves the same purpose as the "state of nature" in the traditional social contract theories. The original position is a purely hypothetical situation in which individuals are prevented from knowing anything about their positions in society and their skills. A "veil of ignorance" denies them knowledge about their abilities and disabilities. They do however have access to information about their society generally, such as information relating to its economic standing, and are aware of the consequences of possessing certain attributes or of being (dis)advantaged in a certain way. They are denied information only in relation to their personal situation.

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[12] Clarendon Press, Oxford, 1972.

In such a situation rational individuals, who are equals in all relevant ways, and who have no interest in agreeing to a set of principles which will favour one group over another (i.e. they are "mutually disadvantaged") will be able to agree on a just set of principles to govern the organisation of society and the distribution of resources. Rawls' aim, in imposing these conditions on the original position, is to find "a conception of justice that nullifies the accidents of natural endowment and the contingencies of social circumstances as counters in the quest for political and economic advantage"(1972. p.15).

Any existing social system is just if it complies with the principles that would have been agreed upon by rational individuals in this hypothetical original position.

Rawls argues that in the original position rational individuals would accept the following two principles of justice (p.60):

1. Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

2. Social and economic inequalities are to be arranged so that they are both:

a) reasonably expected to be to everyone's advantage, and

b) attached to positions and offices open to all.

In this way Rawls divides the social structure into two parts. The first part concerns basic liberties, which Rawls defines as including political liberty, freedom of speech and assembly, liberty of conscience and freedom of thought, and so on. The undiluted concept of equality of results applies to this first principle, since every citizen is regarded as having an equal right to these liberties. The second principle applies to the distribution of social and economic advantages, and is of relevance to the present discussion. The two principles are arranged in serial order, with the first always taking priority over the second, so that an increase in social or economic advantage cannot be justified if it involves a reduction in the basic liberties of some or all citizens.

Rawls refines the first part of the second principle in the "difference principle". This requires that inequalities in the distribution of social or economic advantages are only permissable if they benefit everyone. This means that the better off (in terms of the "primary goods" - for example, social, intellectual, physical ability etc.) can only receive greater

advantages if this also benefits those who are less well off. In the light of the difference principle Rawls amends his second principle as follows (p.82):

Social and economic inequalities are to be arranged so that they are both:

a) to the greatest benefit of the least advantaged and

b) attached to offices and positions open to all under conditions of fair equality of opportunity.

When applying the two principles of justice one takes the position of certain representative individuals and considers the social system from their point of view. When considering the permissibility of social and economic inequalities the relevant representative individual will belong to the least fortunate group, for only if the inequalities are to the benefit of this group are they acceptable. Rawls states that usually one can define the least fortunate in terms of levels of income and wealth (p.98), but accepts that fixed natural characteristics can also be used to identify relevant positions (p.99). As an example he states that the difference principle will justify the favouring of men in the assignment of basic rights[13] only if this is to the advantage of women and acceptable from their standpoint.

Since one focuses on the position of the relevant representative individual, and requires that any inequality be in the interest of the least fortunate, it is quite possible that the difference principle could favour the adoption of measures which in fact disadvantage other groups in society. However, since the interest of the relevant representative individual has priority, this resulting disadvantage to other group(s) is not unjust, since prior to the redistribution they were benefitting from an advantage which did not also improve the position of the least fortunate.

Rawls' second principle of justice is very different from the equality of opportunity theory. Rawls states that even if this latter theory were to succeed in eliminating the influence of social factors (and he does not believe that this is possible), it would still allow the distribution of wealth and income to be determined by the distribution of natural abilities and talents. The final distribution is thus the result of a natural lottery, which is "arbitrary

[13] Presumably the "basic rights" referred to here are not the same as the "basic liberties" referred to in the first principle of justice.

from a moral perspective"(p.74) and which is no more justifiable than a distribution determined by "historical and social factors".

Having explored the general framework of Rawls' ideas, it is time to consider how they can be applied to the problem in hand, and what their relationship is to the concept of equality of results.

In the original position the individual parties are prevented from knowing about their existing and future disabilities. They will, however, have certain information about the society in which they live. If we are considering the situation in a modern advanced economy, which seems appropriate since we are concerned with the European Community, then the parties will know that their society is one which values productivity, and which is wealthy enough to cover the extra costs employers may face when employing disabled people without this causing excessive disadvantage[14] to other, non-disabled citizens. They will also know that handicapped and disabled people suffer various disadvantages, and that these can be eliminated or reduced by the appropriate organisation of society. The parties, whilst not knowing the extent of their own disabilities, will know that disability can occur at any stage in an individual's life, and that many people are affected before and during their working life.

Faced with this situation a rational individual will be prepared to sacrifice some potential wealth in order to guarantee the option of employment for all those people who are disabled, but nevertheless wish to work and to achieve their self-respect in this way. In so doing they are taking out a kind of insurance against the chance of being or becoming disabled themselves.

It is therefore reasonable to assume that, in relation to disabled people, the agreement reached in the original position would reflect Rawls' second principle of justice, which states that inequalities are only permissable as long as they are to the advantage of the least

[14] The disadvantage will become "excessive" if it means that non-disabled people are thereby made worse off than (compensated) disabled people.

fortunate. Disabled people, as a result of the pervasiveness of disability[15], and the resulting disadvantages which accrue in the labour market and elsewhere, are amongst the most disadvantaged members of society[16]. The present social and economic inequalities do not, on the whole, favour them, whereas inequalities in the form of positive action would, and are therefore permissable. Rawls' theory, based on distributive justice, can therefore provide a basis for positive action in favour of disabled people in the employment sphere. This theory also has the strength of favouring positive action for the group of disabled people, which it was argued earlier was important.

Rawls' Theory of Justice, though, is quite clearly not based on the idea of equality of results - it does, after all, permit an inequality of results in certain circumstances. However, these inequalities are only permissable if they benefit the most disadvantaged; if the most disadvantaged do not benefit then equality is to be opted for since no better distribution is available. For example, under this theory, segregated vocational training for disabled people can only be justified if it actually benefits disabled people; it cannot be justified, according to Rawls' theory, on the grounds that non-disabled trainees are distracted by the presence of disabled trainees, or that it requires modifications to be made to the training centre or course. Rawls' theory also shows why it is permissable to prevent some disabled people from occupying certain posts, since only those who are actually capable of doing the work should be given the position. If incapable people are placed in positions of responsibility then everyone, including the least fortunate, will suffer as productivity decreases or the quality of services deteriorates. It is therefore quite permissable to deny a disabled person access to a job if s/he is incapable of carrying it out efficiently, either as a result of the impairment or because of a lack of (acquirable) skills. The pure equality of results theory does not face up to this problem.

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[15] In the sense that disability usually presents barriers to full participation in many areas of life, and is rarely confined to one particular activity.

[16] For evidence of this see OPCS Surveys of Disability in Great Britain, Report 2: The Financial Circumstances of Disabled Adults Living in Private Households, op.cit., and Report 4: Disabled Adults: services, transport and employment, HMSO, 1989.

Rawls' theory, then, follows the pure equality of results theory only up to a certain point. He is only interested in benefitting the least advantaged, and if any change in the distribution of resources, whether that change be based on equal or unequal distributions, reduces the advantage which flows to the least advantaged group, then it is not to be supported. Rawls offers a more substantive and adapted theory of equality of results.

At this point it seems necessary to comment on why Rawls' second principle of justice justifies positive action in the sphere of employment for disabled people rather than just monetary compensation. If the aim were simply to provide for a certain standard of material well-being then transfer payments would be sufficient and, in certain cases, more economical. People with disabilities are not only disadvantaged financially however, and monetary compensation ignores the disadvantages that stem from non-pecuniary sources.

The Rawlsian concept of self-respect is vital to understand why the second principle of justice ascribes to disabled people what Kavka has called "a right to work as well as a right to a basic welfare level"[17]. It is this concept of self-respect which, when linked to the second principle, provides a justification for positive action for people with disabilities. Rawls describes self-respect as an "essential primary good" (p.107), and as something of importance that any rational person is presumed to want. Self-respect is dependent on one's own perception of oneself which, to a considerable degree, is influenced by other people's perceptions. In modern advanced societies, such as those that make up the European Community, an individual's image and identity is closely tied to his or her employment, income and professional success. To render it more difficult for an individual to obtain (high status) employment, or even to deny an individual this opportunity altogether, is to close one means (perhaps the most important means in our society) of achieving self-respect. Kavka argues in addition that disabled people, because of the pervasiveness of their condition, are frequently disadvantaged with respect to other activities through which self-respect can be attained[18]. It is this element of self-respect then that means that positive action in favour

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[17] Kavka, Gregory S., Disability and the Right to Work, Social Philosophy and Policy, Vol. 9, No. 1, (1992), p.272.

[18] Ibid, p.272.

of disabled people, rather than simply transfer payments, should be used to ensure that the least advantaged (disabled people) benefit from any social or economic inequalities.

It is also necessary to make some comment here on why positive action in favour of disabled people does not breach the second element of the second principle of justice i.e. that offices and positions should be open to all under conditions of fair equality of opportunity. At first sight it would seem that positive action, where it involves favouring a disabled person who, as a result of impairment, is less able or less skilled than a non-disabled person, over a non-disabled person would contradict this requirement, and so Rawls' principle can in fact only be used to justify measures which eliminate the environmentally caused disadvantages associated with disability. It was argued in the previous chapter that such measures were justified by the equality of opportunity concept, and if Rawls' theory takes us no further it is little use for solving the problem at hand. However, Rawls' concept of equality of opportunity differs significantly from that elaborated earlier. It has already been stated that Rawls rejects the version developed previously as allowing the distribution of wealth and income to be determined by the distribution of natural abilities and talents which he regards as the result of a natural lottery and as unjust. Used in this way "Equality of opportunity means an equal chance to leave the less fortunate behind in the personal quest for influence and social positions" (p.106).

Rawls' concept of "fair equality of opportunity" is not this notion of "careers open to talents" (p.83) and it does not lead to a "callous meritocratic society" (p.100).

Rawls comments that the difference principle, of which the concept of "fair equality of opportunity" is part, contains elements of the principle of redress, i.e. that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities should be compensated for. Rawls argues that the difference principle, influenced by this principle of redress, does not lead to a society dominated by social efficiency and technocratic values, but emphasizes also the ability of citizens to appreciate the culture of their society and to take part in its affairs, and, in this way, to ensure that each citizen is able to achieve a sense of his or her own worth. Rawls, recognising that self-respect is a vital "primary good" argues that "the confident sense of their own worth should be sought for the least favoured and this limits the form of hierachcy

and the degrees of inequality that justice permits" (p.107). It is in the light of these comments that Rawls' concept of "fair equality of opportunity" must be judged. Rawls does not necessarily mean that the most able and skilful individual should be given positions or offices when he says that the allocation of these social goods should be determined "under conditions of fair equality of opportunity". Consideration must be given to the first part of the second principle, i.e. that the least advantaged must benefit, to determine if this is the case.

It is now appropriate to apply these comments to the problem of positive action in favour of disabled people. At present disabled people do not have equality of opportunity. They are faced with the double disadvantages caused by a hostile physical and attitudinal environment and impairment. A meritocratic concept of equality of opportunity allows for measures to combat the first kind of disadvantage, but not the second. A Rawlsian concept of equality of opportunity, however, when coupled with the first element of the second principle, allows for measures to compensate for the contingent disadvantage caused by impairment as well. Seen in this light positive action in favour of disabled people is in fact underpinned by the concept of equality. Positive action is an element of equality of opportunity, and it is only by providing such measures that the second principle of justice can be fulfilled. Far from breaching the requirements of the second principle, positive action is necessitated by the principle. It is necessary because without such measures many disabled people will be denied access to the primary good of self-respect. The aim must be to remove the need for positive action; however, because of the inherent nature of impairment this may be an unrealistic aim, or at least only achievable in the very distant future.

The principles of distributive justice, as elaborated by Rawls, finally provide an adequate justification for positive action in the sphere of employment for people with disabilities. These ideas are compatible with the adapted model of disability developed earlier. Furthermore, they are developed within a liberal framework, and are therefore relevant to a discussion of policy within the European Community, and do not have the numerous disadvantages of the pure equality of results theory.

Throughout this chapter references have been made to general problems related to positive action - that innocent third-parties lose out, that certain members of the majority group suffer disproportionately, and that the least deserving benefit. Although the concept of distributive justice provides a justification for positive action in favour of disabled people, it does not deal with these criticisms. These points shall now be considered, and the question of how great a problem they pose shall be addressed.

4. General problems with positive action for disabled people.

4.1 Gains are made at the expense of "innocent third parties".

It is clear that if disabled people are to benefit from positive action, this must, at least at times, be at the expense of other non-disabled individuals who would otherwise have profited from the employment or training opportunities. This seems particularly harsh when the individuals who lose out have not been responsible for previous discriminatory behaviour. However, it is possible to acknowledge this fact, and to nevertheless support positive action. McCrudden does this, stating that it is "regrettable and they [those who lose out] deserve sympathy" (1985. p.90), but still argues that a redistribution is justified. If this were allowed to stand as a reason for not introducing positive action it would mean that the injustice could continue. This is recognised in Rawls' theory in that it focuses on the position of the least advantaged, and accepts that the more fortunate may have to make sacrifices if the position of the worst off is to improve. Indeed, according to Rawls, it would be unjust if these sacrifices were not made. Furthermore, when discussing the allocation of limited resources, such as (desirable) employment opportunities it is clear that if a redistribution is to occur some individuals must lose out for others to gain.

Furthermore, those who do lose out are not being told that they are inferior or incompetent in some way, as disabled people often are when they are rejected by employers, and this is a significant difference.

It is therefore possible to acknowledge, regretfully, that certain non-disabled people must lose out if a policy of positive action for disabled people is adopted, whilst still supporting the adoption of such a policy.

4.2 Young, working class males suffer most under a policy of positive action for minority groups.

This criticism is often made of positive action policies in favour of women and members of ethnic minorities. However, it is not clear that this is necessarily true with respect to people with disabilities.

Where disability occurs at a later stage in life there will often be no competition between the disabled worker and a young non-disabled person.

In addition, disability can often limit the choice of jobs available to an individual. For those with a physical disability physical labour (i.e. primarily unskilled work) will often be impossible. Where training or rehabilitation occurs it aims to prepare disabled people for skilled and often sedentary work. In the case of those with mental disabilities though, unskilled and repetitive work will often be more suitable.

It cannot therefore be said with certainty that young white working class males will lose out disproportionately from a policy of positive action directed at disabled people. More research into the constitution and job aspirations / opportunities of the disabled population in order to discover just who disabled people are competing with for jobs is necessary to establish if certain groups within the non-disabled population suffer disproportionately as a result of positive action in favour of people with disabilities.

4.3 Benefits accrue to the least disadvantaged of the minority group.

It is argued that the least disadvantaged of the minority group who have suffered to a lesser degree from discrimination and deprivation, and who are therefore in a better position to compete for positions, will gain disproportionately from such a policy. This is a valid criticism of a justification based on distributive justice (although not of a utilitarian justification, since if the greatest social utility accrues from benefitting this section of the minority group, then the policy can be justified). However, it may not present a significant

a problem in relation to positive action in favour of disabled people as it does for other groups, for any programme can be designed in such a way as to try and ensure that disabled people who are most disadvantaged are also most likely to benefit. While it is often not easy to quickly identify women and members of ethnic minorities who are most disadvantaged, this is not so in the case of disability. The level of disadvantage and deprivation generally tends to increase with the intensity of the impairment. People who are more impaired tend to have lower incomes, higher costs, and less chance of being in employment[19]. Any positive action programme could be geared towards assisting this group of disabled people, and this would be relatively easy to organise. This would help to meet the objection that the least disadvantaged benefit disproportionately to a significant degree.

In addition to these three possible criticisms, there are also the arguments that positive action fails to provide effective role models and reinforces stereotypes, and that it causes social tension. These points have been dealt with earlier in the section covering social utility. In both cases it was concluded that the criticisms were not wholly watertight and that, at least with respect to the former argument, there was a chance that exactly the reverse and beneficial effect would result from positive action.

Against these criticisms the claim can be made in favour of positive action that it helps to prevent inequalities and disadvantages developing in the future. As Lustgarten (1980. p.24) says:

"an ounce of prevention is not merely worth a pound of cure, it is much less expensive".

This helps to justify positive action, and should be weighed against the possible disadvantages.

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[19] OPCS Surveys of Disability in Great Britain, Reports 2 and 4 op.cit.

Conclusion.

The purpose of this chapter has been to discuss the theoretical justifications for positive action. The adapted model of disability developed in the previous chapter made it clear that, even in a situation in which discrimination does not occur, disabled people will not always be able to profit from the equality of opportunity because of the reduction in functional capacity which can result from impairment. Positive action involves measures favouring disabled people which take into account this reduced capacity, and so ensures that both elements of the adapted model are addressed. It also addresses the disadvantage that disabled people experience as a result of prior discrimination.

Three broad justifications for positive action were considered. It was argued that positive action as compensation for previous discrimination directed either at individuals or groups was the weakest justification. It has the major flaw of overlooking the disadvantage which can be caused by impairment, and so is incompatible with the adapted model of disability. There were also a number of other weaknesses such as the fact that newly disabled people who will have never experienced discrimination could not merit positive action under this theory, and the difficulty of actually identifying the appropriate beneficiaries. This justification was therefore wholly unacceptable.

The second justification considered was utilitarian. A number of areas where, it was argued, a utility could accrue to society as a result of positive action directed at disabled people were analsyed. In all cases it was found the arguments were inconclusive or insufficient to support the introduction of positive action. Although the arguments in favour of this social utility justification may be sound in theory it is not possible to show that demonstrable benefits will result to society as a whole from positive action favouring disabled people. Therefore this justification can also not be relied upon.

Finally a satisfactory justification was found in the principles of distributive justice. Here the focus is on the less advantaged members of society - which naturally includes people with disabilities - and the argument is that the state should intervene to ensure that resources, including (desirable) jobs, are redistributed in their favour. In this way society will become more just. The concern is with the result of this allocation, rather than the

allocation itself; however pure equality of results cannot be the aim in a liberal system - rather, it was argued that a distribution based on Rawls' principles of social justice was appropriate. The relevant principle being that inequalities in the distribution of social and economic advantages are only permissable if they are to the benefit of the least advantaged. This provides a justification for positive action in favour of disabled people.

A number of general arguments against positive action were considered, and it was argued that none of them were strong enough to prevent positive action in favour of disabled people being introduced.

The concern in this chapter has not been with the substantive content of a policy to promote the employment of people with disabilities - this shall be addressed in the following chapters. The aim was simply to find a justification for such measures, and this has been done within a liberal framework of the principles of distributive justice, which is capable of encompassing both aspects of the adapted model of disability. In chapter five the desirability of introducing a specific form of positive action, namely preferential hiring (a quota system) in favour of disabled people at the European Community level shall be discussed.

SECTION II

COMMUNITY INITIATIVES THUS FAR

DISABILITY POLICY WITHIN THE EUROPEAN COMMUNITY 1974-1993.

National disability policies within the Member States of the European Community contain various measures designed to promote the economic integration of people with disabilities. These include, amongst other things, the provision of specialised vocational training, financial incentives for, and obligations imposed upon employers, and the supply of adapted equipment to disabled workers. Despite this the employment situation of disabled people is extremely poor and disabled people are presented with many additional problems to those faced by non-disabled people when attempting to find employment. Accurate statistics do not exist, but it is certain that disabled people are much more likely to remain unemployed for a longer period than other, non-disabled, worker seekers.

To this myriad of national policies a new dimension is now being added: that of the European Community. Steps are being taken to formulate a Community policy on the economic and social integration of disabled people and here too employment is a highly important element. The purpose of this chapter is to provide an introduction to these Community initiatives.

The developments which have occurred in Community policy on the vocational training of disabled people shall be considered, and a critical assessment of the initiatives to date shall be made. It will be argued that although the Community began in a very tentative manner, focusing specifically on individual model activities within action programmes, it has now reached the stage where it is ready to embark on the production of a number of policy guidelines on disability related issues.

1.The Initial[1] Community Action Programme for the Vocational Rehabilitation of Handicapped Persons (1974-1979)[2]

The first major involvement by the European Community in the area of vocational integration of disabled people occurred as a result of a Council Resolution of 21 January 1974 which established "a social action programme"[3] (although the European Social Fund had already provided limited assistance to rehabilitation centres for disabled people). The aims of this programme were to generally encourage: "full and better employment, the improvement of living and working conditions, and increased involvement of management and labour in the economic and social decisions of the Community".

The Council recognised that within this general framework specific measures would have to be taken to ensure that more vulnerable groups in society, including that of disabled people, were also able to share in the expected benefits. The Resolution therefore called for the creation of an action programme to encourage the "vocational rehabilitation of handicapped persons". The Resolution, however, only provided for an action programme of very limited scope, referring simply to the promotion of pilot rehabilitation schemes and sheltered workshops (although sheltered workshops were not mentioned in the action programme that was subsequently developed) and a comparative study of legal provisions relating to rehabilitation within Member States. This prompted the European Parliament, as early as March 1974, to request the Commission to expand the area of its involvement and

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[1] To date four Community action programmes in favour of disabled people have been produced. These are, somewhat confusingly, generally referred to as:
The Initial Action Programme(1974-1979)
The First Action Programme (1983-1988)
The Helios (Second) Action Programme (1988-1991).
The Helios II (Third) Action Programme (1993-1996).
These terms have also been used in this paper.

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

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

"submit proposals for solving all the social and rehabilitation problems faced by handicapped persons"[4].

The European Parliament has continued to make requests or propose amendments broadening the scope of proposals in the disability field submitted to it. These amendments would, if adopted, frequently have a major impact on the measure or the way that it is implemented, and have almost always been rejected by the Commission. The Parliament's opinions have nevertheless exerted a constant source of pressure on the Commission to expand the scope of its actions.

The Action Programme was established by a Council Resolution in June 1974 with the specific aim of improving the opportunities for vocational rehabilitation within the Community. It emphasized that all members of society: "public authorities, labour and management, undertakings, local populations, and especially handicapped persons"[5], had a role to play in this process, although the Programme in fact made very little effort to encourage such a wide involvement.

The Programme outlined three areas of specific action. Firstly a **European Network of Rehabilitation Centres** was to be established. This was to consist of some of the best rehabilitation centres within the Community, and was to encourage the exchange of information and so promote the spread of good practice.

This network, set up in October 1975, continued to exist and thrive until recently (the Second Action Programme (1988-1991) expanded the Network from 38 to 50 centres). In the period up to 1979 a number of international conferences were held which were attended by those working at the centres, and it is certain that, both then and subsequently, a great deal of information about good rehabilitation practices was disseminated. Undoubtedly one reason for the success of the Network was that it was established for so long, and it was a good example of what can be achieved at this level through European cooperation.

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[4] OJ No. C 23/17 8/3/74.

[5] Council Resolution of 27 June 1974, op.cit., Section II.

Secondly a number of **short-term demonstration projects** were funded by the European Social Fund[6] which aimed at improving the quality of vocational training facilities available. The 1979 Commission Report on the Action Programme states that these projects were so successful as to prompt some Member States to improve the quality of rehabilitation services provided throughout the country, and the "Community facilitated the implementation of national policies, sometimes to a considerable degree"[7].

These claims seem rather excessive and are not really supported by the Commission's Report; they also detract from the more modest but genuine successes of the Network of Rehabilitation Centres.

The Programme also provided for the **dissemination of information** gained as a result of the short-term projects so that new rehabilitation methods could be applied on a more permanent basis. In fact many of the pilot projects were extended so that their work could continue, and the Commission regarded this as satisfying the third aim of the Programme.

Finally the Programme provided for further study and research, and an information campaign directed at the general public. Whilst some research was carried out, no steps were taken to organise an information campaign.

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[6] This provides a partial explanation as to why sheltered workshops were not referred to in the First Action Programme as was originally envisaged in the Council Resolution of 21 January 1974. The European Social Fund (ESF) only provides grants for vocational training projects which lead to open employment.
The Commission, which administers the Fund, does not accept that sheltered workshops satisfy this criteria, and therefore no such workshops could receive funding and become demonstration projects in this action programme (or, indeed, in subsequent programmes).
Armand Maron, the present director of the Helios II (Third) Action Programme, whilst working within the Belgium administration, argued that in some cases training in sheltered workshops could lead to open employment and in these cases the workshops should be eligible for ESF Funding. It was then agreed that the last year of training in such workshops could receive funding; however, this policy was reversed some years ago (based on information given by Mr. Maron in an interview).
The strict criteria as to eligibility for ESF funding created problems in the subsequent First Action Programme, when grants from the ESF were also used to support local level projects. As a result of these problems the Helios Action Programmes do not rely on support from the ESF at all.

[7] Com.(79) 572 Final, Para 22.1c.

This initial Community action programme was an important step which had to be taken before the Community could attempt more ambitious programmes covering the vocational integration of disabled people. It did not amount to a policy, only covering the three limited project areas mentioned above, and one can understand the European Parliament's request for increased action. Instead, the Programme had limited aims, and achieved limited success; other than the general confidence to tackle the problem, one of its most important results was the Network of Rehabilitation Centres, which made a significant contribution to rehabilitation methods within the centres which were members.

The wording of the Programme bears the mark of the 1970's - the Programme speaks of the need to "help these people," rather than to "enable" disabled people to help themselves. Furthermore, no reference is made to the need to consult disabled people on a wide scale, and encourage their participation in the formulation and implementation of policy. Modern Community action programmes (from the mid-1980s) however adopt different terminology and mention the need for consultation. This reflects a change in attitude that has occurred not only within the Commission, but also generally as it has been recognised that disabled people have an important role to play in formulating policies aimed at meeting their special needs, and as disabled people have themselves become more vocal in expressing their aspirations.

The Commission did not, in 1979, propose a new action programme. Instead it supported the continuation of the Network of Rehabilitation Centres and financial support for the demonstration projects. It was not until 1981, with the United Nation's International Year of Disabled Persons providing the main incentive, that a renewed effort was made to encourage the vocational integration of disabled people.

2. The First Community Action Programme on the Social Integration of Handicapped People[8] (1983-1988).

The United Nations established five principal objectives for the IY of DP, and declared the period 1983-1992 to be a "follow-up" decade in which progress towards achieving these objectives should be made[9].

The European Community responded by adopting a First Action Programme to promote "the social integration of disabled people". This took the form of a non-legally binding Council Resolution[10] and a Communication from the Commission which contained the "framework" of the programme. The actual Action Programme began in 1983, and was scheduled to last four years; in fact it was extended into the first few months of 1988 until the Helios (Second) Action Programme came into effect.

It was originally intended that the Action Programme would encompass the whole area of social integration - reference was made in the framework to, amongst other things, housing, mobility and access, and the encouragement of non-governmental organisations of and for disabled people. This led the House of Lords Select Committee on the European Communities[11] to comment that the Programme consisted of a "collection of diverse

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[8] OJ No. C 347/1 31/12/81.

[9] UN objectives:
-to help disabled people in their physical and psychological adjustment to society.
-to promote efforts to provide disabled persons proper assistance, training, care guidance, and work opportunities for full integration into society.
-to encourage studies and research projects designed to facilitate the participation of disabled persons in daily life.
-to educate and inform the public of the rights of disabled persons to participate fully in economic, social and political aspects of life.
-to promote effective measures for the prevention of disability and the rehabilitation of disabled people.

[10] The Action Programme was in fact formally adopted by the "Council of Representatives of the Governments of the Member States". This was in response to Danish concerns that a number of the activities contained in the Programme (although not those relating to employment and vocational training) fell outside of the scope of the Treaty of Rome. Patrick Daunt, Meeting Disability, A European Response, Cassell, 1991, p.14.

[11] House of Lords Select Committee on the European Communities, Session 1987-88, 13th Report, Integration of Disabled People, p.7, para.17.

activities at different stages of their development". In fact, the way in which the Programme developed ensured that economic integration, in the form of action to improve employment, and particularly training/rehabilitation opportunities, was once again the main concern.

The basic aim of the Action Programme was to foster "more concerted and more imaginative action at local level"[12] rather than for the Community itself to develop a policy on social integration. The Commission argued that this was because many local authorities have a large degree of autonomy in, or responsibility for, the areas most directly related to the social integration of disabled people, and it is at local level that the participation of those directly concerned - non-governmental organisations, employees, trade unions, training institutions, and disabled people - can most easily be encouraged. The Community saw its own role as encouraging this increased local-level involvement; it hoped to do this by building on the areas in which it was already active - notably the Network of Rehabilitation Centres - but also by expanding into other limited areas.

The Programme itself consisted of three parts[13]. Firstly, the Community wished to improve the **information facilities** available to those concerned with disability related questions. Work was begun on the "Handynet" project, which is a "long-term action aimed at establishing a computerized multilingual information system on disability questions throughout the European Community"[14].

Progress towards establishing this complicated database has been slow, and the first module on technical equipment was only launched in 1991.

Secondly the Community wished to encourage **technical cooperation**, by taking actions to "promote and support innovation, the exchange of experiences and the dissemination of good practice"[15]. This took the form of establishing a network of model

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[12] Communication from the Commission to the Council of 4 November 1981. "The Social Integration of Disabled People - A Framework for the Development of Community Action". OJ No. C 347/14 31/12/81. Section IV. A New Community Framework of Activity. Para. 13.

[13] COM(87) 342 final.

[14] Ibid. Part II, p. 2, para. 28.

[15] Ibid, Part II, p. 1, para 1(b).

district projects which would coordinate action at local level; expanding on the work of the Network of Rehabilitation Centres; and supporting housing projects. The first two of these formed part of the Community measures to promote the economic integration of disabled people.

Whilst it was originally intended that the district projects should encompass all areas of the social integration of disabled people, i.e. transport, access, mobility, income, education, as well as vocational training and employment, it was decided before the network was set up that the projects would have to include a "core" vocational training element in order to be able to attract funding from the European Social Fund (which provided 50% of the finances; the other 50% being provided by national authorities). As a result the district projects were concerned primarily with this one element of social integration, rather than the coordination of all the relevant areas as was originally intended. This simple reality, dictated by the funding requirements of the ESF, was unfortunately not recognised in the Commission Report on the Action Programme produced in 1987. Its assessment of the success of the Network in this area can therefore be questioned.

The form of the funding also created severe problems for many of the district projects. In the 1981 Framework the Commission stated that it wanted to concentrate on "actions which can be maintained in the long term within the limits of resources normally available"[16], and indeed the ability of successful projects to continue functioning after the Action Programme has ceased must be regarded as one of the criteria by which the programme is judged. In fact some projects were forced to close despite the fact that they were providing a valuable service when the European funding was withdrawn in 1988. Of those that managed to continue, many had to spend a disproportionate amount of time fighting for funds[17].

A second very important weakness in the Network was its organisational structure. At the European level a Liaison Group on Disability was created. This was made up of delegates from each Member State who were to report to the Commission on the

[16] OJ No. C 347/14 31/12/81. p. 17, para. 16.

[17] Evidence of Lambeth ACCORD to the House of Lords Select Committee, p. 3, para. 2.6.2.

implementation of the Action Programme as a whole in their home country, and to convey information on Community initiatives to interested national organisations and groups. In fact the Liaison Group was relatively ineffective, and the delegates, or at least those from the UK, were not encouraged to become involved[18]. Patrick Daunt, the former head of the Commission's Bureau for Action in Favour of Disabled People, acknowledged these weaknesses, and in fact his own Bureau, which was supposed to exercise general control and direction over the Programme, was also unable to fulfil its role since it had insufficient staff[19]. The limited number of Commission personnel employed within the Bureau (now Division) has continued to be a problem, and has hampered the formulation of policy.

As this central element of control was so weak a great deal depended upon national organisational structures. The programme provided for Member States to establish a National Steering Group, but the exact terms of reference for this Group were left to individual states. Naturally these groups were of different qualities; in the Netherlands, for example, the National Steering Group provided assistance and advice to the district projects[20], whilst in the UK the Steering Group was unclear about its role, and failed to provide this support.

The exchange of information between the district projects was meant to be coordinated by the "Interact Team" established by the Commission. This group produced the Network newsletter[21] and organised conferences and seminars for project leaders, project evaluators and experts, as well as the annual conference attended by representatives of all the district projects.

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[18] Ibid. House of Lords Select Committee Report, Part 3 - Views of Witnesses. p. 11, para. 40.

[19] Ibid. Part 4, Opinion of the Committee, p. 17, para. 76.

[20] This information is based on material gathered in an interview with Claudine van Lierde. Ms. van Lierde was a member of the Interact Team (see below) and was until recently the principal expert for the Networks of Local Model Activities in the Helios Programme.

[21] 10 000 copies were produced three times a year, in all Community languages. COM(87) 341 final. Part II, p. 5, para. 14.

In its 1987 Report the Commission claimed that Interact gave "advice, encouragement, contacts and technical information" to the projects, and this "concerted effort at Community level has greatly enriched the lives of the projects"[22].

The House of Lords Select Committee gained a totally different impression of the contribution made by Interact. The Committee itself had great difficulty in gaining information about the provisions made for disabled people in other Member States, even from those groups and organisations which had been involved in the Action Programme, received the Interact newsletter and attended the conferences. The newsletter did not provide up-to-date information and nor was it of interest to "grass roots" organisations, whilst at least one of the conferences organised by Interact was in a venue unsuitable for some disabled people[23].

It is clear, therefore, that there were weaknesses at all levels of the organisational structure of the Network, and that many of the potential benefits of the involvement of the European Community, in terms of coordination and information about practices in other Member States, were lost as a result.

Information was nevertheless disseminated, and elements of the district projects were transferred to other areas as a result of the study-visits funded by the Community, whereby professionals working at the projects were able to visit other projects within the network. It was this element, as well as the good work done at many of the individual projects, that were the main positive results of the network of district projects. Progress was therefore made in the area of the vocational rehabilitation of disabled people at the local level of the Network members; however, this progress may have been greater if the Network had been structured differently. The Commission in fact recognised many of these structural faults, and tried to avoid them in the subsequent Helios Action Programmes.

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[22] COM(87) 342 final. Part II, p. 5, para. 14.

[23] House of Lords Select Committee, op. cit., Views of Witnesses, p. 9, para 21.

Whilst the district projects were undoubtedly the "flagship"[24] of the Programme, the expansion of the role of the Network of Rehabilitation Centres was also an important development in relation to the aim of improving "technical cooperation".

The Commission wished to build on the success of the Network by expanding the number of rehabilitation centres and interested institutions and associations which had access to the information issued by the Network. This was done by establishing an outer network to which, in theory, all rehabilitation centres operating in the Community were to belong and to which the Network members were to be responsible for sending out and receiving information. Professionals from this outer network were also to be encouraged to take part in the increased programme of study-visits, training and courses, which were funded by the Commission.

Although the aim was for the outer network to link all the establishments specialising in the vocational training of disabled people, and to encourage a useful exchange of information between these centres and the Commission and amongst the centres themselves, this was not in fact realised. The outer network continued to exist under the Helios I Action Programme and the aim continued to be the promotion of the exchange of information; however, despite encouragement from the Helios Team to develop better contacts, it was largely a matter of the domestic circumstances and situations in each Member State which determined whether this outer network functioned adequately, and one cannot claim that all rehabilitation centres were sufficiently aware of the actions of the European Community and were able to benefit from the Action Programme[25].

The Network also established permanent working groups on various topics during this period, and, the Commission claims, was able to contribute directly to the formation of Community policy through the participation in workshops and the production of reports.

The European Community has therefore been able to contribute, through the encouragement of cooperation and the exchange of information, to the quality of

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[24] Patrick Daunt, in evidence to the House of Lords Select Committee.

[25] Based on information obtained in an interview with Armand Maron of the Helios Team.

rehabilitation provided in a number of individual centres which have had the benefit of membership of the Network.

"Technical cooperation" was only one important aspect of the Action Programme; a further key element related to the **"development of policy initiatives"**[26]. The Framework referred to the establishment of guidelines for action in Member States by the Commission on important issues related to integration. These were to be prepared as a result of "a series of studies and conferences"[27].

Whilst some research was done on matters relating to the physical environment, and financial benefits and incomes of disabled people, the only topic on which a guideline was produced was the employment of disabled people.

2.1 The Council Recommendation and Guideline on the Employment of Disabled People in the European Community[28].

In drawing up the Recommendation the Community institutions set themselves impressive targets. Both the Memorandum of the Commission[29], and the actual Council Recommendation referred to three basic principles which were to form the basis of the policy[30]:

" - that disabled people have the same right as all other workers to equal opportunity in training and employment;

- that positive and coherent employment policies for disabled people should be established throughout the Community;

- that these policies should take account of the aspiration of disabled people for a fully active and independent life".

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[26] Framework of the First Action Programme.

[27] Ibid.

[28] Council Recommendation of 24 July 1986. OJ No. L 225/43 12/8/86.

[29] COM(88) 9 Final 24/1/86.

[30] Ibid., p. 5, para. II(i).

The Commission's Memorandum further stated that the Recommendation should "be concrete and practical and not restricted to vague generalities"[31].

These principles and targets, however, are not reflected in the Recommendation itself, which can be criticised exactly on the grounds that it is not based on these principles, and is far too vague and imprecise.

The main text of the Recommendation refers to the need to promote "fair opportunities for disabled people", rather than "equality of opportunity" (which is only referred to in the preamble). Whilst the latter term is a familiar concept, at least in British law, where it is referred to in the Sex Discrimination Act 1975[32] and Race Relations Act 1976[33], it is unclear what is meant by the former. It may be a synonym for 'equal opportunities', or involve greater or lesser rights. In fact the phrase is representative of the vagueness and imprecision of the Recommendation. Few Member States actually refer to "equal opportunities" in their legislation relating to disabled people, and the Community, by adopting this term in its Recommendation, could have set an important precedent.

The Commission further stated that the Recommendation should "deal with all the principal issues in the employment field (such as training, social security and environment)"[34]. This broad approach is needed to establish a coherent and comprehensive policy; yet no specific mention is made of the latter two elements in the Recommendation.

The European Parliament meanwhile criticised the Recommendation for being both "unambitious and too general," and for failing to give precise guidelines on the establishment of a quota system[35]. The amendment proposed by the Parliament, which recommended that Member States should adopt a well-defined quota based on the reservation of 5% of positions for disabled workers applying to both public and private undertakings having more

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[31] Ibid., p. 5, para. II(iii).

[32] Section 53(1).

[33] Section 43(b).

[34] COM(88) 9 final op.cit., p. 5, para. II(ii).

[35] OJ No. C 148/95 16/6/86, p. 98, para. 4.

than 25 employees, was rejected by the Council in favour of a vague generalised proposal which Member States could easily justify ignoring (for further discussion see chapter five).

The Commission was clearly able to identify the dangers which a Community measure relating to the employment of disabled people should avoid, but the Council seems to have totally ignored these warnings despite the very clear message it was sent by the European Parliament that the Recommendation was inadequate.

Attached to the Recommendation was a "guideline framework for positive action to promote the employment and vocational training of disabled people", which "Member States should consider in drawing up a guide or code of good practice". This guideline, which in substantially the same form was referred to as a Model Code in the draft Recommendation, is relatively precise and does define in clear terms what actions Member States should consider taking. It is therefore to be regretted that elements of the guideline were not incorporated within the Recommendation, since they would have added to its substance (although the Recommendation, because of its nature, would have remained a very weak document).

It is to be further regretted that the Council chose to actually weaken the link between the Recommendation and the Code by referring to it as a guideline. In one sense this point is academic, since neither a "Code" nor a "Guideline" attached to a Recommendation could have the effect of obliging Member States to act. However, the move is of symbolic importance, as the Commission critically stated, because it appeared "to reflect an unwillingness in Member States to take the problems of the coordination seriously or to face up to the fact that employment measures for disabled people will not work unless an appropriate living environment is assured"[36].

Generally, the Council's attitude towards the Recommendation was negative, and Patrick Daunt in fact argues that its members did all they could to weaken the measure's content, particularly with regard to quota systems[37].

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[36] COM(87)342 Final Report. p. 3, para. 6.

[37] Daunt, op.cit.,p.23.

Perhaps the greatest weakness with the Recommendation is that it is precisely that - a mere recommendation, which, by its very nature is not binding and can confer no obligations or rights. The Commission argued that a Recommendation was the most appropriate form since, given the legislative, structural and cultural differences that exist between the various Member States in relation to policies on disability, only a recommendation could strike a "balance between effective common endeavour and unrealistic uniformity," and that a "full harmonization in this field" was undesirable[38]. Although it is clearly true that important differences which have an effect on the success of measures to promote the vocational integration of disabled people do exist between the Member States, it does not necessarily mean that Community legislation is inappropriate. Indeed, this argument now seems to have been recognised by the Commission, and it has introduced the policy statement on mobility and transport in the form of a draft directive (for further discussion see chapter seven).

Despite these obvious weaknesses with the Recommendation the Council felt able to conclude in 1989, following a Commission report on the application of the Recommendation, that it -

"a) has contributed to a review of national measures relating to the employment and vocational training of disabled people which have been brought into line with the common objectives set out in the Recommendation;

b) has offered a Community reference framework for national measures which were being prepared when it was adopted;

c) has encouraged the introduction of new measures in accordance with the spirit of the Recommendation"[39].

The Commission report in fact provides very little empirical evidence to substantiate even these modest claims and it is hard to see on what basis they were made. Only a few Member States have a Code of Good Practice (although some others are considering adopting such a code) and, at least in the case of the United Kingdom, this was adopted

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[38] COM(88)9 Final. p. 5, para. 10.

[39] OJ No. C 173/1 6/7/89.

before the Recommendation was produced[40]. Whilst certain Member States have enacted new legislation relating to the employment of disabled people in this period (notably France), the Commission produces no evidence to show that the Council Recommendation had any significant impact on the formulation of that legislation. The Council recognised in its conclusion that disabled people still face difficulties in gaining access to adequate training and employment and encouraged Member States to increase their efforts to promote the vocational integration of disabled people. A more realistic assessment of the effect of the Recommendation seems to be that of Patrick Daunt who stated that "In some ways the outcome of [the] employment initiative ... was disappointing"[41].

The Council furthermore invited the Commission to submit additional proposals in the field covered by the Recommendation. The Commission has, thus far, not responded to this invitation other than by introducing the draft directive on mobility and transport, but it is to be hoped that it will do so at some stage in the future.

Nevertheless the Recommendation must be regarded as a sign that progress is being made. It is the first policy instrument devoted solely to the issue of the employment of disabled workers, and, as stated by one group representing disabled people:

"Perhaps it shows that the 'political will' exists to recognise disabled people as potentially active citizens which is a major step forward in the thinking of some Member States"[42].

The achievements of the First Action Programme, just like the initial Action Programme, were limited; there are however a number of important differences between the two programmes which show that the Commission's attitude towards measures favouring the integration of disabled people was developing. Firstly, the First Action Programme was much more ambitious than its predecessor in that it aimed to tackle all the issues related to

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[40] It does however seem as if the Recommendation did encourage the adoption of such a Code in Belgium. Daunt, op.cit., p.68.

[41] Ibid, p.23.

[42] Lambeth ACCORD. Minutes of Evidence to the House of Lords Select Committee, p. 2, para. 2.3.2.

social integration and not just employment - this approach has also been adopted, somewhat more successfully, in the Helios Action Programmes.

Secondly, while most of the emphasis within the programme was placed on local projects and centres, the need to produce policy guidelines was also recognised. Whilst local projects continue to be of great importance in the Helios Programme, effort is also being directed into producing further policy guidelines. In this manner a Community policy is gradually being developed on the integration of disabled people.

The two earlier programmes are similar, though, in that there was a marked reluctance to rely on legislation. In this sense the Helios Action Programmes and proposed policy guidelines mark a significant step forwards.

The Council has also referred specifically to actions needed to improve the employment and training prospects of disabled people in its Resolution of 22 December 1986[43] which created a general action programme on employment growth. Furthermore the Resolution refers to the development of "more adaptable patterns of work" and the removal of obstacles to part-time and temporary work and job-sharing[44], all of which are of interest to many disabled workers.

This is a positive move as it shows that the Community is considering, to a limited extent, its obligations towards, and the needs of, disabled people when formulating its general policy on employment; the Resolution, however, only makes brief reference to restricted areas relating to the employment and training of disabled people.

[43] OJ No. C 340/2 31/12/86. Section II paras. f/g, and Section III, para. a.

[44] Ibid., Section II, para. e.

3. The Helios[45] I (Second) Community Action Programme for Disabled People[46] (1988-1991).

The Helios Community Action Programme was adopted in April 1988 and lasted from 1988 to 1991. To ensure that no momentum was lost it was launched before a final assessment of the First Action Programme had been made. The Commission however attempted to avoid some of the mistakes which had been made in the previous programme, particularly in relation to the funding of the local district projects, and extended the scope of the Programme to cover an area far wider than economic and vocational integration (although the First Action Programme was not, initially, aimed primarily at this area). It would have been desirable to have had a full assessment of the First Action Programme before launching the second, but the Commission was quite right in claiming that to wait for such a Report would have led to a damaging break in its initiatives.

It was initially proposed that the Helios Action Programme should consist of two Council Decisions: one aimed at promoting vocational rehabilitation and economic integration, and based on Article 128 of the EEC Treaty, and one aimed at promoting social integration and independent living, based on Article 235. The Decision based on Article 128 would then have only required majority support in the Council to be adopted, whilst the Decision based on Article 235 would have needed unanimity.

Doubt has been expressed as to whether Article 128, which gives the Council power to "lay down general principles for implementing a common vocational training policy"[47], could have provided a sufficient legal basis for the adoption of the draft proposal on the vocational rehabilitation and economic integration of disabled people, since the proposal covered a wide area which may have gone beyond the scope of the article in question[48].

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[45] Handicapped People in the European Community Living Independently in an Open Society.

[46] OJ No. L 104/38 23/4/88.

[47] For further discussion of the scope for introducing legislation given by Article 128 and the changes made by the "Maastricht" Agreements in this field see chapter six.

[48] Members of the House of Lords Select Committee on the European Community raised this point. See generally the House of Lords Select Committee Report op. cit.

The proposal was never challenged on this basis, however, since it was decided to merge the two proposals on economic and social integration in order to form a more coherent and unitary action programme, and to base the new decision on both Articles 128 and 235.

Article 235 had initially been referred to as the legal basis for only the proposed decision on social integration and independent living of disabled people. This Article provides the legal basis to take action to achieve "one of the objectives of the Community" where no more specific power is provided in the Treaty. The social integration of disabled people is not a specific Treaty objective (in that it is not set out in Article 2 of the Treaty) but the Commission argued that it came within the general objective of "raising of the standard of living"[49]. The proposal itself covered a wide area, and the House of Lords Select Committee had doubts as to whether the European Community had competence to legislate in such a broad field[50].

The Community's approach, however, both in deciding to merge the two Decisions to form one coherent action programme, and in attempting to tackle such a wide area as social integration and independent living, can be justified. The two Decisions complemented each other and were aimed at the same group of people so that it would have been illogical to have kept them separate. The merged Decision, moreover, based on both Articles 128 and 235, had a stronger legal standing than the two separate proposals, at least in relation to the area of the vocational rehabilitation and economic integration, as Article 235 provided additional justification for this element of the Decision. Furthermore, the Commission was quite right in recognising that economic integration cannot succeed without moves to encourage social integration. It can be argued, therefore, that Article 235 does provide the Community with the competence to legislate on the economic and social integration of disabled people, since it is only by adopting such a broad view of the problem that substantial progress towards raising the standard of living for disabled European citizens can be made.

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[49] Article 2, EEC Treaty.

[50] House of Lords Select Committee Report, op. cit. p. 16, para. 70.

This fact has been recognised in a number of earlier Community measures where reference was made to the need to consider the whole "environment" in which disabled people live when attempting to promote economic integration[51], but the Helios Action Programme was the first measure to really begin to tackle this problem[52]. This fact shows that the Commission was becoming more aware of the spectrum of problems faced by disabled people and was attempting to formulate a policy that would deal with all their needs. However it is very difficult and time-consuming to draw up and implement successfully a policy as ambitious as this, and the Commission showed itself to be unaware of this by stating that four years was:

"sufficient to ensure significant advances towards a common European approach to all major policy issues raised by disability."[53]

This confidence, especially in the light of the Community's previous mixed achievements in this area, could not be justified, and shows that the Commission had still not grasped the complexities of the situation with which it was attempting to deal.

The statement clearly demonstrates, however, that the Commission does believe that despite the different situations in the Member States, there are enough similarities and common aims for a "common European approach ... to policy issues" to be developed. The aim of the Commission, under both the initial Helios Programme and its successor, appears to be to address the chief issues and to contribute to the formulation of a policy which is flexible enough to be applied in the Member States.

Before going on to consider the structure of the actual Programme, one last point must be made about its form. It was expressly stated in the preamble to this Action Programme, unlike previous Community Programmes and initiatives in this area, that the Programme was "designed to complement action taken at national level," and that the "main

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[51] For example The Council Recommendation on the Employment of Disabled People, op.cit., p. 43.

[52] The First Action Programme failed in this aim.
The decision establishing the Helios Action Programme states, at page 39:"in the field of disability, training and employment, measures will be ineffective unless they are complemented by measures to ensure the necessary support for an independent way of life".

[53] COM(87) 342 Final, p. 5, para. 4.

responsibility for the social integration and independent way of life of handicapped persons lies with the Member States"[54]. No doubt one reason that the Commission felt it was necessary to insert these statements was to assure Member States that their freedom to formulate their own policies would not be lost simply because the Community had also legislated in this area (The First Action Programme, in contrast, was based on a Council Resolution, which is not a legally binding measure, and, as already stated, the policy guideline on the employment of disabled people was a mere recommendation). Indeed, the British Government argued in favour of the insertion of such a recital in order to limit any extension of Community competence in this area[55], and the unanimous support necessary to pass the Programme may not have been forthcoming if this had not been done.

As already stated, the first Helios Action Programme attempted to cover a very wide area. Its aims, as expressed in Article 1 of the Decision, were "to promote vocational training and rehabilitation, economic integration, social integration and an independent way of life for disabled people".

These objectives were to be achieved in three basic ways as outlined in the first Helios magazine introducing the Programme. Firstly, the Programme was "to provide a platform from which the Commission [could] encourage and initiate **policy developments**, which [would] take the form of proposals in various key areas"[56] related to social and economic integration. Under the Second Action Programme the Commission planned to continue the preparation of, and ultimately to formulate policy guidelines on both the physical environment and incomes and benefits of disabled people. In the course of the Programme guidelines on mobility[57], access to public buildings, school integration, and the impact of new technology were to have been produced. In fact the draft directive on the

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[54] A similar statement is included in the preamble to the Helios II decision.

[55] House of Lords Select Committee Report, op.cit., p. 16, para. 70.

[56] Bernard Wehrens, Helios magazine, p.3.

[57] This is the directive on mobility and transport for disabled workers which was referred to in the Social Charter, and which will be produced this year. See section six of this chapter and chapter seven.

improvement in the travel conditions of workers with motor disabilities was the only such guideline which saw the light of day.

The Commission also planned to "contribute to the implementation"[58] of the 1986 Council Recommendation on the employment of disabled people although did not specify in what way. In December 1988 a Commission Report was produced on the implementation of the Recommendation, and in 1989 the Council produced some conclusions on the Recommendation[59]. These "invited" the Commission to "develop measures within the Helios Programme to promote cooperation, exchanges of experience and greater reciprocal knowledge" in the area of the occupational integration of disabled people, and to continue to provide support through the European Social Fund to national measures aimed at promoting occupational integration[60].

The Helios Programme though already had as one of its aims the promotion of cooperation and exchange of information, and attempted to achieve this through the local model projects and the development of Handynet. The Commission has increased its support for projects concerned with the economic integration of people with disabilities through a new Community initiative adopted within the framework of the Human Resources Initiatives (including the ESF). The HORIZON project was adopted on 18 July 1990 with the aim of improving "the labour market entry opportunities for marginalized sections of society such as the disabled [sic] and certain other disadvantaged groups"[61]. HORIZON provides financial support for transnational projects which promote the exchange of trainers and trainees and the development of joint projects, modules, programmes, training etc., and which involve institutions operating in two or more Member States of the Community. At least one of the network members must be located in a priority one region for the project to be eligible for funding. The 1990-1993 budget for HORIZON is 180 MECU which is to

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[58] Article 3c.

[59] OJ No. C 173/1 8/7/89.

[60] Ibid. Section II.

[61] Guide to Community Human Resources Initiatives - EUROFORM - NOW - HORIZON. 8/3/1991 V/80/91.

be distributed via the ESF and the European Regional Development Fund. Projects operating within the Helios Programme are eligible, and one of the aims of HORIZON is to "buttress" Helios[62].

Perhaps the most significant of the "invitations" issued by the Council was the request that the Commission introduce additional proposals in the field covered by the Recommendation. This request is open-ended and could potentially refer to binding Community instruments such as directives. As commented earlier though, the Commission has not yet reacted to this invitation other than by introducing the draft directive on mobility which does not seem to be an adequate response.

The European Parliament proposed that the Helios Programme include a commitment to produce a draft directive on the basis of the 1988 report (on the application of the Council Recommendation on the employment of disabled people)[63]. This was rejected by the Commission which argued that it was "inappropriate to give any more precise indications about the likely timetable for presenting further legislative proposals, and as to their legal form, without first completing the necessary preliminary analytical and conceptual work"[64].

Whilst this is true in relation to "precise indications", it would not necessarily have been inappropriate to have included a statement in the Programme showing a general willingness to produce legislative proposals if this seemed to be suitable, particularly given the nature of the request by the Council in its Conclusions. It now seems as if the Commission has in fact decided in favour of proposing directives in this area, although there is as yet no intention of presenting a draft directive on the employment of disabled people.

One reason for the Commission's reluctance to date to produce directives may have been the fear that such legislation would have been rejected by the Council of Ministers. If the directive were based on a Treaty article which requires unanimous support, such as Article 235, then the disapproval of only one member of the Council would be fatal.

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[62] Clemens Russell of Helios estimates that half of the projects presently receiving support from HORIZON were members of the LMAs under Helios I.

[63] OJ No. C 305/156 16/11/87.

[64] COM(87) 544 Final. p. 2, para. 4.

Modifications to the Treaty of Rome by the Single European Act and, prospectively, the "Maastricht" Agreements may have changed this position. The new Article 118A[65], for example, states that a qualified majority[66] in the Council will be sufficient to implement directives aimed at "encouraging improvements, especially in the working environment, as regards the health and safety of workers"[67]. Member States are to have as their objective in this area "the harmonization of conditions in this area, while maintaining the improvements made".

Article 100A[68], on the other hand, states that unanimity in the Council is still necessary in order to introduce legislative provisions relating to the "rights and interests of employed persons".

These terms have not yet been defined[69] and a great deal will depend on the interpretations given to them by the Commission and by the European Court of Justice. Ultimately it will be the Court, should a question of interpretation be brought before it, which will determine the scope of future possible use of Article 118A.

At present it is possible for the Commission to introduce a proposal for a directive relying on Article 118A as a legal basis[70]. It could be argued, for example, that a proposal relating to the economic integration of disabled workers comes within Article 118A if it

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[65] Added by Article 21 of the Single European Act.

[66] Votes within the Council of Ministers are weighted, so the votes of the larger States are worth more than those of the smaller. Of the 76 votes, 56 are needed to approve a measure which requires qualified majority support.

[67] It seems that the Commission has responded quickly to this new opportunity, and that the proposed directive on mobility and transport will be based on Article 118A.

[68] Added by Article 18 SEA.

[69] Bercusson, in Fundamental Social and Economic Rights in the European Community, European University Institute, 1989, suggests three possible interpretations for the terms "working environment" [118A] and "rights and interests of employed persons" [100A(2)] (for further discussion see chapters four and seven).

[70] As has been done with regard to the draft directive on transport to work of workers with a mobilty disability.

requires Member States to adopt legislation entitling disabled workers to work shorter hours, and/or take longer breaks/holiday time[71].

The Social Protocol and attached Agreement contained within the "Maastricht" Agreements, if ratified and found to be legally valid, will also extend the Community's scope for action through qualified majority voting in the social field. The Agreement annexed to the Protocol, for example, provides for the adoption of directives by qualified majority voting in a number of fields including: "improvement of the working environment to protect workers' health and safety"; "working conditions"; "the information and consultation of workers"; and "the integration of persons excluded from the labour market". The scope for action provided by the last objective with regard to an anti-discrimination directive is discussed in chapter four. Furthermore the Agreement also allows for the adoption of legally binding instruments in the fields of "social security and social protection of workers"; "representation and collective defence of the interests of workers and employers"; and "financial contributions for promotion of employment and job-creation" by unanimous voting. The United Kingdom is excluded from this Agreement. It is clear that the scope for the adoption of directives and other instruments by the Community in the social field is gradually expanding, and the significance of qualified majority voting is growing. This obviously increases the possibility of the adoption of binding instruments in the relevant field.

A second aspect of the Helios Programme was the promotion of **positive action** by means of **technical cooperation** at European level "aiming to promote innovation, facilitate the exchange of experience and ensure the dissemination of good practice"[72]. Whilst it was the responsibility of the Commission, through the Division Actions in Favour of Disabled

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[71] This could improve the employment prospects of those disabled people who, as a result of their impairment, tire easily. Legislation in at least two Member States gives disabled people the right to extra paid holiday time.
In the Federal Republic of Germany severely disabled people are entitled to five extra days holiday under the Schwerbehindertergesetz §47.
In Greece disabled people employed under the terms of law 963/79 may be granted six extra days holiday.

[72] COM(87) 342 Final. p. 4, para. 2b.

People, to formulate policy guidelines and to attempt to ensure that they were adopted, an international team of "independent experts" specialised in the field of disability was appointed to implement the remaining two core elements of the Helios Programme (technical cooperation and Handynet). Technical cooperation was provided for through four networks involving in total 130 centres in all the Member States which were concerned with various aspects of the social and economic integration of disabled people. The networks involved were the network of rehabilitation centres, and three new "Local Model Activities Networks" covering economic, social, and school integration. Of these, only the rehabilitation centres and economic integration networks were directly relevant to the employment of disabled people, although the other networks naturally covered areas which are of vital importance in creating a suitable environment for vocational integration.

Under the Helios Action Programme the Network of Rehabilitation Centres was expanded from 38 to 50 centres, 25 of which were new members. One reason for this expansion was to achieve a wider geographical spread and a better representation of disability groups (it was felt particularly that psychiatric and sensory disabilities were under-represented in the previous membership). It was also hoped that with this increased membership more emphasis could be placed on topics of interest to small groups of centres working with specific kinds of disabilities and needs, rather than simply attempting to deal with broad rehabilitation related issues. In this way it was hoped that the exchange of information could be improved.

There was also a change in the criteria for membership which was again aimed at ensuring that the exchange of information was promoted[73]. All members had to be willing and able to supply information to other bodies and centres working in the same area. The aim was to strengthen the outer network of centres and an increased effort was made to provide professionals working in the outer network centres with opportunities to participate in network activities, such as study visits, training seminars and conferences.

[73] Council Decision establishing the Second Action Programme, Annex 2 ai.

A second specific requirement for membership was that all centres had to be represented at network meetings by full-time professionals[74]. The reason given by the Commission for this requirement was that "Rehabilitation has its own necessary complexity: it involves process over time, consisting of several interlocking phases - medical, functional, vocational, social" and it is therefore necessary that this be a "specifically professional network of rehabilitation establishments"[75].

Whilst this expansion was generally welcomed, at least one group representing disabled people expressed reservations about this move, and the emphasis placed by the Commission on the role of professionals, rather than consumers, within the Network. Lambeth ACCORD, one of the British local district projects funded under the First Action Programme, argued that more attention should be paid to giving disabled people the opportunity to participate in "designing and organising the (rehabilitation) services" as supported in the UN World Action Programme, and "further meetings/seminars etc. of 'experts' without disabled people participating could hinder this progress"[76].

The Network of Rehabilitation Centres, however, aimed at encouraging the exchange of information about different rehabilitation methods and practices, which is an area of professional expertise, and it was outside its scope, as defined by the Commission, to tackle in a systematic way the means of promoting the involvement of disabled people in the rehabilitation process. This does not necessarily mean that centres which were members of the Network should not have attempted (or did not attempt) to involve disabled people in this way, but rather that it was not the purpose of the Network to promote this involvement.

By confining the aims of the rehabilitation Network to this limited area of information exchange the Community had already achieved some successes; to have expanded the aims of the Network in the way that Lambeth ACCORD suggested may, at this stage, have been too ambitious and the over-ambitious attempts of the Commission have, in the past, been doomed to failure.

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[74] Ibid.

[75] COM(87)544 Final, p. 3, para. 5.

[76] House of Lords Select Committee, Evidence of Witnesses, p. 5, para.3.4.1.

The Helios Action Programme also provided for the establishment of three 'Local Model Activities Network' which were intended to be "innovatory activities designed to become models of excellence for wider application"[77]. The Commission attempted to avoid some of the problems experienced in the First Action Programme in relation to the district projects by adopting a different form of funding and selecting different kinds of projects. Firstly the LMA projects did not receive funding from the ESF[78]; indeed, many could not do so as they did not contain the vocational element necessary to attract ESF funding since the first Helios Programme was concerned with "social integration and independent living" as much as with "economic integration". In fact funding was only available for network activities[79], i.e. project leader meetings, study visits, seminars, conferences, the documentation service, and exchanges of staff, and the Community made no contribution to the general running costs of the projects. This meant projects were able to continue functioning after the Programme ended since they were not dependent on Community funding. Furthermore, only already existing projects were admitted to the network rather than totally new projects which had yet to become established. It was these existing projects which had the most to offer in terms of exchanging experience, which was a vital aim of the Networks. These factors show that the Commission had learnt from some of the mistakes made in the previous programmes and "should help ... ensure that any achievements [are] ... built in to a lasting development to the benefit of disabled people"[80].

Like the district projects, though, the LMAs concentrated on "achieving integration at grass roots level", and were to form an "important link between developments within each country and the need to form policy based on this practice at Community level"[81]. The LMA members were to do this primarily by helping to gather information about the policies

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[77] Helios Magazine, p.6.

[78] Some of the members of the economic integration LMA may have actually been eligible for and received ESF funding in their own right, but this funding was not part of the Helios Programme.

[79] Some additional funding was available for members of the social integration LMA.

[80] House of Lords Select Committee Report, op.cit. para. 80.

[81] Helios Magazine, p.8.

and activities in their Member State, and by discussing and commenting on possible future Community initiatives and policy guidelines at conferences.

It was clearly recognised then that these two elements of the Programme, i.e. formation of policy guidelines and technical cooperation were interdependent, and that a coordinated approach had to be taken in relation to the economic and social integration of disabled people.

The Economic Integration LMA Network consisted of 27 projects which were "working to promote developments in vocational training opportunities, rehabilitation and the future economic integration of disabled people"[82]. The projects involved in the Network covered a wide area: some were concerned with vocational training, and with helping to match individuals with the available and most suitable jobs, or with providing training in areas related to new technology, whilst others took a broader approach and tried to tackle the problem of the prejudice displayed by employers by attempting to promote a positive image of disabled people. Many of the LMAs provided sheltered employment, day centres, special work centres or local employment initiatives.

It has been stated that "a priority for the work (of the Economic Integration LMA Networks) [was] to stimulate legislation in the area of employment, with the overall aim of establishing a policy of equal opportunities for disabled people Community wide"[83].

Whilst this was an admirable aim, it was not really realistic. Lessons learnt as a result of the Network may ultimately contribute to the formulation of such legislation, and Network members may have been able to comment on draft Community guidelines[84], but the stimulant leading to its adoption must come from elsewhere. The political will must exist in Member States before legislation is forthcoming; as yet there is little sign of that determination, and 27 projects within the Helios Action Programme, however successful they may have been, have not created it. The Commission recognised this in the action

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[82] Ibid., p.9.

[83] Ibid, p.9.

[84] In these respects Patrick Daunt emphasizes the positive contribution which the networks operating within Helios can make. op.cit., p.170.

programme relating to the implementation of the Community Social Charter[85] where it stated, with regard to pilot schemes:

"By definition, these activities are specific whereas there is a need for a coherent overall policy on the occupational and social integration of the disabled [sic] both at national and Community levels" (p.53).

The Economic Integration LMA was only one of the Networks created by the Helios Programme. This creation of different networks, each focusing on different issues, was criticised by Lambeth ACCORD. They argued that "one of the most positive aspects of the district projects (of the First Action Programme) was that they took a fully integrated approach to disability issues, recognising the multiple barriers in all spheres of life that affect disabled people's participation in society. Any attempt to separate networks into individual categories seems a retrograde step"

The Commission however was right to focus on specific aspects of the social and economic integration of disabled people. It wished to link already existing and successful projects and these, for the most part, had confined themselves to one area of the integration process rather than attempting a more comprehensive approach. Furthermore, the Commission's record on ambitious general integration projects, as already stated, is not good, and it was undoubtedly better to achieve small successes in limited areas, than to fail gloriously.

Lambeth ACCORD, however, was correct in stating that the ultimate aim should be to establish centres which adopt "a fully integrated approach to disability issues".

In addition there were two further elements involved in the technical cooperation aspect of the Programme: the Commission gave prizes and organised an annual exhibition on the theme of 'independent living', and also provided grants for activities of European collaboration, particularly those undertaken by non-governmental organisations.

The third aspect of the Helios Action Programme related to the area of **information and documentation.** In this respect work continued on the Handynet project.

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[85] Communication from the Commission concerning its action programme relating to the implementation of the Community Charter of Basic Social Rights for Workers. COM(89) 568 final.

The first Helios Programme was a development on the earlier programmes in a number of respects. Firstly a broader approach was taken to the problem of the integration of disabled people in that the Programme succeeded in addressing many areas which do not lie immediately within the sphere of employment. Secondly, whilst much of the Programme was concerned with projects operating at the local level, a much greater emphasis was placed on the development of policy guidelines. In this way the first Helios Programme managed to achieve a better balance between its constituent parts of formulating policy guidelines, technical cooperation, and the improvement of information services.

It is also of significance that the Helios Programme actually took the form of legislation, and that the Commission has decided to rely on a directive to implement at least the next policy guideline on mobility and transport. This marks a development in the attitude of the Commission which bodes well for the implementation of the policy which is being produced.

The Commission's interim report on the implementation and results of Helios[86] covering the first two years of the programme claims more significant developments than those suggested by the above comments. It is argued that the Programme was "of benefit to the some 30 million disabled people in the Community"[87]. This claim seems somewhat excessive for a Programme as limited as Helios, and is a further example of the broad unsubstantiated claims that the Commission tends to make in this area. However, the argument that the Commission is only now beginning to lay the basis for the development of a global policy to promote the social and economic integration of disabled people is reflected in the report's statement:

"The programme has established, for the first time in the European Community, a basis and framework for developing a coherent global policy at Community level promoting integration of disabled people"[88].

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[86] Interim Report by the Commission on the Implementation and Results of the Helios Programme promoting economic and social integration of disabled people in the European Community (Period 1.1.1988 - 30.6.1990), Commission of the European Community SEC(91) 299 final, 25 February 1991.

[87] Ibid.,p.21.

[88] Ibid.,p.21.

The Commission further states that the exchange of information and experience brought about by the networks contained in the Programme is "a valuable resource to aid formulation of a European policy on integration of disabled people". Whilst this is true, a great deal more than the exchange of information, which is in any case of interest primarily at the local rather than the global level, will be necessary before the formulation of such a policy can occur.

The final report on Helios I[89] is in fact more conservative in its claims and points to a number of weaknesses in the way that the programme was implemented. The delay in launching the programme due to the late adoption of the decision meant that the networks were not really established until the end of 1988 and, at least in the case of the economic integration LMA, 18 months were necessary in order to achieve an effective level of cooperation between the partners. Additional problems were caused in both this network and that of the vocational training and rehabilitation centres by inadequate funding, staff shortages and linguistic limitations. There were however numerous positive exchanges of information and experiences and many network members profited considerably from their involvement. It is noted that in some cases contacts established through the Helios Programme were continued with support from the Horizon initiative. The final report recognises these local level gains, and also acknowledges the involvement of additional centres, groups representing disabled people and other interested parties in the programme, but, unlike previous reports, generally refrains from making unsubstantiated claims that vast numbers of disabled people benefitted. The Commission however could not avoid this temptation altogether, and the report does state:

"The 27 LMA II (economic integration) forming the network have contributed both to the implementation of activities at local level and to the promotion of an overall Community policy aimed at the integration of the disabled"[90].

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[89] Report by the Commission to the European Parliament and the Council on the Implementation and Results of the Helios Programme (1988-1991), Commission of the European Communities, SEC(92) 1206 final, 6 July 1992.

[90] Ibid, p.24.

One of the objectives of the Helios Programme in the field of employment was to contribute to the implementation of the 1986 Recommendation. This document is referred to in the report but the claim that the LMAs achieved this target is not justified by the evidence produced.

Generally the claims made in the final report as to the achievements of the Helios Programme were more limited and realistic than those made in earlier assessments of Community initiatives. They were coupled with an honest acknowledgement of the Programme's limitations and weaknesses. Broad unsubstantiated claims as to the Programme's achievements were naturally made, but these were less prominent than in the past, reflecting a gradual move on the Commission's part towards an understanding of what is possible and what has been accomplished.

A further very important element of the first Helios Programme, as illustrated by the consequences following from weaknesses in this area in the First Action Programme, was its organisational structure. It was of vital importance to avoid the mistakes made in the earlier Programme which resulted in lack of coordination and guidance of the constituent parts.

The original proposals from the Commission[91] supported the establishment of an Advisory Committee, to replace the Liaison Group of the First Action Programme, to "assist" the Commission. This was to consist of 35 Members, made up of two representatives from each Member State, nine representatives of disabled people or their families, and one representative each of employers and employees respectively. These representatives were all to be appointed by the Commission on the basis of proposals made by Member States and invited organisations. This formula was criticised by both the European Parliament and the Economic and Social Committee. The Parliament recommended that twelve members representing disabled people should be appointed, whilst the Economic and Social Committee stated that there should be a more "satisfactory balance

[91] COM(87)342 Final and COM(87)544 Final.

between the three categories of members and fuller representation of the disabled and their families, and management and labour"[92].

This was rejected by the Commission, which stated that its proposal already ensured "a suitable balance"[93].

The Advisory Committee, as finally established under the Programme, was of a modified form. The Committee was divided into two; the larger group consisted of the 35 Members described above and acted as a Liaison Group which served as a forum for consultation. The smaller group, which was the actual Advisory Committee, and which met after the Liaison Group, consisted only of the governmental representatives. This change was made partly at the insistence of the UK government.

In one sense one can argue that this was a retrograde step since it put a further administrative barrier between those representing disabled people and their families, and those formulating policy. One can argue that this, as well as the only limited number of places allocated to disabled people's representatives, did not act as an incentive to the organisation of disabled people at the European level, which was a stated aim of the Commission. Daunt argues that this organisation "fell ... short of what should be expected of a European democracy"[94]. However, there is evidence[95] to suggest that this structure did not present problems, and that at least some organisations representing disabled people felt that they were being adequately consulted.

The final report specifies that groups representing disabled people were thoroughly consulted in the Liaison Group, but that involvement in the more specific Helios activities such as the LMAs and conferences was limited and at times insufficient.

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[92] OJ No. C 347/12 22/12/87. Para. 2.5.

[93] COM(87)544 Final, p. 3, para.5.

[94] Op.cit., p.148.

[95] This comment is based on information gained in interviews with George Wilson, Director of the Royal Association for Disability and Rehabilitation, which is the "umbrella" organisation for groups representing disabled people in the United Kingdom, and as such has a great deal of contact with the Commission, and with Professor Storm, Director of Rehabilitation International, and a member of the Liaison Group. Professor Storm argued strongly that adequate consultation occurred, and that Bernhard Wehrens paid attention to the wishes of non-governmental organisations.

4. The Helios II (Third) Community Action Programme to assist Disabled People (1993-1996)[96].

The Community Charter of Basic Social Rights for Workers[97], and the action programme which outlined the measures which would be introduced to implement the Charter[98], called upon the Commission to introduce a second Helios programme. The Commission responded accordingly by producing a proposal for a Council decision establishing the Helios II action programme in late 1991[99]. This original proposal was similar to the decision which established the Helios I programme; however it met with considerable opposition in the Council and, in particular, in the Parliament, and as a result was extensively modified. The Commission's first proposal was followed by a second amended version[100] aimed at meeting some of the objections of the Parliament. This was superseded by the text that was ultimately adopted by the Council.

The Commission's first proposal was a natural development on Helios I with the reliance on networking activities continuing, and repeated reference being made to the need to develop a global policy to promote economic and social integration. The LMAs were to have been replaced by four Innovative Local Integration and Exchange Activities (A.I.L.E.) covering medical rehabilitation centres, education, vocational training and employment, and the social field. These networks were to have consisted of established and successful institutions which were willing to cooperate at the Community level and participate in the exchange of information and experience through seminars, study visits, conferences etc.. The funding and practical organisation of the A.I.L.E. was to have been similar to that of

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[96] Council Decision of 25 February 1993 establishing a third Community action programme to assist disabled people (Helios II 1993 to 1996). OJ No. L 56/30 9.3.93.

[97] COM(89) 471 final.

[98] COM(89) 568 final. pp.53-54.

[99] Proposal for a Council Decision establishing a third action programme to assist disabled people (Helios II (1992-1996)). Commission of the European Communities, COM (91) 350 final.

[100] Amended proposal for a Council Decision establishing a third Community action programme to assist disabled people - Helios II (1993-1997), COM(92)482 final.

the LMA networks. In fact, as a result of opposition within the Parliament, all reference to networking was dropped in the amended proposal and final version. The Parliament felt that the network activities under Helios I had been too exclusive and of limited use on a global scale[101], and that another form of organisation, which would guarantee a wider dissemination and sharing of experiences, was necessary.

The original and amended version also referred to the need to develop a Community policy with regard to the social and economic intergation of disabled people. Article 3 of the initial proposal, which specified the objectives of the action programme, referred to the need "to promote the development of a comprehensive Community integration policy"; in the amended version this became "development of a Community disability policy". However the final version, no doubt as a result of compromises made within the Council, has a much more limited set of objectives. The aspiration is no longer an "integration policy" or a "disability policy", but a "policy at Community level of cooperation"[102]. Cooperation is a means of reaching agreement on a policy - it is not, apart from in the muddled machinations of the institutions of the Community, a policy per se. Three other objectives are referred to in Article 3 of the final decision. Two of these - to develop and improve exchange and information activities with the Member States and non-governmental organisations[103] and the promotion of effective approaches and measures - aim to complement and assist the achievement of the policy of cooperation. The fourth objective relates to continued cooperation with non-governmental organisation representing disabled people.

It can be seen that this action programme has a much more limited set of objectives than the earlier programmes. Ambitious claims relating to the development of a global Community policy have been dropped, seemingly at the insistence of the Council, and the Commission has been left with a much more conservative set of aspirations. Nevertheless the emphasis on exchange and information activities is continued. With the emphatic

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[101] Based on an interview with Clemens Russell of the Helios team of experts.

[102] Article 3c.

[103] Article 3a.

rejection of networking these are to be achieved through the organisation of "conferences, seminars, exchanges of information, study visits and training courses organized on the basis of annual topics"[104]. These are to be carried out in four general areas - functional rehabilitation; educational integration; vocational training, employment rehabilitation and economic integration; and social integration and an independent way of life for disabled people. Participants for these activities will be nominated by Member States and a total of 670 partners are allowed for. In fact what this amounts to is an enlarged set of networks, operating on the same basis, with the same objectives, and funded in the same way as those under Helios I. The increased membership and proportionally reduced budget per partner means that the Helios team of experts will have to target their activities very specifically, but in principle this is a similar system to that established under earlier action programmes - politics prevents the open admission of this.

A further area where the Parliament expressed dissatisfaction with Helios I was the involvement of disabled people and non-governmental organisations representing their interests in the planning and implementation of the action programme. It therefore called for major modifications in this field. To some extent these calls were heeded, and the present action programme has established three consultative bodies. Firstly the Advisory Committee is to "assist" the Commission by delivering opinions on measures to be taken. The Commission is to take the "utmost account" of this opinion[105]. In addition a European Disability Forum, made up of up to 24 non-governmental organisations selected by the Commission according to certain criteria related to representativeness following consultation with the Member States, has been established. The Commission is to ascertain the views of the Forum before consulting the Advisory Committee. Lastly a Liaison Group made up of twelve members of the Advisory Committee with each Member State being represented, and twelve members of the Forum, is also to be consulted prior to the Advisory Committee. These measures will increase the democratic element of the consultation procedure and go some way to meet Patrick Daunt's criticism of the system. However, it is to be noted that

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[104] Annex. Article 2.1.

[105] Article 8.

the highest consultative body, the Advisory Committee, still excludes representatives of the community of disabled people.

Apart from the consultative procedure other steps have been taken within Helios II to promote greater involvement in the decision-making process. Article 6, relating to the implementation of the action programme, states:

"The Commission shall ensure the implementation of Helios II in accordance with Article 8 (which refered to the Advisory Committee) and in close cooperation with the Member States and the institutions and organizations catering for the integration of disabled people".

This is much broader than the original proposal which referred only to the Commission.

The annex also specifies that the Commission will strengthen its cooperation with non-governmental organisations via national disability councils and European orientated organisations[106].

The Helios II decision also calls[107] on the Commission to ensure that there is "consistency and complementarity between the Community measures to be implemented under Helios II and the other relevant Community programmes and initiatives". The most important of these other initiatives, as recognised in article 7 of the annex, are the HORIZON and TIDE programmes. HORIZON has already been mentioned elsewhere. TIDE, the Technology Initiative for Disabled and Elderly People in Europe, is a project aimed at encouraging the creation of a single market in rehabilitation technologies in Europe and at ensuring coordination and cooperation between research centres, users' organisations and companies operating in this field. It provides grants to relevant bodies to further this objective. To achieve this aim meetings between Commission staff and the involved expert groups working on these three programmes are being organised.

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[106] Article 4.1.

[107] Article 6.

These are the major alterations made to the Commission's original proposal. The initial (or amended) proposal also included elements which were broadly followed in the final version.

Firstly, whilst Helios I was described as an action programme "for disabled people", Helios II has always been a programme "to assist disabled people". This reflects a greater awareness on the Commission's part of the need to avoid patronising language, and implies an increased role for disabled people. The focus would have been placed on the target group to an even greater extent if the term "enable" or even "empower" had been used.

The description of the action programme differs from that applied to earlier programmes. Both the amended and final version describe Helios II as "A Community action programme to promote equal opportunities for and the integration of disabled people"[108].

The definition of "disabled people" for the purposes of the action programme has also been altered under Helios II in comparison with its predecessor. Whilst Article 2 of the Helios I programme defined "disabled people" as "all people with serious disabilities resulting from physical or mental impairments", the definition used in Helios II is:

"people with serious impairments, disabilities or handicaps resulting from physical, including sensory, or mental or psychological impairments which restrict or make impossible the performance of an activity or function considered normal for a human being".

The reason given for this alteration was the need to take into consideration the World Health Organisation definition of the three terms "impairment", "disability" and "handicap" (see preamble) which are increasingly used in the Member States, and which cover all persons targeted by the Community action programme irrespective of the origin of their disabilities[109]. The new definition is clearly more precise than those used in the past and, in that it is based upon established international standards, it is to be welcomed.

Work on Handynet is naturally to continue under Helios II, although this is subject to certain limitations. The go-ahead has only be given for further development of the technical equipment (Handyaids) module and no action on additional modules, such as

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[108] Article 1.

[109] Section D of the proposal, Comments on the Articles of the Proposal for a Decision, p.12.

employment and vocational training, will be taken pending a further re-examination by the Council which will occur before the end of 1994.

The Commission's initial proposal for a Council decision to establish Helios II was very clearly in the tradition of the earlier programmes, and was closely related to Helios I. A number of changes were made to that draft as a result of dissatisfaction within the Parliament and Council; however, these changes may in fact relate more to form than to content. It is true that the final decision, with its reference to a policy of cooperation, is much more conservative in tone than its predecessors. The Commission though has already demonstrated its intention to carry on formulating policy guidelines which will take the form of binding directives in numerous fields, including that of transport, and will not be restricted by the Helios II decision. Furthermore the network activities will continue in all but name under Helios II, although a much larger number of partners will be involved. Therefore one can expect the Helios team and, more particularly the Commission, to continue along broadly the same path under Helios II.

5. The Community Charter of the Fundamental Social Rights of Workers.

On 9 December 1989 eleven Member States (the United Kingdom being the exception) adopted a Community Charter of the Fundamental Social Rights of Workers[110]. This reaffirmed the importance of the social dimension within the internal market and at the European Community level more generally. Paragraph 26 of the Charter is concerned with disabled people, and states:

"All disabled persons, whatever the origin and nature of their disablement, must be entitled to additional concrete measures aimed at improving their social and professional integration.

These measures must concern, in particular, according to the capacities of the beneficiaries, vocational training, ergonomics, accessibility, mobility, means of transport and housing".

The Charter does not confer legal rights or obligations, but it does invite the Commission to take initiatives, including the proposition of legal instruments covering the areas referred to in the Charter, where this is within its competence. With this in mind the Commission prepared an action programme specifying the measures it intended to introduce to implement the Charter[111]. The action programme referred to two new initiatives to be introduced to achieve the objectives of the Charter. These are the proposal for an action programme to succeed Helios I (see above) and the adoption of a directive aimed at promoting an improvement in the travel conditions of workers with motor disabilities (see below and chapter seven). Work on both these initiatives was in fact already well advanced before the adoption of the Community Charter and its action programme and in this sense these documents add nothing at the practical level. However it is reassuring that the Commission recognises the need to include measures to improve the situation of disabled people within the general framework of its social policy.

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[110] Op.cit.

[111] Op.cit.

6. An example for the future: The proposal for a Council Directive on the minimum requirements to improve the mobility and safe transport to work of workers with reduced mobility[112].

Reference has been made to the importance of the "physical environment" in relation to the social and economic integration of disabled people in a number of Community documents[113]. This term covers matters such as housing, access to buildings, and transport, and it is on the latter aspect that the most recent policy guideline has been produced[114].

In line with what has been argued to be the Commission's new approach (i.e. relying on legislation rather than non-binding measures), this policy guideline has been introduced in the form of a directive with Article 118A providing the legal basis. Article 118A is concerned only with the health and safety of workers which explains why the directive has been confined to transport to and from the place of employment. However a global policy to promote the economic and social integration of people with disabilities must extend beyond that narrow group of disabled people who are in open employment and, in this sense, the Community's response, in terms of producing a directive to ensure that only workers with motor disabilities can move safely within the Community for certain purposes is inadequate[115]. It is also true, however, that in producing directives in this area the Commission faces the problem of finding Treaty articles to support its legislation, and it is much easier to find articles to support directives aimed specifically and only at disabled workers. This fact has prompted the Commission to decide to restrict most of its future

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[112] COM(90) 588 final.

[113] For example, in the proposal for the Helios I Programme, op.cit.

[114] Chapter Seven is devoted to the analysis of this draft directive, including a consideration of Article 118A upon which the proposal is based.

[115] It should be noted though that the Commission intends to follow this up with directives to harmonise the provision of transport which will not be restricted to disabled workers, and which will have the potential to benefit all people with a mobility disability. This approach is the exception rather than the rule under the present Treaty though, and the basic argument made here remains valid.

directives to disabled workers. This is not an ideal state of affairs, and this is recognised within the Commission, but once the decision was made to implement the Community policy in the form of directives it was almost inevitable that this policy, for the most part, would be restricted to disabled workers.

The Community policy on the social and economic integration of disabled people will to a large extent therefore be a policy for the integration of disabled workers. Although realistic, this is a highly artificial approach. Of the over thirty million people in the European Community who have some form of disability it is reasonably certain that less than a third of them come within the category of workers (Exact figures are difficult to obtain, because of the different definitions used in Member States and the fact that statistics are often not very extensive. Generally, since the prevalence of disability is much greater in the older age groups, a high percentage of disabled people are of pensionable age - to this group must be added those disabled people who are reluctant, too young, or too severely disabled to work. In the Federal Republic of Germany, for example, of the over five million disabled people, less than a million are in open employment and the recent OPCS Surveys reveal that only 31% of disabled adults in the UK are in employment[116]). The aim of the Commission is not to exclude these people from the benefits of the policy which is being formulated; instead the Commission hopes that although not directly aimed at this group, disabled non-workers will also benefit, since it is expected that it will in fact be difficult to restrict the positive effects of the policy to disabled workers.

It has yet to be seen how this approach will develop, and if benefits will accrue to both disabled workers and non-workers.

[116] Schwerbehindertengesetz, BasisKommentar, Bund Verlag, Cologne, Introduction by Gerd Muhr, and OPCS Survey of the financial circumstances of disabled adults living in private households, Martin and White. HMSO, London, 1989.

Conclusion.

The developments which have occurred over the past twenty years have brought the Commission to the point where it is now ready to begin to seriously tackle the issue of formulating a policy on the economic and social integration of disabled people. Whilst promoting employment opportunities is still a vital element of the Community's programme it is recognised that unless sufficient attention is paid to all the other elements affecting the lives of disabled people, attempts to promote economic integration will fail. Much emphasis continues to be placed on local level initiatives, but it has been realised that in order to have a Community-wide influence, policy guidelines must be produced; indeed, efforts have been made to encourage the participation of the local projects in this process, as they have been asked to give opinions and gather information. It has been realised that for these policy guidelines to have any significant impact they must be produced in the form of directives. The problem of finding legal bases for these directives means, however, that they will be largely directed at disabled workers, since only in that way can they be brought within the present Treaty of Rome. This will clearly not present difficulties for the policy guidelines on economic integration, which are the focus of this thesis, but could well pose problems with regard to promoting social integration. It is hoped, however, that disabled non-workers will also be able to benefit from such a policy.

The remaining four chapters of this thesis will consider specific areas where Community policy guidelines to promote the economic integration of people with disabilities could or will be introduced. It will be assumed, in line with the arguments made in this chapter, that these guidelines will be adopted in the form of binding Community instruments, and consideration will naturally be given to the potential legal basis for these instruments, as well as to the necessity of a Community initiative and the contents of such a measure.

SECTION III

A COMMUNITY POLICY FOR THE FUTURE?

ANTI-DISCRIMINATION LEGISLATION

The argument has been made in chapter one that the major obstacle which people with disabilities face in achieving economic and social integration is discrimination in both its physical and attitudinal forms. Discrimination has been defined broadly to include not only direct and indirect discriminatory acts, but also the failure to make accommodations to an individual's disability, so causing handicap, i.e. "unequal burdens". Since discrimination is the main barrier, the core of any policy to promote the economic integration of people with disabilities should be measures to counter such discrimination. This chapter shall consider the feasibility of developing disability employment anti-discrimination legislation within the European Community. Further chapters shall address the potential role of other policy measures in the fields of quota systems for employment, vocational training and transport. However, it is the measures discussed in this chapter which must be regarded as the centre piece of any coherent integration policy, and all additional measures must compliment and enhance this basic anti-discriminatory approach.

This chapter is divided into three sections. Firstly the general problems of formulating and adopting disability employment anti-discrimination legislation shall be outlined and discussed. Secondly, a detailed case study of how these problems have been dealt with in one particular jurisdiction, the United States, shall be made. Finally, an analysis of the scope for, and desirability of, action in this area by the European Community shall be carried out, and the present and potential future competences shall be discussed. I shall begin, however, with a brief overview of employment anti-discrimination legislation and recent developments in relation to people with disabilities.

1. Employment Anti-Discrimination Legislation and People with Disabilities - A Civil Rights Issue.

A legislative concern with the welfare of more vulnerable workers has existed for well over a century; however, it was only with the growth of the U.S. Civil Rights Movement in the 1960s that active measures to counter discrimination in employment as opposed to, for example, measures concerning the health and safety of workers, began to enter the statute book. This was initially confined to the United States, but the momentum quickly spread to other countries.

Disabled people in the European Community have not benefitted from these legislative developments on the whole. Attitudes formed prior to the development of the civil rights movement have continued to shape policy decisions with respect to disabled people in Europe, although other minority groups have experienced a redefinition of their status, and a new approach to solving the problems of economic and social marginalisation which they experience. The civil rights movement has fundamentally altered conceptions about the position of ethnic minorities and women in society, but, at least in the eyes of European policy-makers, has left practically unchallenged the conception of disability, so that policy continues to be shaped, for the most part, by a charity model of people with disabilities, rather than a civil rights model[1]. A consequence of this is the belief that discrimination is not a major problem for people with disabilities[2], since the difficulties they experience arise from the intrinsic nature of impairment rather than a hostile attitude or environment, and that anti-discrimination legislation does not have a major contribution to make in terms of equalising opportunities.

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[1] In this respect Burgdorf states: "Efforts to pass laws banning discrimination on the basis of disability represent a shift in society's conception of its responsibilities to people with disabilities - a shift from charity to civil rights". The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Right Statute. Harvard Civil Rights - Civil Liberties Law Review, Vol. 26, 1991, pp.413-522 at p.426.

[2] For example, in 1991 the Dutch Government refused to add disabled people to a draft amendment to the constitution which listed groups which could not be discriminated against. When challenged on this the government justified its decision on the grounds that disabled people in the Netherlands did not experience discrimination. Reported in Zeitschrift der Bundesarbeitsgemeinschaft Hilfe für Behinderte 3/92, Gesetzentwurf schließt behinderte Bürger aus, Pauline Versteegh, p. 14.

Gradually, however, one senses the winds of change, and once again it is a movement within the United States which is leading the way. Disabled people in the U.S. were quick to draw parallels between the position they found themselves in the 1970s and 1980s, and that of African Americans or women some twenty or more years previously. People with many different forms of disabilities managed to come together to form their own civil rights movement[3], modelled on that of the black civil rights movement[4], to successfully lobby for anti-discrimination legislation[5]. Policy-makers have accepted this reconceptualisation of disability, and indeed, in some respects, have led the way, and there is now a consensus of support within American society behind what is, in fact, quite radical disability anti-discrimination legislation.

The situation has developed to such an extent that not only are there two federal employment anti-discrimination Acts applying to people with disabilities, but practically every state has some form of legislation forbidding discrimination against some, or all, disabled people[6].

Just as occurred with the black and female civil rights movement, the concept of disability as a civil rights issue is gradually beginning to gain favour within Europe. Naturally it has been organisations representing disabled people which have been most eager to embrace this concept and to demand anti-discrimination legislation. Thus far they have

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[3] Ottmar Paul, Theorie und Praxis des US Amerikanischen antidiskriminierungsgesetzes - paper presented to the Bundesverband Selbsthilfe Körperbehinderter Tagung in Bonn on 28 March 1990 published in Ein Leben ohne Barrieren, Plädoyer für ein Mobilitätssicherungsgesetz, Tagungsbericht, BSK, 1990.

[4] See Burgdorf, op.cit., pp.427-428.

[5] Although, as noted in chapter one, it was not such a movement which inspired the enactment of the first piece of anti-discrimination legislation, the Rehabilitation Act of 1973. Instead disabled people were rallied by the need to lobby legislators to adopt the administrative rules necessary to implement the anti-discrimination provisions of the Act.

[6] See Barbara Lindermann Schlei and Paul Grossman, Employment Discrimination Law, Chapter Eight: "Handicap", American Bar Association, Section of Labor and Employment Law, Second Edition, 1983, pages 277-279; and Derek J. Jones and N. Colleen Sheppard, AIDS and Disability Employment Discrimination in and beyond the Classroom, Dalhousie Law Journal, Volume 12 Number 1, April 1989, pp.103-132 at p.111.

not met with the success experienced by their American counterparts, partly because it has proved difficult to work together to form one single pressure group, and lobbyists instead continue to work within separate groups concerned with specific forms of disability. It has proved particularly difficult for groups representing physically and mentally disabled people to cooperate.

In addition this civil rights concept of disability is beginning to find favour amongst certain sectors of the policy-making community of the national governments of the European Community member States. In April 1990 a bill which outlawed discrimination on the grounds of disability or state of health was approved unanimously by the French National Assembly, despite the reservations of certain members that the proposed measures would not apply to employment related discrimination directed at disabled people[7]. In other countries, such as the United Kingdom, such legislation has been at least considered as one possible tool to be used in the effort to improve the (employment) prospects of people with disabilities[8] and, since 1940, ten private members bills, most recently the Civil Rights (Disabled Persons) Bill[9], have been introduced in this area. Generally, the matter is attracting much more attention amongst disabled people and policy-makers - although European academic writers, legal and otherwise, have yet to develop a similar interest.

It is now true that policy makers who are concerned with this problem at the European Community level, as well as at the national level, must at least consider the role which anti-discrimination legislation has to play in counteracting the problems which disabled people experience in the employment sphere and elsewhere. One potential contribution of legislation towards an improvement in the economic and social integration of people with disabilities which has until very recently been neglected is therefore now deservedly attracting attention.

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[7] Debate of the Assemblé Nationale, 17 April 1990, pp.385-401.

[8] See U.K. Employment Department Group Consultative Document, Employment and Training for People with Disabilities, 1990, p. 39, paras. 5.14 and 5.15.

[9] This bill failed when it did not gain a second reading on 31 January 1992.

Having given this brief introduction to the political background to demands for disability employment anti-discrimination legislation, I shall now go on to consider some of the problems with formulating and adopting such legislation. The differences between disability discrimination and discrimination directed at other minority groups have been considered in some detail in chapter one and it is these differences, and particularly the fact that disability can sometimes lead to a reduced productivity (unless a suitable accommodation is made)[10], that creates special problems for the drafters of disability employment anti-discrimination legislation.

2. The Application of Anti-Discrimination Legislation to Disability Employment Discrimination: Some Problems at National and European Community Level.

One of the main arguments given by those who oppose the introduction of disability anti-discrimination legislation is that it would simply be too complicated - or even impossible - to draft. This view is not only held by many policy makers[11], but also by some of those who are actively campaigning for an improvement in the economic and social position of people with disabilities[12]. Undoubtedly such legislation is far more difficult to draft than sex and race anti-discrimination measures, and this fact, as well as the relatively short time that disabled people have been campaigning for greater government assistance in their efforts to achieve integration, contribute to the scarcity of such legislation in the world today. However many countries, both within and outside the European Community, have, and still

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[10] However, as pointed out in chapters one and two, in a minority of cases the impairment will affect productivity where this cannot be compensated for through an accommodation. As argued earlier though, this does not necessarily mean that the disabled individual should be prevented from taking up employment - rather this is an argument for positive action to ensure that such disabled people do not have to compete with workers not disadvantaged in this way.

[11] Employment and Training for People with Disabilities, op.cit., para. 5.15, p. 39.

[12] See M. Kettle, Contact, Number 61, Autumn 1989, p.39, RADAR, London.

are, giving serious consideration to such legislation, and such legislation already exists in the United States. This suggests that the drafting arguments against disability anti-discrimination legislation are not so overwhelming as to enable it to be rejected out of hand as a tool incapable of contributing to a greater economic and social integration of people with disabilities.

2.1 Specific Problems.

The primary difference between discrimination directed at people with disabilities and that directed at people on grounds of sex or race is that while almost all differential treatment directed at people on the latter ground can be viewed as discrimination, this is not true in relation to disability. Disability, unlike sex or race, can affect one's ability to make use of normal facilities and one's productivity at work. So whereas it is clearly discrimination to prevent a man entering a public building, or to deny a woman a job, on the ground of his race or her sex, is it still discrimination to fail to provide a ramp giving people in wheelchairs access to that building, or to fail to provide specialised equipment to enable a blind person to do a particular job? - For in both cases, unless the necessary adaptations are made, an individual will be denied an opportunity on the grounds of his or her disability. It is partly this question of how far one should be obliged to go to meet the special needs of people with disabilities which makes the formulation of anti-discrimination legislation so difficult.

Secondly a definition-related problem applies to the description of the attribute, the possession of which prompts the protection of the law. Whilst no discrimination legislation need give a definition of "male and female"[13], and a definition of the concepts relevant for

[13] Although legislation may have to specifically state that discrimination on the basis of sex includes discrimination on the basis of pregnancy, childbirth or related medical condition. For example, Title VII of the US Civil Rights Act of 1964 specifies this at section 701(4).

race-related anti-discrimination legislation have not proved difficult to find in most cases[14] this is not true of disability.

The problems which have been outlined above shall now be further considered.

2.1.1 Who is a "Person with a Disability"?

There is no one accepted legislative definition of "disability" or "handicap" within the European Community. Indeed, within some Member States different definitions of these terms exist within the different government departments and in the various pieces of legislation, whilst in one State - Denmark - there is no legal definition of a disabled person at all, and there is strong resistance to the adoption of such a definition. In fact this plurality of definitions within Member States is a normal and healthy phenomenon for it shows that efforts are being made to direct services and facilities at those disabled people who need them and can benefit from them. It is quite logical, for example, that rehabilitation measures should be directed at those people who, with appropriate training, are capable of (re)-entering the labour market, whilst the highest level of disability income support should be directed at those with the severest disabilities who are likely to incur higher disability related expenses but unlikely to find the support a disincentive to look for work. In formulating the definitions of "disability" then, one must look to the group one is trying to serve and the aim one is trying to achieve.

Bearing this is mind it is clear that any definition used in anti-discrimination legislation must be very broad. Employment anti-discrimination legislation must aim not only to cover those whose disability physically hampers their economic integration and which requires an accommodation, but also those who suffer reduced employment opportunities as a result of an employer's false assumption about the limitation associated with their impairment, or about the very existence of an impairment. Employment anti-discrimination legislation must therefore adopt a multi-tiered approach when specifying the class of

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[14] The definitions used in the UK Race Relations Act 1976, Section 3 are:
"racial grounds" means any of the following grounds, namely colour, race, nationality or ethnic or national origins;
"racial group" means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refers to any racial group into which he falls.

beneficiaries in recognition of the differing characteristics of those who could potentially suffer from the phenomenon of disability discrimination, and in recognition of the socially derived nature of "disability" and "handicap". This is a highly complex process, and the formulation of a definition broad enough to incorporate those who are disadvantaged because they are falsely perceived to have a handicap or disability, whilst at the same time being sufficiently unambiguous so as to inform employers of their obligation in all cases, may prove elusive in even the best worded statutes. This fact is reflected in the history of the definition used in the U.S. legislation. This definition has been developed and elaborated over the years through regulations, court decisions and congressional reports in order to reduce ambiguity, and it is only recently that an acceptable and reasonably well understood definition could be said to exist.

2.1.2 What is Disability Discrimination?

It has also been stated that there are difficulties in deciding what acts - or inactions - should be classified as disability discrimination. Clearly cases of less favourable treatment motivated by the (perceived) disability of an individual should be covered, as should the imposition of conditions or criteria with which a disproportionate number of disabled people cannot comply, where the condition or criteria are not job-related[15]. These two forms of behaviour amount to direct and indirect disability discrimination, as described in chapter one. However it is clearly not enough to declare that all cases of differential treatment, with a few limited exceptions, amount to discrimination. Indeed, in many cases disabled people will require differential treatment - such as specialised equipment, adaptations in tests and interview procedures, and extra assistance - in order to give them an equal opportunity, and it will be necessary to define the extent of the obligation to provide the differential treatment to accommodate disabled people and in which circumstances an employer will be justified in failing to make an accommodation. At certain times, therefore, the failure to provide differential treatment will amount to the third kind of discrimination referred to in chapter one - "unequal burdens".

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[15] This is not to imply that all criteria which are job-related and which indirectly discriminate against people with disabilities are necessarily acceptable.

A few examples in the employment sphere will suffice to help explain how complicated the situation is, and to show what kinds of issues any statutory definition of discrimination should aim to cover. It cannot be regarded as discrimination for an employer to refuse to employ someone with a disability that prevents him from carrying out the job effectively[16]. But should it be regarded as discrimination if, in the same situation, the disabled worker were able to do the job if provided with specialised equipment or assistance? Is it discrimination if the only thing preventing the disabled person from carrying out the job is the fact that the building where the work is based is inaccessible? Factors such as the size and profitability of the enterprise, the cost of the adaptations, the availability of external (financial) support and the number of people who will benefit are all relevant in deciding when a failure to accommodate amounts to discrimination. But how much weight should be given to each of these factors?

2.2 The European Dimension.

These definitional problems are compounded at the European Community level. With twelve different Member States involved agreement on satisfactory definitions will be even harder to reach, and it may be that vague terms open to various interpretations will be more attractive than those whose meaning are relatively clear. This temptation, however, needs to be resisted. Furthermore, even before discussions on the definitional problems can begin a consensus, or at least majority support, must exist in favour of such legislation, and this is by no means the case at present. The barriers which need to be overcome for European Community-wide disability anti-discrimination legislation to be adopted are therefore quite substantial.

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[16] The concept of "effectively" carrying out a job is clearly highly subjective. The term cannot have the same meaning with regard to disability discrimination as it has in sex or race discrimination, i.e. carrying out all the job-related functions in the normal manner to the required degree of proficiency. In fact disability employment anti-discrimination legislation must contain a definition of the concept in acknowledgement of the fact that some disabled people will carry out work in an unconventional manner or be unable to perform certain tasks normally associated with the position. If an individual is unable to perform the job "effectively" according to the standards elaborated in the anti-discrimination statute a decision not to hire, or to dismiss, on the grounds of disability will not amount to legal discrimination. It will shortly be seen how the U.S. legislation has dealt with this particular problem.

3.United States Disability Anti-Discrimination Legislation.

Having outlined the general problems involved with drafting and implementing disability anti-discrimination legislation it will now be useful to consider how they have been dealt with in one particular jurisdiction. The United States is one of the few countries in the world which has anti-discrimination legislation directed at protecting people with disabilities. Partial anti-discrimination legislation has existed in the U.S.A. since 1973, and a measure applying to all such discrimination was adopted in 1990, and came into effect in July 1992. The American experience is relevant for all policy makers who are considering adopting such legislation, since it illustrates factors which must be taken into account and incorporated into the legislation if the above problems are to be successfully dealt with. These factors shall be revealed through a detailed examination of the U.S. legislation.

The United States was the first country in the world to adopt legislation directed at countering disability discrimination. This legislation consists of the Rehabilitation Act of 1973[17], and the more comprehensive Americans with Disabilities Act of 1990[18].

The Rehabilitation Act of 1973 is only directed at discrimination encountered by disabled people in their dealings (and particularly their employment) with Federal departments, and with organisations and firms which receive federal assistance, or which have a contract to provide services or goods to the Federal government. The most important part of the Act in this respect is Title V. Sections 501 and 502 require, respectively, affirmative action in federal employment, and federal buildings to be made accessible to people with disabilities. Section 503 imposes affirmative action obligations on federal contractors where the value of the contract exceeds $2500. The fact that this threshold is so low means that practically all firms dealing with the federal government come within the scope of Section 503. Section 504 bars discrimination by recipients of federal financial

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

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

assistance and federal agencies. This section covers a huge number of institutions which are important sources of employment, such as schools, universities and hospitals.

In 1990 the more wide-ranging Americans with Disabilities Act was adopted. This Act is not just confined to the Federal government and those institutions and firms which have dealings with it, but, when all its provisions come into force, it will impose obligations on all employers with fifteen or more employees[19]. Furthermore, the Act imposes obligations on providers of public transport and the occupiers of premises to which the public is given access, such as shops, restaurants, health centres etc., to adapt their services and premises so as to ensure that people with disabilities are given access.

The employment provisions of the Americans with Disabilities Act are modelled very closely on those of the Rehabilitation Act, and specifically on the Section 504 anti-discrimination provisions. Definitions and concepts such as "individual with a disability"[20], "reasonable accommodation", and "undue hardship" have been transferred into the new Act, and many of the guidelines to interpretation for the Rehabilitation Act have been incorporated within the statutory language of the Americans with Disabilities Act or its accompanying regulations. This was done for political reasons rather than as a result of an overwhelming satisfaction with the language of the 1973 Act. The Americans with Disabilities Act was presented by its supporters as simply an extension of the requirements of the Rehabilitation Act to private employers, and its political effect was deliberately played down[21]. In this way a close scrutiny of the language and impact of the Act was avoided. This was necessary as it was feared that such a scrutiny would lead to radical amendments, making the measure less effective. Therefore the employment provisions of the Americans

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[19] The employment sections of the Act came into force on July 26 1992. At present only employers with twenty-five or more employees are covered. The more comprehensive coverage will come into effect on July 26 1994.

[20] The Rehabilitation Act uses the term "individual with a handicap" rather than "individual with a disability". In fact the two terms are defined in exactly the same way, and the change in language was made out of deference to the disability movement which uses the latter term.

[21] Based on discussions with Chai Feldblum. Feldblum worked as a legislative Counsel for the American Civil Liberties Union and was involved in the negotiations on the Americans with Disabilities Act. For further information see The Americans with Disabilities Act: What it Means to All Americans, (in press), Brooke Publishing Co.

with Disabilities Act are basically the employment provisions of Section 504 of the Rehabilitation Act applied to all private employers with 15 or more employees. Very few modifications were made to the statutory language, and these were indeed heavily debated.

These two Acts, and the regulations and court decisions which have been used to interpret Section 504 of the Rehabilitation Act of 1973, (which, because of the similarity in statutory language, will also set relevant precedents for the Americans with Disabilities Act), shall now be considered in detail to see how the problems outlined in section 2.1.1 and 2.1.2 have been dealt with, how satisfactorily they have been solved, and the relevance of the U.S. approach to E.C. policy-makers. The analysis in section 3.1, covering the definition of "disability", illustrates two points which must be noted by E.C. policy-makers: that legislation in this field must be very detailed and explicit so as to reduce the scope for employer uncertainty and that, even where this is the case, a defining period, whereby courts and the administration elaborate on the meaning of relevant concepts will be necessary. Three further important points are illustrated by the analysis in section 3.2 covering the definition of "discrimination" - that the definition must be broad enough to encompass two concepts of discrimination: the traditional one, and that based on "unequal burdens"; that the legislation must represent a compromise between the interests of employers and the interests of disabled people; and that, because of the idiosyncratic natures of disability and employment, extensive use must be made of individualised analysis.

Since the Americans with Disabilities Act is the more important of the two statutes, in the sense that its coverage is broader, more attention shall be paid to it. However, ample reference shall also be made to the Rehabilitation Act since an understanding of this Act is necessary in order to appreciate the later measure.

3.1 Who is a "Person with a Disability"?

Both the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 adopt the same definition for a the term "individual with a disability"[22], namely:

"(a) a **physical or mental impairment** which **substantially limits** one or more of the **major life activities** of such individual;
(b) a **record** of such an impairment; or
(c) being **regarded as having** such an impairment."[23]

The original definition of an "individual with a handicap" in the Rehabilitation Act was in fact much narrower than the present one, which was adopted in 1974. Congress concluded that the original definition, whilst appropriate for the vocational rehabilitation sections of the Act, was too restrictive to achieve the aims of Title V, and the above definition, which has now become firmly established, was adopted[24].

The definition consists of three prongs, and further elaboration has proved necessary to clarify their meaning. Regulations issued by the Department of Health, Education and Welfare (HEW) with respect to Section 504[25] provided the first such clarifications. These regulations were used as the basis for all later government regulations which apply to Section 504, as well as being relied on by the courts as guides to interpretation and being incorporated, to a large extent, in the regulations for the Americans with Disabilities Act.

The three prongs of the definition shall now be considered in some detail to establish exactly how the question "Who is a person with a disability?" has been answered:

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[22] The term "handicap" is used in the Rehabilitation Act.

[23] Rehabilitation Act of 1973, Section 706(8)(B), and The Americans with Disabilities Act, Section 3(2).

[24] S. Rep. No. 1297, 93rd Cong., 1st Sess., 16, 37-38, 50. (1974).

[25] This section bars handicap discrimination by recipients of federal financial assistance and federal agencies.

3.1.1 The First Prong: "a physical or mental impairment that substantially limits one or more of the major life activities of such individual".

There are three terms contained in this definition which require further explanation:

(i) "a physical or mental impairment ..."

Both the HEW regulations applicable to section 504 and the government agency regulations issued with respect to the Americans with Disabilities Act define a "physical or mental impairment" as:

"any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organ; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitor-urinary; hemic and lymphatic; skin; and endocrine;" or "any mental or psychological disorder..."[26].

Neither the HEW regulations nor the Americans with Disabilities Act regulations attempt to provide an inclusive list of the conditions that amount to a "physical or mental impairment" because of the impossibility of ensuring the comprehensiveness of such a list[27]. However an appendix to the HEW regulations, and the Department of Justice (DOJ) Americans with Disabilities Act regulations, do give examples of conditions which are covered[28].

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[26] 45 CFR §84.3 (j) (2) (i) (1989). 29 CFR §1630.2 (h) (1992) EEOC.

[27] For example, a list of such impairments compiled in 1973 would have excluded HIV disease and AIDs, which are now recognised as disabilities under the Rehabilitation Act of 1973 and the Americans with Disabilities Act. See following footnote.

[28] The DOJ regulations refer to:
"contagious and non contagious diseases and conditions as orthopaedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction and alcoholism". 28 CFR §36.104 (1992). The HEW appendix is similar, but excludes HIV disease. 45 CFR §84. Appendix A, No. 3 (1989).

An "impairment" is therefore a "physiological disorder or condition ... or a mental or psychological disorder". This does not cover characteristics such as hair or eye colour, or left-handedness, although these too could conceivably expose an individual to employment discrimination.

(ii) "...which substantially limits...".

The Americans with Disabilities Act regulations state that a person is "substantially limited in a[n] ... activity" if:

a) s/he is unable do the activity at all, or

b) s/he is significantly restricted in the "condition, manner or duration" in which s/he performs the activity[29].

Thus a person with paraplegia will be covered as s/he cannot engage in the activity of walking[30], just as will be a person who, as a result of rheumatism, can walk, but only short distances, or only with the aid of a stick.

(iii) "...one or more of the major life activities of such individual".

The HEW and Americans with Disabilities Act regulations (from the Equal Employment Opportunities Commission and the DOJ) both contain an illustrative list of "major life activities". These include activities such as:

"caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working"[31].

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[29] 29 CFR §1630.2 (j) (1992).

[30] Walking, as can be seen below, is classified as a major life activity.

[31] 45 CFR §84.3 (j) (2) (ii) (1989); 29 CFR §1630.2 (i) (1992) (EEOC); 28 CFR §36.104 (1992) (Definition of "disability"), (2) 1) (DOJ).

Again this list is not exhaustive and other activities, which are not referred to, such as reproduction or engaging in sexual relationships, are covered.

The interpretative guidance to the Americans with Disabilities Act further elaborates:

"'Major life activities' are those basic activities that the average person in the general population can perform with little or no difficulty"[32].

When considering whether an individual with an impairment is substantially limited in a major life activity the mitigating effects of any medicine or auxiliary aids are not taken into account. Thus, a person with epilepsy is considered impaired, even if s/he receives medical treatment which leaves him or her seizure free.

It is not necessary that an individual be substantially limited in a major life activity which affects his or her ability to work in order to be covered by the Act, although this will often be the case. For example, an individual who has difficulty in engaging in sexual relationships as a result of his or her HIV status is not limited in any work related activity; however that individual does possess an impairment which is substantially limiting in what has been classified as a "major life activity" (engaging in sexual relationships) - thus, if they are discriminated against in a work situation as a result of their impairment they will pass the first hurdle necessary to gain the protection of the Act (that of being a disabled person) even though their impairment does not affect their physical or mental ability to work.

A consequence of this requirement that the impairment must be "substantially limiting in a major life activity" is that those people who have an impairment which does not affect a "major life activity", or affects it in only a modest way, will not be covered in cases of discrimination where the employer also does not perceive the impairment to be a major limitation on such an activity. The requirements relating to "major life activity" were no doubt inserted to ensure that only those who had a significant degree of disability, or were perceived as such, were covered. However, if someone experiences employment discrimination as a result of possessing a minor impairment there seems to be no logical reason why they should not be covered.

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[32] 29 CFR §1630.2(i) (1992) EEOC.

3.1.2 The Second Prong: "a record of such an impairment".

The Americans with Disabilities Act regulations define an individual with a "record" of an impairment as someone who:

"1) had a physiological or mental disorder that substantially limited them in a major life activity but no longer has that impairment, or

2) someone who was simply misclassified as having such an impairment"[33].

The HEW regulations are worded very similarly[34].

This prong of the definition recognises that people who have recovered from a disabling condition may nevertheless be exposed to discrimination on the basis of their medical history. The first section of the regulations covers, for example, those with a history of mental and emotional illness, heart disease or cancer[35]. The second section of the regulations refers to those who have been misclassified in the past as having an impairment, and the example of those who have been incorrectly labelled as mentally retarded or learning disabled is given. Such people should undoubtedly be covered, but they seem to fit more logically under the third prong of the definition ("regarded" as having an impairment). This, however, was the approach taken in the HEW regulations which applied to the Rehabilitation Act and, for the reasons stated earlier, it was simply copied into the Americans with Disabilities Act regulations.

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[33] 29 CFR §1636.2 (k) (1992) (EEOC); 28 CFR §36.104 (1992) (Definition of "disability" (3)) (DOJ).

[34] 45 CFR §84.3 (j) (2) (iii) (1984).

[35] These examples are given in the HEW (Rehabilitation Act), EEOC and DOJ (Americans with Disabilities Act) regulations.

3.1.3 The Third Prong: "being regarded as having such an impairment".

The HEW and Americans with Disabilities Act regulations explain that an individual is regarded as having an impairment if:

"1) the person has a physical or mental impairment that does not substantially limit a major life activity, but is treated by the entity covered by the law as constituting such a limitation;

2) the person has a physical or mental impairment that substantially limits a major life activity only as the result of the attitude of others toward the impairment; or

3) the person does not have any physical or mental impairment, but is treated by the entity covered by the law as having a physical or mental impairment that substantially limits a major life activity"[36].

The prong therefore covers discrimination against people who are treated as if they have a disability. In scenarios one and two the discriminatee does in fact have an impairment, but this is not significantly limiting in any major life activity. Instead the individual concerned experiences the limitation as a result of the treatment by others, which may be based on prejudice, ignorance or misunderstanding. This prong would cover the situation, for example, where an employer refuses to employ an individual with a certain kind of disability (e.g. epilepsy, cerebral palsy) on the false assumption that all such people are incapable of carrying out the job in question.

The third scenario mentioned above covers the case of an individual who is not disabled, but who is assumed to be so by the discriminator. The Acts are therefore broad enough to cover even non-disabled people as was argued should be the case earlier.

It can be seen that a great deal of effort has been put into clarifying the concept of "disability", and, to avoid unnecessary confusion, government agencies have issued the same, or similar regulations with respect to this key concept.

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[36] 45 CFR §84.3 (j) (2) (iv) (1989); 29 CFR §1630.2 (i) (1992) (EEOC); 28 CFR §36.104 (1992) (Definition of "disability" (4)) (DOJ).

Since the first regulations were issued some fifteen years ago a number of court decisions (on the Rehabilitation Act), and Congressional Reports (on the Americans with Disabilities Act) have helped to clear up ambiguities.

3.1.4 Interpretation and Elaboration of the Statutory Terms and Guidelines by the Courts.

3.1.4.1 The First Prong: "a physical or mental impairment..." - Mere characteristics are not impairments.

The HEW and Americans with Disabilities Act define an "impairment" as a "physiological disorder or condition ... or a mental or psychological disorder". It has been argued that this definition is broad enough to cover any characteristic that has exposed the employee who possesses it to less favourable treatment. This argument has been rejected by the courts who have found neither support for this approach within the statutory language and regulations, nor an intention to provide such coverage in the legislative history.

In Tudyman v. United Airlines 608 F. Supp. 739 (D.C. Cal. 1984) an applicant for the position of flight attendant brought an action against an airline alleging handicap discrimination under section 504 of the Rehabilitation Act of 1973, when he was rejected because he did not meet the weight guidelines set for the position. The plaintiff was a body-builder and he exceeded the weight limit because his training had increased his body weight. He argued that the term "handicapped" covered an individual who is not "within the ordinary definition of that term" but who "is perceived as such by an employer who has acted in a manner which precludes [the] plaintiff from obtaining employment, notwithstanding the fact that he is in all other respects qualified to perform the requirements of the job".

The court rejected the plaintiff's claim, and found that he was not a "handicapped individual" within the meaning of the Act since he had no physical impairment and was not substantially limited in a major life activity. His condition could not be regarded as the result of a "physiological disorder", "cosmetic disfigurement" or "anatomical loss". Instead his weight was self-imposed and voluntary, and did not amount to an impairment, but was a mere characteristic. It found that Congress did not intend the protection of section 504 to be extended to such people when it passed the Rehabilitation Act.

3.1.4.2 The First Prong: "...which substantially limits one or more of the major life activities of such individual" - Both Quantative and Qualitative Approach to "Substantially limits" apply with respect to employment.

The term "substantially limits" in relation to employment was considered in detail, and its meaning somewhat clarified in E.E. Black Ltd. v. Marshall 497 F.Supp. 1088, 23 FEP 1253 (D. Hawaii 1980).

The term "substantially limits" with respect to work can be interpreted in two ways. Firstly, it is possible to understand it as only having a quantative meaning, i.e. referring only to the number of jobs that the impairment, or employer's treatment, affects. If a "significant" number of jobs are foreclosed then the individual is covered, but if only a few jobs are excluded the individual is not. Alternatively "substantially limits" can be interpreted to include a qualitative element as well, i.e. referring also to the effect that the impairment or discriminatory treatment has on the employability of a given individual for a particular job. A quantative meaning is clearer and easier to apply. It does not require an individualised examination of the relation of the (perceived) impairment to the particular requirements of the job in question. Instead evidence of the general employability of the individual need only be introduced. A history of job rejections based on the existence of the impairment would, for example, be sufficient to establish that an individual was "substantially limited" in the major life activity of working. With such a limited concept it is unlikely that a court or an employer would be uncertain, in many cases, as to whether the "substantially limited" requirement was met or not.

Once a qualitative element is introduced, the matter becomes much more complicated. This does involve an examination of the relation of the (perceived) impairment to the job requirements to establish if the alleged discriminatee is in fact "substantially limited" in performing that particular job. Herein arises a problem, for this qualitative definition of "substantially limits" contains the potential to extend the definition of "disability" in an open-ended way, so making a nonsense out of the former term. An individual would be covered if s/he could show that s/he was rejected for one job with one employer. There are arguments that this should in fact be the case; however, it seems hard to reconcile this with the statutory language. Therefore if, with respect to the qualitative

concept, the term "substantially limits" in relation to work is to have any meaning, some kind of boundary must be established. This was the problem that the court faced in E.E. Black Ltd. v. Marshall.

The case arose under Section 503[37] of the Rehabilitation Act, which forbids federal contractors from discriminating against "qualified handicapped individuals" and requires that they take affirmative action. A "qualified handicapped individual" is defined in the Section as one who is "capable of performing a particular job, with reasonable accommodation"[38].

In E.E. Black Ltd. v. Marshall an apprentice carpenter, Crosby, was denied a job by an employer, Black Ltd., because a pre-employment medical test revealed that he had a congenital back anomaly. It was accepted by all parties that this anomaly did not prevent Crosby from carrying out the job at the time of the application, although it was unclear if the work could exacerbate the condition. One of the questions which the court had to decide was whether Crosby was a "qualified handicapped individual", and so could benefit from the protection of the Act, and to do this it had to define the term "substantially limited" in relation to employment.

In the first debarment hearing the Chief Administrative Law Judge held that Crosby was not a handicapped individual because his impairment did not prevent him from carrying out most jobs. The Judge found that although Crosby had an impairment, or was perceived to have an impairment, this did not "substantially limit" his ability to take part in a "major life activity", namely employment, and so he was not a "handicapped individual". He stated that Crosby's perceived impairment, could, at the most, only prevent him from carrying out jobs which involved heavy labour, and since such jobs only constituted a small minority of the available jobs in the labour market, he did not come within the statutory definition of "handicapped individual". For this to be the case the (perceived) impairment would have to limit an individual's access to a wide variety of jobs.

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[37] "Any contract in excess of $2500, entered into by any Federal department ... for the procurement of personal property and nonpersonal services ... shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment handicapped individuals ...".

[38] The concepts of a "qualified handicapped individual" and "reasonable accommodation" shall be analysed in detail in the next section of this chapter.

This decision was overruled by the Assistant Secretary of Labor, who took a much broader view of the meaning of the phrase "substantially limited in one or more ... major life activities". He held that it was not necessary for the (perceived) impairment to be a barrier for entrance into a wide range of jobs, but "it is sufficient that the impairment is a current bar to the employment of one's choice with a federal contractor which the individual is capable of performing". He found that since Crosby's back anomaly prevented him from obtaining the job which he wanted, and which he was capable of doing, he was a "qualified handicapped individual" within the meaning of the Act.

The employer appealed from this decision, and requested a summary judgment that the Act and regulations as interpreted by the Assistant Secretary were unconstitutionally vague, and the firm was therefore being denied the due process of the law.

The Court rejected the argument that the term "handicapped individual" as used in the Statute was unconstitutionally vague. The Court rejected the Judge's definition of "substantially limits" and "substantial handicap to employment" which it found too narrow, and which would "drastically reduce the coverage of the Act". However, it also rejected the definition provided by the Assistant Secretary on the grounds that it was overbroad. The Court held that in analysing whether an individual was "substantially limited" in the field of employment one had to look at not just the impairment or perceived impairment, but at all the facts of the case - a case-by-case analysis is required to determine whether a (perceived) impairment for any individual is a substantial handicap to employment. The Court stated:

"The definitions contained in the Act are personal and must be evaluated by looking at the particular individual. A handicapped individual is one who 'has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment... .' It is the impaired individual that must be examined, and not just the impairment in abstract".

The Court also gave some guidelines to help determine if an impaired individual is "substantially limited" in relation to employment. Firstly, one has to consider the types of

jobs from which the individual with the impairment is excluded. To do this one must assume that the debarring criteria used by the employer in the actual case is applied generally by all employers in that field. In the case of Crosby, if the criteria applied by Black Ltd. were applied by all employers offering similar types of work, it would lead to an exclusion from all carpentry jobs; but such a general exclusion is not necessarily the result of this kind of analysis. For example, the reason for exclusion may be related to the location of one particular job rather than to a fundamental requirement of that job. The Court gave the example of excluding an individual who was sensitive to loud noises from a job where s/he would be exposed to such noises at the workplace, but where such noises were not generally associated with that kind of work.

Secondly, once it has been determined how many employers would apply the debarring criteria, one must consider the number of jobs for which this criteria is relevant. In the case of E.E. Black Ltd. v. Marshall this would be all jobs which involve heavy lifting.

Thirdly, in determining the number of jobs which are potentially available to an individual, one must consider the geographical area within which it is reasonable to expect him or her to work.

Finally, a personal analysis of the individual must be carried out, involving a consideration of his or her training, experience and expectations.

In essence the Court must consider the range of available jobs, and decide how broad the debarring criteria must be for it to be said of any individual that he or she has a substantial handicap to employment. One must engage in a case-by-case analysis in order to be able to reach a conclusion[39].

Applying these guidelines to the case in question the Court found that Crosby had an impairment, or was perceived to have an impairment, and that this was a substantial handicap to employment, since if all firms offering similar positions had applied the debarring criteria used by Black Ltd., Crosby would have been unable to find employment in his chosen field, for which he was qualified.

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[39] This formula was incorporated into the Americans with Disabilities Act regulations at CFR 29 §1630.2 (j) (3). EEOC.

The Court, whilst showing its favour for both a quantative and qualitative approach to the concept of "substantially limits" was attempting to set some boundaries to the definition. It argued that the "formula" it produced would enable employers to discover which individuals were, or probably were, covered by the Rehabilitation Act. It stated that employers would quickly realise if a job applicant or employee had a (perceived) impairment, was capable of performing a particular job, and if s/he was rejected because of that impairment. The combination of these factors should put employers on warning that they were dealing with someone who was at least possibly covered by the Rehabilitation Act.

The Court also emphasized the need for an individual analysis of the circumstances of each case to determine whether an impairment for a particular individual was a substantial handicap to employment. Employers may not be equipped to apply the detailed guidelines set out in E.E. Black Ltd. v. Marshall in every situation, and so may at times be left uncertain as to their obligations to individuals with disabilities under the Act.

However, the Court should not necessarily be criticised for this. The concept of disability is highly complex, and a definition which is clear and unambiguous in all cases may well be impossible to reach. The problems outlined above will probably apply in only a small minority of cases, and, since E.E. Black Ltd. v. Marshall was decided, the understanding of the concept of "disability" has reached a high level amongst employers, lawyers, and disabled people. This is the approach taken by Haines in his commentary on the case[40]. He states that the court made an "admirably strong analysis" of the phrases "substantially limits" and "substantial handicap to employment"[41], and that the formula produced represented an important advance in the interpretation of the terms. He acknowledged that there would still be problems in applying the guidelines in a few cases, but commented:

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[40] E.E. Black Ltd. v. Marshall: A Penetrating Interpretation of the 'handicapped individual' for Sections 503 and 504 of the Rehabilitation Act of 1973 and for the Various State Equal Opportunity Statutes, Andrew E. Haines, Loyola of Los Angeles Law Review, Vol. 16, 1983, pp.527-566.

[41] Ibid, p.561.

"In essence, the Court observed that the best anyone can achieve is an interpretation of 'substantially limits' that turns on individualized assessments, rather than a logically defensible, abstract interpretation that avoids all ambiguity"[42].

He concludes that:

"...all statutes that adopt the approach of the Rehabilitation Act can, at best, achieve only refinements of the statutory formula, even then admitting that we must ultimately rely on a combination of factors heavily weighted in favour of the individual employment setting, a profile of the individual job applicant, inferences, and historical experience"[43].

The definition of "substantially limits" with regard to work has in fact been refined even further since Haines wrote. In relation to the first prong of the definition of "disability" the House Judiciary Report on the Americans with Disabilities Act stated:

"a person who is limited in his or her ability to perform only a particular job, because of the circumstances unique to that job site or materials used, may not be substantially limited in the major life activity of working"[44].

This follows the court's approach in E.E. Black Ltd. v. Marshall. In contrast, in relation to the third prong of the definition[45], the Report notes:

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[42] Ibid, p.562.

[43] Ibid, p.565.

[44] Judiciary Report at p.29.

[45] "being regarded as having such an impairment".

"[A] person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under the third [prong], whether or not the employer's perception was shared by others in the field..."[46].

The Senate Report and House Education and Labor Reports make similar comments. These reports suggest that under the third prong of the definition of disability a purely qualitative approach will be adopted under the Americans with Disabilities Act, and that there need be no showing that the individual is limited in performing other jobs, or that the employer perceives him or her to be limited in other jobs.

This highly complex concept of "substantially limits" with regard to employment has therefore been refined to a significant extent since 1974. Although uncertainty may still exist in a minority of cases, it has been reduced to a minimum.

It should be pointed out though that in the vast majority of cases the question of whether an individual is "substantially limited" in employment will not even arise. This is because it will be obvious that the (perceived) impairment of such individual is "substantially limiting" in some other "major life activity". The list of areas which are regarded as "major life activities" contained in the EEOC regulations is broad and, because of the pervasiveness of most disabilities, an individual will usually be able to show that s/he is limited in a covered activity other than employment. For example a blind person or a person with a visual impairment will be covered because s/he is limited in seeing; a person with dyslexia will be covered because s/he is limited in learning; a person who uses a wheelchair or walking stick will be covered because s/he is limited in walking, and so on. Only a few individuals with impairments will be limited simply in the activity of working, and it will usually be obvious to an employer that this is the case - for example, an employee who cannot read from a V.D.U., but in all other respects has normal vision, would be covered because of the wide use made of computers in employment. Therefore it is only in a minority of the few cases where an individual claims to be limited in working that the problems outlined in E.E. Black will arise, and, even then, the regulations and points

[46] Op.cit., at p.30.

outlined in the case will usually make it clear if an individual is covered or not. The infrequency with which this question will arise means that it cannot be regarded as creating a substantial area of uncertainty as to whom is covered.

3.1.4.3 The Second and Third Prongs:

"a record of such an impairment".

"being regarded as having such an impairment".

Concerned with the effect of the impairment on others as much with the effect of the impairment on the individual.

The third prong of the definition reflects the fact that in many cases it is neither a reduced capability caused by an impairment nor a failure to accommodate an impairment which causes difficulty, but rather the negative reaction of others to an actual or perceived impairment. The rationale behind this element of the definition was articulated by the Supreme Court in School Board of Nassau County v Arline 480 U.S. 273 (1987).

In Arline the plaintiff teacher, who had been hospitalised for tuberculosis and who, some twenty years later suffered a relapse, was dismissed, and brought an action alleging handicap discrimination under Section 504 of the Rehabilitation Act of 1973. The Court found that she was covered because, as a result of the hospitalisation, she had a "record of an impairment".

The defendants had not however dismissed the plaintiff because of the prior hospitalisation, but because of a fear that she was contagious. The Supreme Court found that the defendant's could not be allowed to distinguish between the contagious effects of a disease or illness and its physical effects on the individual, and to justifiably dismiss on the former ground. It stated that the effect of an impairment on others is as relevant to a determination of an existence of a handicap as the physical effect of the impairment. In reaching this verdict it considered the legislative history of the Rehabilitation Act, and specifically the decision to broaden the definition of "handicapped individual" in 1974:

"By amending the definition of 'handicapped individual' to include not only those who are actually physically impaired, but also those who are regarded as impaired and who,

as a result, are substantially limited in a major life activity, Congress has acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment"[47].

The Court therefore made clear that the third prong of the definition was designed to protect those who had impairments which did not substantially limit their functioning in any way other than as a result of the attitude of others.

3.1.5 Comment on the U.S. Definition of "Disability".

Having analysed the approach adopted by the U.S. legislation towards defining an "individual with a disability" it is now possible to consider how successfully the problems outlined in section 2.1.1 have been dealt with. It was stated earlier that difficulties exist in producing a definition broad enough to cover both those who experience discrimination because of the failure to take account of the physical or mental restrictions caused by their impairment, and those who suffer as a result of a false assumption about their impairment or the existence of an impairment, whilst simultaneously ensuring that employers are sufficiently well informed and certain as to who is protected. It has been shown that the U.S. definition is very broad, and is capable of encompassing the vast majority of those who experience disability discrimination, whether or not they in fact have an impairment, and whether or not they are restricted by that condition. The first requirement has therefore, on the whole, been met.

As a result, however, the definition of "individual with a disability" is complicated, and involves far more than a medical determination. To compliment this complex definition there is a detailed and lengthy set of regulations to the Americans with Disabilities Act. These regulations have the force of law and are the first such regulations ever to be issued by the EEOC. Furthermore an appendix was attached to the regulations providing interpretative guidance and the EEOC issued a detailed Technical Assistance Manual[48] for

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[47] 480 U.S. 273 (1987), p.284.

[48] 146 000 copies of this manual had been distributed as of September 1992.

employers. The Americans with Disabilities Act is the most detailed (and therefore lengthy) piece of American civil rights legislation that exists. This attention to detail is reflected not only in the definition of "disability", but in all other sections of the Act as well. In addition assistance to interpretation can be found in the court decisions based on Section 504 and the legislative history to the later Act. This all illustrates a very important pre-requisite for the adoption of successful disability employment anti-discrimination legislation - the legislation must be extremely detailed and go to great pains to explain concepts which are not immediately obvious to employers, disabled people, or their lawyers. Furthermore, there must be an effort to distribute information explaining the nature of the obligations imposed and the rights granted by the Act, as has occurred in the U.S..

The result of such an approach, consisting of detailed legislation and regulations and an extensive distribution of information, is a definition of the term "individual with a disability" which, although relatively complicated, is also generally understood by the relevant parties, although complete certainty has not been achieved. However, in the light of the complicated socially-determined nature of disability and handicap it is unlikely that a definition which will provide certainty in every case is attainable. Nevertheless, what can be said of the U.S. definition is that it has significantly reduced the scope for misunderstanding and uncertainty and dealt relatively well with the problems outlined above.

This, however, has not always been the case, and when the definition was first adopted in 1974 with no guidance, there was confusion. A long defining process, however, has significantly reduced this uncertainty and ambiguity.

There is however one area where an improvement could be made: by eliminating the requirement that the (perceived) impairment must "substantially limit a major life activity" the definition could be simplified, and the small group of people with an impairment who are presently unprotected (those whose impairment does not substantially limit a major life activity, and is not perceived to be so limiting by the discriminator) could be covered. Employers and courts would then only have to grapple with the concept of "impairment", which seems to be the least controversial of the three concepts in the first prong of the definition of an "individual with a disability".

3.1.6 Comment on the value of an E.C. / U.S. Comparison.

Care needs to be taken when making comparisons between the United States and the European Community, and an approach which may be successful in the U.S. would not necessarily be appropriate for the Community. The U.S. legal system, based on common law, differs markedly from that used in most European Community states (only one U.S. state, Louisiana, has a legal system based on the civil law), and the American system naturally has a wholly different political, historical and ideological background to that of European Community states. On the other hand the situation seems comparable at first sight in that there is a division of powers between individual states (E.C. Member States or U.S. states) and a "supra-state" institutions (European Community or the Federal Government), each with its own competences. In the United States unitary federal laws must be applied to states with differing legal systems, just as European Community law must be applied within the various Member States. In the U.S. federal disability anti-discrimination legislation has not proved incompatible with the adoption of individual state disability employment practices, and most states have their own disability anti-discrimination legislation which compliments the federal Acts.

It would be wrong however to draw the conclusion that a similar kind of co-existence could occur within the E.C.. An E.C. directive is implemented through national legislation; U.S. federal law is not implemented through state legislation, but exists as a wholly separate entity. National laws of E.C. Member States cannot contradict directives, or exclude certain groups or areas. States law, however, can do so. This does not remove the protection of the federal law, which exists irrespective of any states legislation, but, where state law exceeds federal law in the scope of protection it confers additional rights and a second cause of action (just as is the case in the E.C. - in this limited respect, therefore, a comparison is valid). For example, a state is entitled to adopt a disability employment anti-discrimination law which only covers those with physical disabilities. A physically disabled person who feels that s/he has been discriminated against at work can then bring an action under both state and federal anti-discrimination law; a mentally disabled person in a similar position, however, would only be able to bring an action under federal law. National law of Member States could clearly not be allowed this freedom. Thus a comparison between state /

national law and supra-state law, which initially seems attractive, does not really provide much insight into how an E.C. policy could be implemented in practice.

A comparison is valid though in that both systems are faced with a common problem - that of achieving the economic integration of people with disabilities - and need to attempt to solve it through eliminating the discrimination which such people are exposed to.

As long as one is aware of the need for caution, and of the areas where differences and similarities exist, a comparison between the two systems can be profitable and illuminating.

Even though the U.S. definition of "disability" has been relatively successful in diminishing ambiguities and uncertainties, it is not necessarily the one that should be adopted in any E.C. directive, even if amended in the manner suggested at the end of the previous section. The E.C. can approach this problem with a great deal more freedom than the U.S. Congress. It is clear, nevertheless, that any E.C. directive must make some specification as to who the beneficiaries of a disability employment anti-discrimination directive should be. If this matter were left to Member States to determine it could lead to a series of national statutes implementing the directive covering widely different groups. Protection in one Member State might be extended only to those with "traditional" disabilities, whilst in a neighbouring state coverage may be as broad as that in the U.S.. Apart from any social considerations, this would hamper the development of the internal market, in that it would restrict the freedom of movement of workers with a disabilities, and competition. It is necessary, therefore, that a single coverage exists throughout the Community.

A precise definition, similar in nature to the U.S. one, would indeed be one way of achieving this. A possible alternative would be to state that anyone who is a victim of disability employment discrimination is covered, so focusing attention solely on the alleged discriminatory act rather than on a combination of that act and the actual characteristics of the discriminatee as occurs under the American legislation. Such an approach was in fact proposed in the original Americans with Disabilities Act, but the political reasons outlined earlier necessitated that the new Act be based on the Rehabilitation Act, and meant that this approach could not be adopted.

There are, however, problems with such an approach at the European Community level. Firstly, Member States may be reluctant to endorse a directive framed in this way, fearing that it would lead either to uncertainty as to who is covered by the directive, or to an open-ended coverage. Secondly, such an approach may in fact be ambiguous. It is possible to envisage cases of employment discrimination where it is not clear that a motivating factor was disability. For example, an employer may discriminate against someone on the grounds that they are obese, or very short, or do not pay sufficient attention. The question will then arise as to whether this amounts to disability discrimination, or whether it is motivated by some other factor. Under the U.S. approach it will be disability discrimination if the individuals' obesity or short stature is caused by some glandular or hormonal disorder (i.e. if it results from an impairment), but not if it is caused by a general tendency to obesity or short stature which is unrelated to any medical problem. Similarly, in the case of poor attention, it will be disability discrimination if the problem is caused by a head injury suffered in an accident, but not if it is caused by worrying about being dismissed. These may in fact be quite arbitrary distinctions, and possibly all obese, short and distracted people should be covered; however, what the U.S. definition does provide in such cases is legal certainty. A directive simply covering all those who experience disability employment discrimination would leave it unclear as to whether such people are covered, and in any case would be unlikely to reach the level of certainty of a relatively precise definition. For this reason there may be pressure on the European Community to adopt such a definition. This suggests that, inspite of the differences between the United States and the European Community, a similar approach to the problem of identifying the protected class under disability employment anti-discrimination legislation may in fact be suitable. If so, then the U.S. experience make a valuable point of reference.

However, whatever definition is adopted needs to be detailed and explicit, as is the case in the U.S. Even so it is unlikely that such a definition will be able to achieve the maximum level of certainty immediately, particularly since it will be dealing with concepts which are presently unfamiliar to E.C. employers and lawyers. Just as in the U.S., a period of refinement and elaboration through the courts, and possibly through E.C. or national administrations, will be necessary. Detailed and explicit legislation would significantly

reduce the length of time which this clarifying process will take. Furthermore, as the U.S. experience demonstrates, legislation should not fail to be introduced in this area because it cannot achieve maximum certainty immediately, and E.C. policy-makers and national governments must be prepared to accept an initial degree of employer uncertainty and subsequent litigation.

3.2 What is Discrimination?

Both the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 embrace two different concepts of discrimination. The first concept is the traditional one as applied to race, sex, national origin and religion in Title VII of the Civil Rights Act of 1964, and assumes that the pertinent characteristic, in this case disability, is nearly always irrelevant for the competent performance of a job. The statutes therefore prohibit that disability, where it has no impact on the ability to perform a job, be taken into account when making employment-related decisions.

This concept though is insufficient to take into account the institutional discrimination people with disabilities face. Therefore both Acts encompass a second concept of discrimination which assumes that, at times, the existence of a disability can be highly relevant for the performance of a job. This second concept of discrimination obliges the employer to take the disability into account where it affects the ability to satisfactorily perform a job, and to consider the relation of the disability to the work environment to establish whether any alterations or modifications can be made to enable the individual to meet the necessary performance standards. Where such an accommodation can be made the employer is obliged to carry it out, except in cases where this would cause what is termed "undue hardship" under the Acts. It was emphasized in chapter one that such a double approach was necessary for comprehensive disability employment anti-discrimination legislation. The American experience confirms that this is true, and it must also be the approach adopted within any E.C. policy.

The American legislation therefore amounts to a compromise between the needs of employers to run a profitable business and the needs of disabled people to be in employment.

Employers are obliged to undertake accommodations, but only where this would enable a disabled person to attain the required performance standards, and where it would not cause the employer excessive difficulty. Disabled people who cannot reach the required standard, even with an accommodation, or for whom an accommodation would be too difficult to implement, do not benefit from the anti-discrimination protection. This too must be the approach of any E.C. policy. To do otherwise would be to impose unreasonable expectations upon employers or to pay insufficient attention to the needs of people with disabilities. The first step in analysing what constitutes disability discrimination under the US legislation, therefore, is to determine the standard of performance a disabled person must reach, either with or without an accommodation, in order to be protected. Less favourable treatment towards an individual who does not reach this standard will not be discrimination; whilst such treatment towards an individual who does, where it is based on such person's (perceived) disability, will be.

3.2.1 "A Qualified Individual with a Disability".

Section 102 (a) of the Americans with Disabilities Act states:

"No covered entity[49] shall discriminate against a qualified individual with a disability because of the disability of such individual".

A "qualified individual with a disability" is defined in section 101(8) of the Act as:

"an individual with a disability who, **with or without reasonable accommodation**, can **perform the essential functions of the employment position** that such individual holds or desires".

To determine if an individual with a disability is "qualified" within the meaning of the Act a number of steps must be gone through. Firstly, it must be established that the individual meets all the necessary skill, experience and other job-related requirements for the job, just as would be the case with any other applicant, e.g. if the position requires a law degree, or three years work experience as a lawyer, it must be shown that the disabled person meets these criteria. Secondly, the "essential functions" of the job must be identified.

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[49] All employers with fifteen or more employees (twenty-five or more employees until 26 July 1994) are "covered entities".

Thirdly, a determination must be made as to whether the individual can perform those functions. If they can then they are "qualified"; if they cannot, a further determination must be made as to whether any reasonable accommodation could be made which would allow them to perform those functions. If so then the individual is also "qualified".

The intention is clearly not to oblige employers to appoint people who are unqualified or unable to do the job, but to prevent employees from considering irrelevant characteristics such as the inability to perform non-essential functions of the job, or the inability to perform essential functions in the usual way.

Before considering the meaning of "reasonable accommodation", the concept of "essential functions" shall be analysed. If a disabled person can perform these functions in the usual way, then the second question of the need for an accommodation will not arise.

3.2.1.1 "Essential Functions of the Job".

This provision was included to insure that a disabled individual who can perform the core elements of a job, but not some of the marginal requirements, is not treated less favourably than individuals who can perform both the essential and marginal functions. Employers are therefore not allowed to consider the ability to perform non-essential job functions when making employment decisions, and may only judge candidates on their ability to carry out "essential functions".

The EEOC regulations to the Americans with Disabilities Act define "essential functions" as "the fundamental job duties of the employment position"[50]. This is elaborated in the interpretative guidance to the regulations, where it is stated that:

"The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation"[51].

[50] 29 CFR §1630.2(u).

[51] Ibid.

More Disabled Than Others

The regulations state that a job function may be considered essential for a number of reasons. Firstly, it can be essential because "the reason the position exists is to perform that function" [52]. The ability to type, for example, is clearly an essential function of a typist.

Secondly, a function can be essential because "of the limited number of employees available among whom the performance of that job function can be distributed"[53]. The interpretative guidance to the regulations explain that this may be because the total number of available employees is low, or because of the fluctuating demands of the business operation. If, for example, an employee in a small business is required to do a number of functions in the production process, then all of those may be regarded as "essential". However an employee working in a larger business which is engaged in the same sort of work may have fewer "essential functions" because the size of the workforce makes such flexibility unnecessary.

Thirdly, a function may be "essential" because it is:

"highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function"[54].

These three factors do not amount to an exclusive list of reasons why functions may be considered "essential".

To determine if a function is in fact "essential" an individualised analysis of the job must be engaged in. The regulations list a number of factors which should be considered in making this determination. Once again this does not amount to an exclusive list, and other factors may also be relevant.

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[52] 29 CFR §1630(2)(u)(i).

[53] 29 CFR §1630(u)(ii).

[54] 29 CFR §1630(2)(u)(iii).

Firstly, both the regulations and section 101(8) of the Act state that consideration shall be given to the employer's judgment as to which functions are essential. Section 101(8) specifies:

"if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job".

However, simply because a function is viewed or listed as essential by the employer does not amount to proof that it is in fact essential. The disabled individual may introduce evidence to rebut the employer's claim, and the court must look beyond the employer's claim, and analyse the actual requirements of the job. Thus in Davis v. Frank 711 F.Supp 447 (N.D. Ill. 1989), a case brought under section 504 of the Rehabilitation Act[55], a court found that the requirement of "the ability to hear the spoken voice", which was listed in a job description, was in fact not essential as claimed, and had been inserted to artificially exclude the plaintiff who was deaf. Instead the essential function was that of communicating certain information, which the plaintiff could do through writing, lip-reading and with the assistance of minimal accommodations. This illustrates another element of the "essential functions" requirement - namely that the functions must be defined broadly to allow for the fact that certain disabled people may carry out the functions in an unconventional manner, which is nevertheless effective.

The interpretative guidance also lists the "amount of time spent on the job performing the functions" as a relevant consideration in the determination. Thus, if a large amount of time is spent performing a certain function, that is evidence that the function is essential. However the reverse is not necessarily true, and simply because a function is seldom performed, or takes up only a small amount of time, does not mean that it will always be unessential. An individualised analysis will be necessary to establish if this is the case. In

[55] Section 504 contains a provision similar to that of Section 102(a) of the Americans with Disabilities Act, specifying that recipients of federal financial assistance shall not discriminate against "otherwise qualified" handicapped individuals.

Treadwell v. Alexander 707 F. 2d. 473 (11th Cir. 1983), for example, the court stated that the essential nature of a particular job function was not determined solely by the amount of time devoted to it, and found that the function of operating a motorboat alone, although only occasionally necessary, was nevertheless an essential function of the job of park technician.

A third factor to be considered are the "consequences of not requiring the incumbent to perform the function". The guidance gives the example of requiring a firefighter to be able to carry an unconscious adult out of a burning building. Although this occasion would only infrequently arise, the consequences of failing to require this ability of firefighters could be very serious.

In addition the terms of collective bargaining agreements and the work experiences of past and present incumbents in the job, or similar jobs, should be considered.

The essence of the determination of the "essential functions" of the job, as the regulations and section 504 cases make clear, is that it involves an individualised analysis, and an examination of the purposes of the job and their relation to the other employees and the overall purpose of the business. The detailed regulations and interpretative guidance provide a great deal of assistance in making this determination by referring to some of the factors which must be considered. A good example of such an analysis can be found in the section 504 case of Ackerman v. Western Electric Co. 643 F. Supp 836 (N.D.Cal. 1986). The court found that whilst certain functions were essential for a team of workers which installed and modified telecommunications equipment, they were not essential for all individuals in that team. Therefore the plaintiff, who was unable to do certain tasks, was nevertheless "otherwise qualified" since she could do all the essential functions of her job as defined by the court, and there were a sufficient number of workers in the team to perform the tasks which she could not do.

Once a disabled individual has established that they are able to perform the essential functions of a job they will be covered by the Americans with Disabilities Act, and any less favourable treatment by the employer based on the disability of such individual will amount to discrimination. This follows the traditional approach to employment discrimination based on the assumption that the characteristic in question is irrelevant to the employment situation. However, even when it is established that the disabled individual is unable to

perform the "essential functions", the employer may still not necessarily treat that individual less favourably. Here the second element of the definition of "qualified individual with a disability", and the second concept of discrimination, i.e. "unequal burdens", come into play. In such a case the employer must consider if any "reasonable accommodation" could be implemented to enable the individual to perform those functions.

3.2.1.2 "Reasonable Accommodation".

The Americans with Disabilities Act, like the Rehabilitation Act, does not contain a definition of "reasonable accommodation". Instead it states that:

"The term 'reasonable accommodation' may include

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

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities"[56].

A definition is, however, given in the EEOC regulations to the Act. "Reasonable accommodation" is defined as:

"(i)Modifications or adjustments to a **job application** process that enables a qualified applicant 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

[56] Section 101(9).

(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"[57].

Therefore, in relation to the concept of a "qualified individual with a disability", a "reasonable accommodation" is a modification or adjustment that is effective in enabling the disabled individual to perform the "essential functions" of the job. The reasonableness of the accommodation does not refer to its limited cost or inconvenience to the employer, but rather to its potential to provide equal opportunity, reliability, and efficiency. The House Labor Report on the Americans with Disabilities Act states:

"A reasonable accommodation should be effective for the employee ... [and] should provide a meaningful equal employment opportunity ... [that is] an opportunity to attain the same level of performance as is available to non-disabled employees having similar skills and abilities"[58].

It is possibly misleading to use the adjective "reasonable" to describe such an accommodation, and at least two commentators[59] have assumed that the adjective refers to what is required of an employer rather than to the efficiency of the accommodation itself. A more appropriate term would seem to be "effective accommodation".

Furthermore, just as is the case with the "essential function" question, an individualised analysis is needed to establish the need and scope for implementing a "reasonable accommodation" and the Senate Report on the Americans with Disabilities Act states in this respect:

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[57] 29 CFR §1630.2(o).

[58] Page 66.

[59] Tucker, B.P. and B.A. Goldstein, Legal Rights of People with Disabilities - An Analysis of Federal Law, LRP Publications (1991,1992).

"The decision as to what reasonable accommodation is appropriate is one which must be determined on the particular facts of the individual case"[60].

Although any accommodation must be designed to meet the needs of the individual in question, the Act and the regulations do give examples of some of the more common types of reasonable accommodation which an employer should consider[61].

If the implementation of a reasonable accommodation would allow a disabled individual to perform the "essential functions" of the job, then that individual is regarded as "qualified" and protected by the Act. If, however, no such accommodation is possible the individual will not be qualified, even if s/he meets all of the other requirements of the job (e.g. experience, academic qualifications), and any less favourable treatment will not amount to discrimination. An employer is not required to eliminate an essential job function which a disabled applicant or employee cannot perform. This was illustrated in Southeastern Community College v. Davis, 442 U.S. 397 (1979). The plaintiff brought an action under section 504 of the Rehabilitation Act alleging handicap discrimination after she was rejected by the defendant college when she applied for a nursing training programme. She met all the entrance criteria and was rejected because she had a hearing impairment. The Supreme Court found that no discrimination had occurred, and that the rejection was justified because the plaintiff was not "otherwise qualified". As a result of her condition she could not take part in the clinical phase of the programme, and there was no reasonable accommodation that the defendant could make that would enable her to do so.

Davis also illustrates another element of the "qualified individual with a disability" investigation - namely the need to engage in an individualised examination of the impact of the particular disability on the particular individual. The Court did not assume that all hearing impaired people were incapable of participating in the programme, but found that, in this particular instance, the plaintiff was. A similar question arose in Pushkin v. Regents of the University of Colorado 658 F. 2d 1372 (10th Cir. 1981), where the plaintiff was

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[60] Page 31.

[61] See section 101(9) quoted earlier.

rejected from a psychiatric residency programme because he had multiple sclerosis. The admissions committee were found to have wrongly assumed that all people with the plaintiff's condition were incapable of participating in the programme and, following an individualised analysis, the court found the plaintiff to be "otherwise qualified" and covered by Section 504 of the Rehabilitation Act.

Therefore, in making an assessment of whether an individual with a disability is "qualified", and so covered by the Act, a case-by-case analysis must be entered into. The impact of the particular disability on the particular individual, in relation to the particular job, and specifically the "essential functions" of that job, must all be reviewed and, only on the basis of such an analysis can an informed decision be made. This clearly places a heavy and time-consuming burden upon employers. However, because of the idiosyncratic nature of disability and employment such an approach is necessary. The matter is further complicated by the dual function that the term "reasonable accommodation" serves. Not only is this term part of the definition of "otherwise qualified", it is also contained within the definition of discrimination, since it amounts to disability discrimination to fail to provide a reasonable accommodations to the known disabilities of a qualified individual, or to treat an individual less favourably because of their need for such an accommodation, unless the employer can rely on the defense of "undue hardship".

Once it has been established that a disabled individual is "qualified" then it becomes an offence to discriminate against such individual on the grounds of his/her disability. The acts that are considered to be discrimination and the role of "reasonable accommodation" shall now be considered.

3.2.2 Discriminatory Acts.

Section 102 (b) of the Americans with Disabilities Act lists a number of acts that are regarded as disability discrimination. Once again one can see the two concepts of discrimination reflected in the Act's approach: the traditional concept of discrimination, embodying direct and indirect discrimination, and the newer concept of "unequal burdens".

Section 102 (b) states "the term 'discriminate' includes

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of a disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title ...

(3) utilizing standards, criteria, or methods of administration

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control; ...".

Such behaviour amounts to direct discrimination and, once a determination has been made that a disabled person is qualified for the position in question, it is relatively easy to identify.

Section 102 also covers indirect discrimination. It states that discrimination includes:

"(6) using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity".

There was some uncertainty as to whether indirect discrimination was covered by the Rehabilitation Act. The clear wording of the 1990 Act though, leaves no doubt on this matter.

Thus far the Americans with Disabilities Act breaks no new ground with its concept of discrimination, and the behaviour covered here is also covered under Title VII of the Civil Rights Act of 1964 when directed at the classes protected by that Act. However the Americans with Disabilities Act also covers the "unequal burdens" concept of discrimination, by defining the term to include:

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

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

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure)".

Thus, a failure to make a reasonable accommodation, where the employer knows of the need for such an accommodation, amounts to discrimination, as does implementing a test that fails to accurately measure the skills of a disabled individual. The meaning of "reasonable accommodation" has already been touched upon in relation to the concept of a "qualified individual with a disability", and the term shall now be analysed as a non-

discrimination requirement. The requirement relating to testing shall not be examined in the same detail; the theoretical justification for the two requirements is however the same, and many of the arguments made with respect to the obligation to make a "reasonable accommodation" can be adapted to this second requirement.

3.2.2.1 "Not making a reasonable accommodation".

Unlike the definition of "qualified individual with a disability", where "reasonable accommodation" is used only with respect to "essential functions" of a job, the term, when used as an obligation not to discriminate, applies to all employment decisions and to the job application process.

The EEOC interpretative guidance provides assistance in determining the extent of the obligation. The emphasis is on obliging the employer to make modifications or alterations with the needs of a particular individual and a particular job in mind. These obligations do not extend, for example, to the provision of equipment or assistance for general daily-life use. The employer is only obliged to make work-related accommodations, including accommodations that allow the individual to profit from benefits associated with work. Thus, if all employees have access to kitchen facilities to prepare their own food and drinks whilst at work the employer should ensure that such facilities are also accessible to disabled employees or, where this is not possible, make alternative arrangements which provide such employees with a similar benefit. However, an employer would not be required to provide an employee with a wheelchair, or spectacles, where the employee needs such equipment to function effectively outside of work as well.

The statute makes it clear that the employer is only required to make accommodations "to the known physical or mental limitations of an otherwise qualified individual". It is the responsibility of the disabled individual to inform the employer of the need for an accommodation, and an employer will not be held liable for failing to accommodate disabilities of which s/he was unaware.

The guidance also makes it clear that the employer is expected to consult with the disabled individual in determining which accommodations are suitable. The appropriate accommodation will often be obvious to both the employer and employee and in such cases

a decision can usually be quickly and easily made. For those cases where it is not obvious which accommodation to adopt the regulations specify that an interactive process should be followed. Firstly an analysis of the particular job and a determination of its purposes and essential functions must be made. Secondly the employer must consult with the employee to determine the precise job-related limitations and how these limitations could be overcome with a reasonable accommodation. Thirdly, still in consultation with the employee, possible accommodations must be identified and their effectiveness considered. Ultimately a decision on which accommodation to adopt must be made by the employer. The accommodation does not have to be the "best" which is available; it is sufficient if it enables the individual to perform the tasks at which it is directed. However, the employer is expected to give consideration to the wishes of the individual.

Therefore, it amounts to disability discrimination to fail to provide a "reasonable accommodation" for an existing "qualified" employee, or to deny an employment opportunity to a "qualified" disabled individual because of the need to make an accommodation for that individual. There is, however, in keeping with the idea that the Act is a compromise between the needs of employers and disabled people, a limit to the obligation to make a "reasonable accommodation" to the known disabilities of a "qualified" individual. An employer is not required to make an accommodation if doing so would impose an "undue hardship" on the operation of the business.

This term shall now be examined, for whilst the concept of "reasonable accommodation" is reasonably well developed, the legislation still leaves uncertainties as to the extent of the duty to provide an accommodation.

3.2.2.2 "Undue hardship".

"Undue hardship" is defined in Section 101(10) of the Americans with Disabilities Act as "an action requiring significant difficulty or expense".

This is not a de minimus standard, and the legislative history of the Act makes it clear that "undue hardship", as used in the Americans with Disabilities Act, does not have the same meaning as when it is used in Title VII of the Civil Rights Act regarding

"reasonable accommodation" for individuals on the basis of religion[62]. In the latter case the Supreme Court, in Trans World Airlines v. Hardison 432 U.S. 63 (1977), interpreted the "undue hardship" limitation as not requiring employers to accommodate workers' religious beliefs if doing so would impose more than a de minimus cost. The House Committee on Education and Labor emphasised that this was not how the term was to be interpreted under the Americans with Disabilities Act when it stated:

"The Committee wished to make it clear that the principles enunciated by the Supreme Court in TWA v. Hardison ... are not applicable to this legislation. ... under the Americans with Disabilities Act, reasonable accommodation must be provided unless they rise to the level of 'requiring significant difficulty or expense' on the part of the employer ... i.e., a significantly higher standard than that articulated in Hardison"[63].

On the other hand, though, "undue hardship" does not just cover those accommodations which would drive the employer to the verge of bankruptcy. Such a limited definition of the term was rejected by Congress.

To determine whether an accommodation would in fact pose an "undue hardship" to a particular employer an individualised examination must again be made. The Act, in Section 101(10)B lists a number of factors which should be considered in this process. These include:

"(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;

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[62] Section 701 (j) of the Civil Rights Act states: "The term 'religion' includes all aspects of religious observance and practice, 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 employee's business".

[63] Page 68.

(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"[64].

These do not amount to an exclusive list and other factors, such as the number of employees or applicants who will potentially benefit from the accommodation, or the availability of external funding or support, may also be considered.

The Act and the EEOC regulations do not specify the weight to be given to each of these factors deliberately. The aim is to ensure that the problem is approached in a flexible manner, so that the cost and the nature of the accommodation can be assessed in the light of the employer's financial resources, workplace and operations. There is no general rule that all employers are obliged to provide a particular accommodation, or that no employer can be required to provide another. Instead the extent of the obligation is different in each case. Thus, in Nelson v. Thornburgh 567 F. Supp. 369 (E.D. Pa. 1983), a case brought under the Rehabilitation Act, a district court stated that the weight to be given to the factors listed as relevant for a determination of "undue hardship" in the regulations to the Act would vary depending on the facts of a particular situation, and an accommodation that amounted to "undue hardship" for a small operation would not necessarily be so for a larger one. In this instance the court found that the provision of readers for three blind administrative workers did not amount to an "undue hardship", given that the cost of the readers was very modest compared to the employer's $300 000 000 budget.

An accommodation can, however, be found to amount to an "undue hardship" for reasons other than cost, and even a cheap accommodation may not be required where, for

[64] The statute distinguishes between the "covered entity" and the "facilities" of the "covered entity". The "covered entity" is the employer, whilst "facilities" are the individual factories, shops, hotels etc. which are operated by the "covered entity".

example, it would cause severe disruption, reduce productivity or threaten safety. In Dexler v. Tisch 660 F. Supp. 1418 (D. Conn. 1987), another Rehabilitation Act case, an accommodation of providing a step stool to allow a postal employee with achondroplastic dwarfism to perform certain tasks, and exempting him from others, was found to amount to "undue hardship". The post office in question used a "task-oriented" approach to work, which required that each employee be able to carry out numerous tasks. If the plaintiff had been exempted from some tasks productivity would have suffered, since he could not have been assigned alternative tasks to compensate for those which he could not do. The provision of a step stool was also an "undue hardship" since it would have caused safety problems and led to inefficiency.

The legislative history of the Act makes it clear that "undue hardship" is to be interpreted and applied consistently with its use in the Rehabilitation Act, and indeed the criteria in Section 101(10)B, which are to be considered in making a determination of "undue hardship", were taken directly from the regulations to the Rehabilitation Act.

The cases referred to above, and others decided under the Rehabilitation Act, are therefore highly relevant for determining the extent of the burden placed upon employers by the Americans with Disabilities Act.

In addition the EEOC regulations to the Act make it clear that an employer cannot show "undue hardship" by demonstrating that other employees would be disrupted by the accommodation, where the disruption results from the fear or prejudice of those employees towards the disabled individual, or by showing that the accommodation would have a negative impact on the morale of other employees[65].

3.2.3 Comment on the U.S. definition of disability discrimination.

The Americans with Disabilities Act recognises that employers may be tempted to judge disabled applicants on factors other than the ability to perform a job. By allowing employers to consider only the capacity to carry out "essential functions" of a job the Act has attempted to prevent the consideration of such irrelevant characteristics. Although the

[65] 29 CFR §1630.15(d).

determination of "essential functions" necessarily involves an individualised analysis of each job, the Act, and its accompanying regulations and guidance, provide a great deal of assistance to employers to enable them to make such a determination, and this is not regarded as a controversial or problematic concept. What is clear though is that employers are not required to employ or promote a disabled person who is capable of performing the "essential functions" of the job with or without a "reasonable accommodation" where there is an alternative applicant who is more skilled, and who can perform the "essential functions" to a higher standard. The aim of the Americans with Disabilities Act is restricted to providing an equal opportunity for disabled people by preventing discrimination.

The concepts of "reasonable accommodation", and specifically the extent to which this duty is limited by the "undue hardship" defense are not, however, so well understood. It is clear that an "undue hardship" can be something less than an expense which would drive the employer out of business, but that it must impose more than a de minimus cost. However in between those two outer limits there is a grey area of uncertainty. Uncertainty, though, is the necessary price for the flexible approach which any disability employment anti-discrimination law must adopt. No other approach could allow for the wide range of possible accommodations, their differing impact on businesses, and the varying resources available to employers. An amendment to the Americans with Disabilities Act that would have helped reduce this uncertainty, by legislating that any accommodation for a disabled employee which cost more than 10% of that employee's annual salary amounted to an "undue hardship", was rejected by the House Judiciary Committee precisely because it would involve sacrificing this flexibility. It may be possible, however, to reduce this uncertainty without sacrificing flexibility. Cooper[66] has suggested that this is in fact possible with respect to the Americans with Disabilities Act. He states that Congress, when defining "reasonable accommodation", showed a concern for an employer's overall performance by requiring only accommodations that allow a disabled employee to perform the "essential functions" of a job. In addition, when defining the reason for examining the

[66] Overcoming barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act. Jeffrey O. Cooper, University of Pennsylvania Law Review, Vol. 139, pp. 1423-1468.

impact of an accommodation on a facility as well as on a business entity as a whole, Congress stated that it did not intend the Act to require employers to cease operations or reduce their workforces. Cooper states that in these two sections of the Act Congress clearly indicated the burdens which it did not wish to impose on employers, and it therefore follows that an accommodation would impose an "undue hardship" if its cost would either:

"(a) substantially impair the ability of the employer to produce goods or provide services, or

(b) impose such a high cost that the employer would be forced to compensate by reducing the overall workforce"[67].

Even such an interpretation, however, still leaves a degree of uncertainty, and Cooper acknowledges that:

"A strict definition of undue hardship that would provide a clear cut answer in every situation is not possible, because of the range of possible accommodations and the variance in employer's resources"[68].

3.2.4 Comment on the value of an E.C./ U.S. comparison.

The arguments in chapter one showed that disability discrimination extends beyond the areas of direct and indirect discrimination to cover the "unequal burdens" concept. The U.S. experience illustrates the practical necessity of adopting such an approach, and also the difficulty with producing a clear and unambiguous definition of such a concept. Indeed, because of the need to engage in a case-by-case analysis to determine whether "unequal burdens" discrimination has occurred, a definition which provides a quick and clear answer in every case is impossible to find, and a degree of uncertainty is inherent. Cooper's arguments, however, suggest that the uncertainty contained in the definitions used in the

[67] Ibid, pp.1454-5.

[68] Ibid, p.1456.

Americans with Disabilities Act is greater than need be, and any European Community measure should attempt to reduce the uncertainty to an absolute minimum, whilst not sacrificing the flexibility of the concept. This is even more necessary at E.C. level, than is the case with the U.S.. Should the E.C. policy take the form of a directive, actual implementation will occur through national statutes and, as was argued earlier in relation to the definition of disability, the scope for differing interpretation of the policy by Member States, and national courts, must be minimalised. If this is not the case it could lead to a situation where employers find themselves subject to differing obligations, and therefore expenses, at least until the matter is clarified by the European Court of Justice. This would defeat one of the objects of such a policy: the desire to ensure that businesses are not subject to significantly different costs and obligations depending on where they are established, so restricting competition. This point will be discussed later, when the E.C. competences in this area are considered.

The E.C., however, is not necessarily restricted to defining "unequal burdens" discrimination simply through the dual concepts of "reasonable accommodation" and "undue hardship" as the U.S. Congress was. An alternative approach would be to provide public funding for the costs of accommodation, thus eliminating the complicated "undue hardship" defense, at least in relation to the financial burden it places on an employer. If such a policy were to be adopted employers would be obliged to implement any accommodation for which external funding was provided unless it caused a significant problem in relation to productivity, safety or the like. In many E.C. countries external funding is already available for accommodations, through government agencies, charitable organisations, or, in the case of Germany and France, through the levy-grant system connected to the quota system. If such an approach were adopted it would be necessary to ensure that the level of financial support was similar for all employers throughout the Community, and that competition was not restricted by obliging some employers to shoulder the costs of accommodations themselves. There may, however, be serious political and economic problems obstructing the adoption of such an approach, and the tendency may in fact be towards a policy similar to that of the U.S., requiring employers to finance accommodations.

If so, then an element which has played an important part in the U.S. legislation - the need for the anti-discrimination measure to represent a compromise between the needs of employers and disabled people - will also be highly relevant for E.C. policy-makers. Even if financial assistance for accommodations were to be made available the need for a compromise would still apply to the more limited concept of "undue hardship" covering productivity, safety, and so on. This is therefore another area where E.C. policy-makers must carefully consider the U.S. experience.

A further area, the importance of which is amply illustrated by the U.S. legislation, is the need to incorporate, time and time again, the requirement that an individualised examination be made before any determination of eligibility or suitability is made. Such a requirement has been shown to apply to a determination of whether an individual has a "disability", and is "qualified", to establishing the "essential functions" of a job, to the availability of a "reasonable accommodation", and to whether its implementation would constitute an "undue hardship". This is a reflection of the individualised nature of disability - sex and race are not individualised to the same extent, and anti-discrimination legislation in these areas therefore does not require such a case-by-case analysis. E.C. policy-makers must also incorporate such an individualised approach, always remembering that this needs to be accompanied by detailed instructions to reduce uncertainty.

3.3 General assessment of the U.S. experience and its relevance for European Community policy-makers.

The U.S. experience is illustrative for E.C. policy-makers in a number of respects. Firstly, it confirms the need to incorporate two concepts of discrimination - the traditional approach and "unequal burdens" - and the impossibility of simply extending existing anti-discrimination legislation to disabled people. Secondly, it illustrates the need for such legislation to represent a compromise between employers and disabled people. Neither should be forced to bear too heavy a burden, and both should be required to take account of the needs and expectations of the other. Thirdly, and linked to the two previous points, is the need for extremely detailed legislation which, in the case of the U.S., has been accompanied by extensive regulations and a comprehensive legislative history. Legislation

in this field must be as precise as possible since it is a complicated area where scope for misunderstandings are rife. Finally, and once again connected to the two previous comments, the U.S. legislation proves the need to include the requirement that an individualised analysis be made before any employment-related decision is reached. This reflects the peculiarities and idiosyncrasies of each disabled person, employer, accommodation and job.

These points are relevant inspite of the differences that exist between the E.C. and the U.S. and they must therefore be fully appreciated by those who are ultimately responsible for drafting E.C. policy in this area.

The necessity of requiring employers to treat each case separately, and to engage in an individualised analysis to establish if an individual is "disabled" and "qualified", and is capable of carrying out the "essential functions of the job" "with or without a reasonable accommodation" which does not amount to an "undue hardship" under the American legislation, may seem, to European eyes, to create a mass of uncertainty which is wholly unacceptable. In fact, as has been stated throughout this chapter, this does not seem to be a major problem, and it seems appropriate to comment on why this should be so, especially since the argument that such legislation would create uncertainty is often given by those who oppose its adoption in Europe.

Firstly, as has already been stressed, the Americans with Disabilities Act is accompanied by detailed regulations and guidance, and great efforts have been made to distribute this information to employers. This guidance is particularly helpful in the areas which call for an individualised analysis. Thus, examples of conditions which are considered to be impairments, and of activities considered to amount to "major life activities" under the Act are given in the regulations and guidance. Although neither list is intended to be exclusive, both cover the most common conditions and activities relevant for a determination of "disability", and, in the vast majority of cases, it can be established if an individual is covered simply by referring to these lists. Similarly the regulations list reasons why a job function may be considered "essential", list the most common kinds of "reasonable accommodation", and refer to factors to be considered in determining if an accommodation

amounts to "undue hardship". The regulations and guidance are therefore so detailed that, in most cases, there will be little difficulty in carrying out an individualised analysis.

Secondly, and one of the reasons why the regulations are so detailed, is the length of time which disability employment anti-discrimination legislation has been in force in the U.S.. Most large employers have been subject to Section 504 of the Rehabilitation Act of 1973 for a number of years, and the new Act imposes no new obligations upon them in this respect. Although there was an initial period of uncertainty under the Rehabilitation Act, this has been reduced through familiarity with the law, and through the gradual elaboration of the Act by court cases and detailed regulations. It is to be expected that such a familiarising process will also be necessary in the E.C..

Thirdly it has been suggested that one reason why uncertainty is no longer a major problem under U.S. law is that employers are very willing to comply with the requirements of the Act. Larry Kessler, an attorney who represents employers in cases brought under the two Acts, argues that many small employers are keen to comply because they have personal experience of disability in their workplace, community or family[69]. This may be compounded by a feeling of sympathy for people with some kinds of disabilities, and a desire to give them an "equal chance". Such feelings may be much less common for other minority groups, such as members of ethnic or religious minorities. Accommodation costs for disabled people are often not great, and there seems to be little resentment from employers that they must bear them, at least as long as they remain low. This can be contrasted, for example, with the requirement that public transport systems be made accessible to people with disabilities. This is often expensive, and has prompted protests from transport authorities.

Relative certainty has therefore been achieved through a mixture of detailed and well distributed regulations and guidance, a long history of implementation, and a willingness to comply. These points must be taken on board by E.C. policy-makers if relative certainty is also to be achieved for any E.C. instrument.

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[69] Interview with Larry Kessler of McGuiness and Williams Law Firm , Washington D.C.

The particular political, historical and ideological background of the U.S., and particularly of pressure groups of disabled people in the U.S., has heavily influenced the forms that the Rehabilitation Act and the Americans with Disabilities Act have taken. Other pressures and demands emanating particularly from the various national governments will influence the development of an E.C. policy, and the Commission will not be restricted in the same way as the U.S. Congress was in drafting the Americans with Disabilities Act. Suggestions have already been made as to areas where alternative approaches could be adopted, although doubt was expressed as to whether this would in fact occur. Nevertheless, the different pressures and forces operating at E.C. level will clearly mean any E.C. policy will diverge at certain points from the U.S. legislation. However, the points mentioned at the beginning of this section must still be taken account of.

To conclude, this analysis has shown that there are many strengths in the approach that the U.S has adopted and, although it needs to be refined in certain areas, a generally similar approach would seem to be appropriate for the European Community.

Having discussed some of the problems with drafting disability employment anti-discrimination legislation, attention shall now be payed to the scope for action that the E.C. has in this area. Consideration shall be given to the existing competences and justifications for action. In line with the arguments made in chapter three it shall be assumed that any policy will be implemented through a directive.

4. The Scope for Introducing a Disability Employment Anti-Discrimination Directive.

Having considered the justifications for anti-discrimination measures and, through a detailed examination of the U.S. situation, some of the elements which a European Community policy instrument could contain, attention will now be turned to the legal competences of the Community in this field. The intention is to consider whether the Treaty of Rome, as amended, has transferred sufficient powers to the Community to enable it to adopt a directive aimed at countering employment discrimination directed at disabled people. In addition the "Maastricht" agreements will also be analysed to establish if they have the potential to add to the existing competences in this area.

Before engaging on a detailed analysis of individual Treaty articles, the relevance of disability employment anti-discrimination measures to the development of the internal market shall be considered. It has been argued that the Commission intends to direct its policy in general at workers with a disability rather than at all disabled citizens, so that an economic element can be introduced into the policy which will in turn enhance the possibility of relying on binding Community instruments. A closer examination of this aspect of an employment anti-discrimination directive will therefore be carried out, and a comparison made with the E.C. policy of guaranteeing equality of pay for men and women provided for by Article 119 of the Treaty which also contains both economic and social dimensions.

Following this specific articles of the Treaty - namely Articles 100, 100A and 101 relating to the approximation of laws; Article 48, referring to the freedom of movement of persons; Article 235 relating to measures necessary to attain one of the objectives of the Treaty when the necessary powers have not been granted elsewhere; and finally amendments made by the "Maastricht" Protocol and Agreement on Social Policy - shall be examined, to consider what scope, if any, they give for the introduction of a directive in this area. In addition the possibility of incorporating disability employment anti-discrimination measures through the accession by the Community to international agreements such as the Social Charter of the Council of Europe shall also be addressed.

4.1 Economic Implications of a Disability Employment Anti-Discrimination Directive.

The social dimensions of a policy to promote the employment of people with disabilities have been referred to in earlier chapters; the economic implications of such a policy, and specifically an anti-discrimination measure, have however thus far only been alluded to. Given that such a measure, if adopted, is likely to be motivated by economic as well as social considerations, it is important to consider these implications with regard to the European Community.

4.1.2 Freedom of Movement of Workers.

One of the four fundamental freedoms guaranteed by the Treaty of Rome is the freedom of movement of workers[70]. This principle requires that discrimination on the grounds of nationality which inhibits free movement be eliminated, and provides for Community intervention to harmonize legislation where this is necessary to attain the objective in question. If it were established that a Member State were treating non-national disabled workers less favourably than national workers with a disability - for example, by denying them access to a quota scheme - then the Community could require the Member State to amend the scheme. If the discrimination amounted to a denial of the protection of national anti-discrimination legislation, the Community could similarly require that the coverage of the legislation be extended to cover all disabled workers within that State who are also nationals of a Member State.

A global anti-discrimination directive would clearly have much wider economic implications than this limited intervention. Discrimination directed at workers with a disability is, amongst other things, a barrier to the mobility of such workers. Where discrimination occurs within a Member State it is not only directed at disabled nationals of that state, but at all disabled workers whatever their origin. Disabled workers may well be discouraged from attempting to find, or to take up employment in another Member State because they believe that they will receive insufficient protection from discrimination there. Their attitude may be one of "better the devil you know". Furthermore, workers who have

[70] Articles 48-51.

benefitted from national legislation, such as a quota system, may feel that other Member States cannot offer a satisfactory minimum degree of protection, and that they are likely to experience greater employment discrimination if they seek work in other Member States. A global anti-discrimination directive would therefore promote the mobility of such workers. However, this is not the "freedom" of movement which underlies Article 48, which can only be used to ensure that national, rather than E.C. legislation, covers all disabled workers.

4.1.3 Prevents the distortion of competition.

An examination of the American with Disabilities Act has shown the huge economic impact which disability anti-discrimination legislation can have. Such legislation can require employers to adapt their recruitment, promotion and employment procedures (assuming that these do not already comply with the legislation) and to make accommodations to workers' and job applicants' disabilities. This requires initiatives such as adapting jobs - for example, by introducing flexible working time or job-sharing where these are possible - adaptations to equipment, training, buildings and interview methods, and regular reviews to ensure that workers with disabilities are not being unnecessarily excluded from certain positions.

These requirements will undoubtedly impose extra costs on employers, although the extent of these costs is as yet uncertain. The limited evidence which is available based on the U.S. experience suggests that the cost of most accommodations is low, and even where adaptations are expensive the economic benefits may be greater than simply the enabling effects on disabled workers[71]. It has been argued, however, that as more disabled workers are employed the average cost per accommodation will rise, and the present low costs are a reflection of the ineffectiveness of existing policy[72]. Employers may also face extra costs if they find themselves employing workers who are less flexible in terms of job or geographical mobility or who take longer to train than non-disabled workers. It should be

[71] For example, making a building accessible to wheelchair users may also allow the introduction, or the improvement, of the internal mail delivery system, since the building will also be more accessible to delivery carts. The introduction of more flexible working time may also benefit non-disabled workers.

[72] Thomas N.Chirikos,"The Economics of Employment" in The Americans with Disabilities Act:from Policy to Practice, Jane West (ed.), Milbank Memorial Fund, New York, 1991.

stressed though that many, if not most disabled workers do not present these employment problems.

However, simply because disability anti-discrimination legislation has an economic as well as a social impact does not bring it within the competences of the European Community. This situation might alter, though, should one or more Member States introduce such legislation. In that situation it may be possible to argue that employers in those Member States where such legislation existed had higher costs imposed on them, and that this was a distortion of competition which was unacceptable within the common market. It would have to be demonstrated that the costs were more than merely "de minimus" by, for example, showing that the national legislation acted as a disincentive to firms to establish in that Member State, and forced firms already established there to charge higher prices for their products than would otherwise be the case. If the legislation was as broad as that in the United States then a strong argument could be made that it had the potential to distort competition and that intervention was necessary.

At present, however, no such distortion occurs because no Member State has introduced disability anti-discrimination legislation. However, there is a worldwide trend towards the adoption of such legislation which is being led by the United States, and it is submitted that it is only a matter of time before a Member of the European Community decides to follow suit. Employment anti-discrimination legislation which applies to people with disabilities already exists in Canada and Australia, and it seems as if such legislation will soon be introduced in Japan. Within the Community the French Assemblé Nationale has approved the passing of such legislation, although it will not apply to employment discrimination, and consultation has occurred in the United Kingdom (although the present government does not favour the adoption of such legislation). As disabled people become more active and adopt a more civil rights stance, and as such legislation is adopted elsewhere, it will become more probable that one or more Member States of the European Community will also do so.

It could be argued that this problem of distortion already exists with regard to national quota systems which impose varying obligations on employers of different sizes to employ disabled workers, with the systems providing for (financial) sanctions where

employers do not meet these obligations. This argument is in fact considered in the following chapter where it is claimed that although existing quota systems, because of their ineffectiveness and the relatively low financial penalties which result from a breach of the relevant obligations, do not at present distort competition, they do have the potential to do so, and that the Community would be justified in setting the limits within which national systems should operate in order to ensure that this does not happen.

In fact, as illustrated by the history of Article 119, there is a long standing precedent for the introduction of social policy on the premise that it is necessary to prevent market distortions which hamper the development of the internal market. It is worth paying some attention to this phenomenon, since the development of a Community policy to promote the social and economic integration of people with disabilities may follow a similar path.

4.1.4 The European Community and Sex Discrimination Legislation - A Precedent for Disability Anti-Discrimination Legislation?

If such an argument relating to higher social costs distorting competition were to be advanced it would not be for the first time. Indeed the idea is older than the Treaty of Rome. When the Treaty was drawn up the French government successfully insisted on the inclusion of provisions to establish the "principle that men and women should receive equal pay for equal work"[73] and that Member States should "endeavour to maintain the existing equivalence between paid holiday schemes"[74]. They argued that French enterprises, which faced relatively high social costs at this time compared to enterprises established in the other potential Member States, particularly in terms of obligations to provide equal pay for female workers, would be at a competitive disadvantage unless steps were taken to raise similar social costs in the other states. France was supported in its demand by Italy and West Germany. All three countries had constitutional guarantees of the right of women to equal

[73] Article 119 EEC.

[74] Article 120 EEC.

pay for equal work[75] although this aim was nearest to being achieved in France, where the average difference between male and female wages was 9 per cent in the 1950s. All three countries had ratified the ILO Convention Number 100 on Equal Remuneration.

The position in the Benelux countries was less favourable for women in this respect, and for this reason these countries posed some resistance to the adoption of Article 119. This is reflected in the fact that, despite the adoption of the Article, little use was made of it and little progress made in this area until the 1970s. The Article was initially interpreted in a very restrictive manner, an approach which was strongly favoured by the Dutch government where employers were resisting the ratification of the ILO Convention Number 100, and where the difference between male and female wages was approximately 25 to 30 per cent at the time the Treaty was adopted[76]. This is no longer the case, and the Court of Justice has interpreted the Article broadly to mean that the sex of an employee is irrelevant for the fixing of salaries and all other benefits provided by the employer.

The original economic motivation behind the introduction of Article 119 seems to have played little part in the way that it has been interpreted since the 1970s, and social considerations have become more important. Nevertheless, the Court has recognised the importance of economic factors relating to the distortion of competition when determining the competences conferred by this Article. In Case 43/75 Defrenne v. Sabena (No.2)[77] the Court of Justice stated that Article 119 had been designed to achieve a "double objective". It had an economic goal in that it aimed to ensure that States which had implemented the principle did not suffer a competitive disadvantage vis-à-vis those which had not, and a social goal of achieving "social progress" in "the improvement of the living and working conditions" as required by the Treaty.

Article 119 is in fact very limited, and only refers to the need for Member States to ensure "equal pay for equal work". The Court has held that this Article is incapable of

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[75] Article 37 of the Italian Constitution; Article 3 of the West German Constitution; the Preamble of the 1946 French Constitution (included within the 1958 Constitution).

[76] Christine Langenfeld, Die Gleichbehandlung von Mann und Frau im Europäischen Gemeinschaftsrecht, Nomos Verlagsgesellschaft, Baden-Baden, 1990, pp.32-33.

[77] [1976] ECR 455.

imposing an obligation on Member States to ensure that working conditions, other than pay, are equal for men and women[78]. Despite the limited nature of the Article though, the principle of equality between male and female workers has become one of the unwritten principles of the Treaty and of the interpretation of the Court.

To date five directives have been adopted by the Council based on this equality principle. In 1975 a directive on the approximation of the laws relating to the application of the principle of equal pay for men and women was adopted[79]. This was followed by directives to implement the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[80], and on the progressive implementation of the principle of equal treatment to men and women in the matters of social security[81]. Two further directives were introduced to extend the equal treatment principle to occupational social security schemes[82], and to provide for equal treatment in the area of self-employment[83].

Two things are noticeable when studying these directives. Firstly, they only relate to equal treatment of workers, even though those who are unable to work because of illness and those who are temporarily unemployed are included within the definition of "workers". This may seem an obvious comment, but it shows that the Community's equality principle is confined to employment, and does not address wider issues such as non-vocational education or access to services. This approach was taken in order to ensure that the directives contained the necessary economic elements to bring them within the Treaty, and because Member States would not support a greater interference in legislation and policy relating to sex discrimination. Secondly, none of the above mentioned directives were based

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[78] Case 149/77 Defrenne v. SABENA [1978] ECR 1365.

[79] 75/117 OJ No. L 45/19 19/2/75.

[80] 76/207 OJ No. L 39/40 14/2/76.

[81] 79/7 OJ No. L 6/24 10/1/79.

[82] 186/378 OJ No. L 225/40 12/8/86.

[83] 86/613 OJ No. L 359/56 19/12/86.

on Article 119, which in fact gives no competence to introduce binding Community instruments. The directives on equal treatment as regards access to employment, vocational training and promotion, and working conditions, and that on social security were based on Article 235; the directive on equal pay was based on Article 100; and the directives on occupational social security schemes, and self-employment have a dual basis of Articles 100 and 235. Article 119 clearly provided a large part of the political incentive to introduce these directives even if it did not provide the legal base. It is questionable whether the directive on equal pay, for example, introduced on the grounds that it was necessary to prevent the distortion of competition, would have been produced had it not been for the existence of Article 119. It needs to be acknowledged that the elimination of disability employment discrimination is not referred to as an objective in the Treaty as the attainment of equal pay is, and that it may be correspondingly more difficult to introduce a directive for this reason. Nevertheless, should evidence show that national disability employment anti-discrimination legislation is distorting competition, a directive to introduce global legislation may be regarded as the appropriate reaction.

The basing of directives on Article 100, which is contained in the chapter on the approximation of laws rather than social policy, is a clear illustration of how the Community institutions can use economic arguments relating to the distortion of competition to justify the introduction of social policy. This may also be the approach which will be adopted in relation to the policy to promote the social and economic integration of disabled people, and a useful precedent has been set by the adoption of legislation based on the principle of equality between the sexes.

4.2 Potential Legal Bases for the Introduction of a Disability Employment Anti-Discrimination Directive.

4.2.1 Articles 100, 100A and 101 - The "Approximation of Laws".

The aim of all the articles contained in the chapter on the approximation of laws, i.e. Articles 100, 100A, 100B, 101 and 102, is the realisation and proper functioning of a common market, and the only powers which they confer are those which are necessary, or at least very useful, to the achievement of this aim.

4.2.2 Article 100.

"The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market."

It has been argued that Article 100 allows for harmonisation whenever national provisions directly affect the functioning of the common market[84]. This will occur whenever such provisions influence the competitive position of undertakings, even where they are not directly concerned with market behaviour. Kapteyn and Verloren van Themaat state:

"In principle this is particularly the case for all legislative and administrative positions which directly concern market behaviour, particularly behaviour towards competitors ..., workers (many directives have already been adopted dealing with the labour market, conditions of work and workers' protection), consumers ... or buyers ... in general"[85].

The fact that a national provision, such as disability anti-discrimination legislation, is considered to be primarily a social rather than an economic instrument, will not bring it outside the scope of Article 100, as long as it leads to a distortion of competition. In Case 173/73 Italy v. Commission[86] it was held that a measure which allowed employers in the textile industry to make reduced social charges contributions and which the Italian government claimed was an element of social policy, was incompatible with Article 92,

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[84] P.J.G. Kapteyn and P. Verloren Van Themaat, Introduction to the Law of the European Communities after the coming into force of the Single European Act Second edition, edited by Laurence W. Gormley, Kluwer Law and Taxation Publishers, 1989.

[85] Ibid, p.471.

[86] [1974] ECR 709.

which forbids the granting of benefits by public authorities which distort competition by allowing certain undertakings or producers an advantage over their competitors in other states. The Court stated:

"Article 92 does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects.

Consequently, the alleged fiscal nature or social aim of the measure in issue cannot suffice to shield it from the application of Article 92"[87].

This is also the approach which is taken with regard to Article 100, so that it has the potential to provide a legal basis for a directive on the approximation of laws relating to employment discrimination directed at disabled people should national measures be introduced in this field. It is submitted that, inspite of the social nature of legislation in this field, it can easily be shown that national measures also affect the functioning of the common market through imposing additional costs and requirements on employers which can ultimately affect competitiveness.

Where anti-discrimination legislation provides for subsidies to employers to enable them to employ disabled workers - for example, financial assistance to enable employers to meet the costs of accommodations or extra training provisions - it could be argued that this too distorts competition, by allowing employers financial assistance which is denied to competitors in other Member States, and so breaching the requirements of Article 92. However, where this assistance only covers part or all of the extra costs actually incurred (and no more) no distortion will occur, and therefore Community intervention to eliminate such national measures cannot be justified. However intervention may be necessary where national legislation in a number of Member States provides for varying degrees of subsidies and/or support. If some employers are obliged to carry a significantly higher (or lower) percentage of the cost of employing disabled workers than others it could be argued that distortion was occurring, and that Community intervention was needed. Such intervention

[87] Para. 13 of the judgment.

should not involve the elimination of all such assistance, but instead involve an attempt to harmonize it, or to set limits, to ensure distortion does not occur in the future.

Kapteyn and Verloren van Themaat claim that a change in the emphasis in the Community's approach to competition policy is occurring, so that the aim is no longer simply the abolition of border controls and other obstacles to the achievement of the internal market, but to go further and to approximate to each other the legal and administrative provisions of Member States, so as to create reasonably equal conditions of competition between undertakings operating within the Community[88]. If this is so it is possible that the approach outlined above will be the one adopted by the Commission and the Court when faced with the situation in which a Member State does introduce disability employment anti-discrimination legislation.

Taschner, in Kommentar zum EWG-Vertrag, Groeben et al.[89], has even implied that it is not necessary for the legislation or administrative measures of a Member State to cover a particular area before Article 100 is invoked. He suggests that it would be foolish if the Article required the Community institutions to wait for national measures which distort competition to be introduced before producing directives in that area. He states that as long as the directive is concerned with the achievement of the common market, it may be possible to produce a complicated norm in an area regulated in only one Member State, or possibly in none at all[90].

Nevertheless, despite the fact that it is possible to argue that Article 100 is capable of providing a sufficient legal basis for an E.C. directive in this field, at least in the event of a number of Member States introducing disability employment anti-discrimination legislation in the future, there are pressing political reasons to believe that this will not in fact occur, or if Article 100 were to be used, it is unlikely to be relied upon as the sole legal base. Article 100 requires unanimity in the Council before any directive is adopted, and it

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[88] Op.cit., p.477.

[89] Groeben, Boeckh, Thiesing, Ehlermann, Kommentar zum EWG-Vertrag, Third edition 1983, Nomos Verlagsgesellschaft, Baden-Baden.

[90] Para.13, pp.1707/8. For examples of where this has been done see Taschner, footnote 24 in Groeben et al.

is likely to be a considerable period of time before such a consensus can be achieved with regard to a binding Community measure covering disability discrimination. Furthermore, as will be commented upon shortly, if Article 100 were to be used it is probable that it will be complimented by Article 235 (which also requires unanimity). This latter Article tends to be used to introduce directives which have a global significance such as this, even though it would also influence the conditions of competition in the common market. This is especially true at present when no Member State has in force broad legislation or administrative measures which aim to combat employment discrimination directed at disabled people.

4.2.3 Article 100A.

The unanimity problem presented by Article 100 could be overcome if it were possible to base the directive on the new Article 100A. This was added to the Treaty by Article 21 of the Single European Act, and allows for the adoption of directives which "have as their object the establishment and functioning of the internal market" on the basis of qualified majority voting.

Paragraph 2 of the Article, however, specifies that this procedure does not apply to measures relating "to the free movement of persons nor to those relating to the rights and interests of employed persons". For such measures the old unanimity requirement of Article 100 is still applicable. The exact extent of the exception provided for by Paragraph 2 has not been judicially determined. However Bercusson, in a European University Institute report on the Fundamental Social and Economic Rights of the European Community, argues that there are three possible interpretations. Unanimity could be required[91]:

- only for those proposals which are concerned solely with the free movement of persons and/or the rights and interests of employed persons; or also

[91] Brian Bercusson, Fundamental Social and Economic Rights in the European Community. Human Rights and the European Community: Towards 1992 and Beyond. Research Project of the European University Institute, Florence, under the direction of Professor A. Cassese. October 1989, p.13.

- for those proposals which are **predominantly** (though not exclusively) concerned with these topics; or

- for **any** proposal, however indirectly concerned with the free movement of persons and/or the rights and interests of employed persons.

The first interpretation may well allow for the introduction of a directive to counter disability employment discrimination; however this interpretation would seem to render the exception almost meaningless. Very few measures will deal exclusively with the topics referred to, but will instead touch on, for example, the rights and interests of employers or conditions affecting competitivity more generally (as indeed would the directive in question). It is therefore unlikely that the Court would interpret the provision in this manner.

The final interpretation, which would seem to prevent the adoption of any instrument of social policy under Article 100A, would clearly not allow for the introduction of the anti-discrimination directive. Nor, probably, would the second interpretation, since the rights and interests of employed disabled persons would be the main concern of the directive.

In all probability, therefore, Article 100A does not allow for the adoption of a directive on disability employment discrimination by qualified majority voting, and the stricter provisions of Article 100 would still be applicable.

4.2.4 Article 101.

"Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the common market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

If such consultation does not result in an agreement eliminating the distortion in question, the Council shall, on a proposal from the Commission, acting unanimously during the first stage and by a qualified majority thereafter, issue the necessary directives. The Commission and the Council may take any other measures provided for in this Treaty."

On first reading this article appears to confer a great deal of power on the Commission and Council to eliminate distortions of competition. If consultation does not result in a satisfactory agreement the Council may adopt a directive on the basis of a qualified majority (now that the first stage has been completed), and the Council and Commission are further enabled to take other "appropriate measures provided for in this Treaty". In fact little use has been made of Article 101 to date. No directive or regulation has been based on it and the only Community instrument to even refer to Article 101 is a 1968 recommendation concerning a draft law on wine-growing in Germany[92]. That recommendation though was not "based" on Article 101, and instead the Commission claimed that its intervention was justified by Articles 102 and 155. The only other Community instruments to refer to Article 101 are four resolutions of the European Parliament[93]. Generally the Article has not gained the importance which the authors of the Spaak Report[94] suggested the framers of the Treaty intended. Pipkorn in Groeben et al[95] comments:

"Artikel 101 EWGV scheint sich damit als flexibles Instrument für das Krisenmanagement bei schweriegenden Funktionsstörungen des Gemeinsam Marktes anzubieten. In der Praxis hat Art. 101 EWGV bisher noch keine bedeutsame Rolle gespielt"[96].

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[92] Empfehlung der Kommission vom 11. Dezember 1968 zum Entwurf eines deutschen Weingesetzes, OJ No. L 18/3, 24/1/69.

[93] Resolution on consumer protection and the Internal Market - 1992, OJ No. C 158/321.
Resolution on the harmonization of taxation of alcoholic drinks, OJ No. C 127/200.
Resolution on stronger Community action in the cultural sector, OJ No. C 342/127.
Resolution on industrial competition between the Member States, OJ No. C 144/60.

[94] Rapport des Chefs du Délégation aux Ministres des Affaires Etrangéres - Secretariat of the Intergovernmental Conferences, Brussels, April 21, 1956.

[95] Op.cit.

[96] "Article 101 EEC appears to be a flexible instrument for dealing with distortions of competition within the common market. In practice Article 101 EEC has up until now not played an important role."(My own translation).

The reason for this is that, despite the apparently broad competences conferred by Article 101, it has in fact been interpreted in a very narrow way. On the face of it, it seems as if only two conditions must be fulfilled before the Commission and Council can act on the basis of Article 101. Namely, that a disparity exists between the legislation or administrative rules of two or more Member States, and this disparity interferes with the conditions of competition in the common market and needs to be eliminated. One can call this kind of distortion a general or global distortion of competition.

The Spaak Report, however, made it clear that in the opinion of the Foreign Ministers of the founding states, this was not how Article 101 was envisaged. It was argued that the Article was not intended to deal with general distortions - for example, high levels of taxation or social security - which affected all enterprises in a Member State, since such distortions could be compensated for in other ways, such as through the exchange rate mechanism. Rather Article 101 was intended to deal with specific distortions to competition. Such distortions occurred between enterprises within Member States. According to the Spaak Report three conditions need to be satisfied before Article 101 can be relied on as the basis for a directive. Firstly, one group of enterprises in a Member State needs to be subject to higher or lower charges than other enterprises. Secondly, there must not be an equal deviation for the same group of enterprises in the other Member States, and finally, the deviation must not be compensated for through other changes in benefits.

If this "specific distortion" interpretation of Article 101 is correct, then it is highly unlikely that if one or more Member States were to introduce disability employment anti-discrimination legislation which imposed high costs on enterprises, and therefore affected the conditions of competition, Article 101 would be relied on to introduce a directive on Community-wide disability discrimination, since it is probable that the national legislation would lead to a general rather than a specific distortion.

Given this interpretation the Article could at most provide a basis for an anti-discrimination directive covering only one particular kind of industry or enterprise where one or more Member States had introduced legislation covering the employment of disabled people in that industry/enterprise, and the resulting distortion of competition needed to be eliminated. Nevertheless the concern here is primarily with a global anti-discrimination

directive rather than a limited measure of this nature and, as stated, Article 101 has never been used as a legal basis for any binding Community legislation.

There are a number of factors, however, which suggest that the "specific distortion" interpretation is not necessarily the correct or only one, although there have been no clear signs from the Commission or Council that a broader interpretation has been or will be given to the Article. Most important is the fact that there is nothing to suggest that Article 101 is confined to dealing with specific distortion to competition within the Article itself. This idea is only contained within the Spaak Report which, although influential in interpreting the Treaty, is not definitive. As always it is up to the Court of Justice to interpret the scope of the Article, and the Court's judgments, and the opinion of the Advocate Generals, have not been clear in this matter. In Case 13/86 United Kingdom v. Council[97] Advocate General Mischo gave an interpretation of Article 101 which complied with that given in the Spaak Report, although he did not mention the Report specifically. He argued that different minimum standards for the protection of laying hens kept in battery cages could result in undertakings facing different costs, which could in turn lead to a distortion of competition. However other opinions of Advocate Generals have suggested that Article 101 is capable of being used to eliminate global as well as specific distortions. Advocate General Verloren Van Themaat in Case 54/81 Fromme v. Bundesanstalt für Landwirtschaftliche Markordnung[98] stated:

"Differences in specific interest rates which depart from the general differences in interest rates between Member States lead to a distortion of competition within the meaning of ... Article 101 (if they are adjusted upwards)."[99]

Assuming that "specific interest rates" does not mean interest rates applicable to only a particular group of enterprises, the Advocate General's comment suggests that Article 101 can be used to deal with the global distortion caused by certain differences in interest rates.

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[97] [1988] ECR 905.

[98] [1982] ECR 1466.

[99] Para.5.2, p.1475.

Verloren Van Themaat however went on to say that Article 101 could not give the competences to harmonize interests rates.

Additional support for the global distortion theory was given by Advocate General Capotorti in Case 155/80 Summary proceedings against Sergius Öbel[100] in a case concerning the prohibition of nightwork in bakeries. Referring to the regulation of working hours by Member States the Advocate General said:

"Where disparities between national legal provisions for which the internal legislation is responsible lead to distortions of competition in the common market, the most progressive remedy is the adoption by the Community authorities of directives intended to approximate the legislation of the State's concerned in accordance with Article 101 of the EEC Treaty."[101]

There has been no clear statement from the Court favouring either the specific or global distortion theory. In Case 45/76 Comet BV v. Produktschap voor Siergewassen[102] the Court did little more than reiterate the wording of Article 101 when describing the competences conferred by this Article. It stated:

"Articles 100 to 102 and 235 of the Treaty enable the appropriate steps to be taken as necessary, to eliminate differences between the provisions laid down in such matters by law, regulation or administrative action in Member States if these differences are found to be such as to cause distortion or to affect the functioning of the common market"[103].

Whilst in Case 173/73 Italy v. Commission the Court ambiguously stated:

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[100] [1981] ECR 2012.

[101] Para.2, p.2013.

[102] [1976] ECR 2043.

[103] Para.14, p.2053.

"Articles 92 to 102 of the Treaty provide for detailed rules for the abolition of generic distortions resulting from differences between the tax and social security systems of the different Member States whilst taking account of structural difficulties in certain sections of industry.

On the other hand, the unilateral modification of a particular factor of the cost of production in a given sector of the economy of a Member State may have the effect of disturbing the existing equilibrium".

It is impossible, therefore, to find clear support in the Court's judgments and the Attorney Generals opinions for either interpretation of the competences conferred by Article 101.

The specific distortion interpretation has however been critised by a number of commentators including Mesenberg[104]. Furthermore, it is not at all clear that the exchange rate mechanism can wholly compensate for general distortions to competition such as those referred to in the Spaak Report since exchange rates are influenced by many factors other than the costs of production. In addition this argument has ceased to be true in many cases since the introduction of the European Exchange Rate Mechanism (although recent events have demonstrated that, in times of crisis, Member States will drop out of the ERM and that currencies can be devalued). Indeed, the Wetenschappelijke Raad voor het Regeringsbeleid has argued, in its report "The Unfinished European Integration"[105], that the presuppositions on the basis of which the Spaak Report argued measures to combat general distortions were unnecessary, in terms of there existing other forces capable of compensating for such distortions, are no longer valid.

If a broader "general distortion" interpretation were to be given to Article 101 it has the potential at least, at some time following the introduction of national disability employment anti-discrimination legislation which leads to distortions in competition, to be used as a basis for the introduction of a European Community measure in this field.

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[104] In Groeben et al., op.cit., para.11, p.1732.

[105] Report No. 28, The Hague, 1986, at pp.99-101.

Nevertheless, it should be recognised that Article 101 has not thus far been interpreted to allow the introduction of such broad directives, and that this is not a likely legal basis for the introduction of a disability employment anti-discrimination measure.

4.2.5 Article 48 "Freedom of movement for workers".

"Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest".

Article 48 sets out the objective of securing freedom of movement for workers within the Community, whilst Article 49 provides for the adoption of directives and other Community instruments by qualified majority voting to achieve this objective.

It is unlikely though that Article 48 will be interpreted by any of the Community institutions as providing sufficient scope for the introduction of a disability employment anti-discrimination directive. A regulation on the freedom of movement of workers within the Community covering access to employment and equality of treatment (Regulation 1612/68) has been adopted[106] - this, not surprisingly, contains no reference to disability, nor does it hint that the Treaty provisions could be interpreted to allow for the introduction of Community instruments directed at anything other than discrimination based on nationality. Member States, as a result of this regulation and a number of Treaty articles (including Article 48 itself[107]) must naturally ensure that disabled workers who are nationals of other Member States are not treated less favourably than workers with disabilities who are nationals - this, however, is of little assistance where the latter group is also not protected from discrimination, and would only become relevant once national anti-discrimination legislation had been adopted.

Furthermore, even though Article 48 has direct effect, it will certainly not allow an aggrieved individual who is not a migrant worker to bring an action requiring the adoption

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[106] Regulation 16/2/68 of 15 October 1968 OJ No. L 257/2 19/10/68.

[107] Article 48(2). Article 7 also covers discrimination based on nationality.

of national or E.C. anti-discrimination legislation. In Case 180/83 Moser v. Land Baden-Württemberg[108] the Court held that Article 48 does not apply to situations which are wholly internal to a Member State, such as that of a national of a Member State who has never resided or worked in another Member State. Such a person is unable to rely on Article 48 to prevent the application to him of legislation of his own country which, in this particular case, resulted in the plaintiff being denied access to a teacher training course. This was in keeping with the earlier judgment of Case 35 and 36/82 Morson v. The Netherlands[109] where the Court stated that the Treaty provisions on the freedom of movement for workers and the rules adopted to implement them (including Regulation No. 1612/68) could not be applied to cases which had no factor linking them with any situations governed by Community law. These problems, however, would not face a migrant worker who sought to bring an action alleging that the absence of disability employment anti-discrimination legislation (or the existence of disability discrimination) had prevented him or her from exercising freedom of movement. Whether the Court would look favourably on such a claim is another matter altogether.

The Court has at least confirmed that disabled workers in the open employment market and/or disabled members of their families are covered by Article 48 and the relevant Community legislation covering freedom of movement of workers. In Case 76/72 Michel S. v. Fonds national de reclassement social des handicapés[110] the Court held that Article 7 of Regulation 1612/68, which requires that workers employed in a Member State other than their own shall enjoy "the same social benefits ... as the workers of that state" and "on the same basis and under the same conditions as workers of that State, teaching at vocational schools and centres of rehabilitation and retraining", applied to national measures designed to allow disabled workers to recover their ability to work[111]. The Court also stated that Article 12 of the Regulation, which provides for children of such workers to be given access

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[108] [1984] ECR 2539.

[109] [1982] ECR 3723.

[110] [1973] ECR 457

[111] Para.8.

to "general education, apprenticeship and vocational training under the same conditions as nationals of that State", extends to "laws of the host country with a view to the rehabilitation of the handicapped"[112].

The effect of this decision seems however to have been limited in Case 344/87 Bettray v. Staatssecretaris van Justitie[113]. The Court held that an individual, in this case someone who was recovering from drug addiction, who was employed under a scheme in which the activities carried out were merely a means of rehabilitation or reintegration could not, on this basis alone, be regarded as a worker for the purposes of Community law. It held that such work cannot be regarded as an "effective and genuine (economic) activity"[114] since it was specifically adapted to the physical and mental possibilities of each individual, and aimed at enabling those individuals to recover their capacity to take up ordinary employment or to lead as normal as possible a life[115]. It would seem that this would also be the case for those disabled people who are employed in sheltered workshops, where the aim is to provide rehabilitation or simply a form of work which enables severely disabled people to enjoy many of the non-financial benefits of employment[116], and which therefore serves primarily a social rather than an economic purpose.

However, Advocate General Jacobs stressed that this exclusion does not apply to disabled people who are employed in the open labour market. He emphasised that the purpose of the law which established the special employment programme in question was "not the same as schemes which enable disabled persons to be employed in normal

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[112] Para.16.

[113] [1989] ECR 1612. Brought under an Article 177 reference.

[114] It was held in Case 93/81 Levin v. Staatssecretaris van Justitie [1982] ECR 1035 that the Treaty provisions and subsequent legislation cover only those who are engaged in an "effective and genuine (economic) activity".

[115] Para.17.

[116] For example, self-respect, an opportunity to socialise, a feeling of making some form of contribution to their own upkeep.

concerns"[117]. Disabled workers who, for example, are employed under a national quota scheme in a normal undertaking would therefore be regarded as workers under Community law[118]. Nor, it seems, would it matter if special adaptations were made in order to enable the disabled worker to take up employment. In this respect the Advocate General states:

"It is not decisive, in my view, whether a person is unable, by reason of some disability, to work in a normal working environment since if he were enabled to work in such environment by the necessary facilities being provided there, he might still be regarded as a worker"[119].

The decision, however, leaves it unclear as to what the status of those disabled people employed in semi-sheltered employment is. Semi-sheltered employment, as the name suggests, encompasses elements of both open and sheltered employment. An example of such a programme is the British Sheltered Placement Scheme whereby disabled individuals work in normal undertakings, with that part of their salary which corresponds to their productivity being paid by the undertaking and the remainder being provided by a public body or charitable organisation which acts as a sponsor. It is the sponsor, not the undertaking, which employs the disabled worker. This question may be of significance as the importance of semi-sheltered employment for disabled people in growing throughout the Community[120].

Nevertheless, not withstanding the fact that disabled people working in the open employment market, and possibly those engaged in semi-sheltered employment, are covered

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[117] Para.10.

[118] This in fact was one of the provisions of the law which was held to apply to the plaintiff in Case 76/72 Michel S. v. Fonds National de Reclassement Social des Handicapés - Opinion of Advocate General Mayras, p.469.

[119] Para.36.

[120] L. Waddington, The sheltered placement scheme: the oldest in Europe, but is it the best? Rehab Network, Autumn/Winter 1990, p.18 and L. Waddington, Sheltered and Supported Employment in the European Community. Rehab Network, Winter 1992, p.12.

by the provisions relating to the freedom of movement for workers, it seems extremely unlikely that Article 48 can be interpreted to allow for the introduction of an employment anti-discrimination directive.

4.2.6 Article 235 "...one of the objectives of the Community...".

"If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures".

It is possible to argue that an employment anti-discrimination directive is necessary to attain one, or even several of the objectives of the Community, and that the necessary powers have not been conferred elsewhere. One can argue that such a directive is required in order to guarantee the mobility of disabled workers and to generally promote the well being of such workers, and that this falls within the general objectives referred to in Article 2 - namely "a harmonious development of economic activities, a continuous and balanced expansion, ...[and] an accelerated raising of the standard of living".

This argument is supported by the 1986 Council Recommendation on the employment of disabled people[121] which refers to Article 235, and which states in the preamble:

"Whereas the provision of fair opportunities in the field of employment and vocational training appears necessary for the achievement of one of the objectives of the Community; whereas the Treaty has not provided the power or action required for the adoption of this Recommendation, other than those of Article 235".

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[121] Council Recommendation of 24 July 1986 on the employment of disabled people in the Community (86/379/EEC) OJ No. L 225/43.
For further discussion of this Recommendation see chapter three.

If this is the case then, failing any other appropriate and more specific Article within the Treaty, Article 235 could be relied upon. Indeed, of all the possible legal bases contained in the Treaty at present (prior to the ratification of the "Maastricht" Agreements) Article 235 seems to provide the greatest scope for the adoption of an anti-discrimination directive. It requires no proof of present or imminent distortion of competition (and it is therefore not necessary to wait until national legislation is adopted which has this effect). Article 235, however, like Article 100, lays down a requirement of unanimity, and this could well be an important barrier to the adoption of a directive in this field. Furthermore, it must be acknowledged that this would indeed be an adventurous use of the Article. Therefore, although it may provide the "greatest scope" for the adoption of an anti-discrimination directive it nevertheless remains an improbable basis.

Given a sufficient degree of political will amongst all the Member States it is possible that a legal basis for the introduction of a disability employment anti-discrimination directive could be found amongst one of the existing Treaty articles referred to above. It must be recognised though that none of the mentioned articles provide an obvious basis for such a directive, and a certain degree of "constructive" interpretation will be necessary in order to act. Given these difficulties, and the absence of enthusiasm amongst Member States for such a measure, it seems extremely unlikely that any such directive will in fact be adopted on the basis of the present Treaty.

4.3 Incorporation of an Anti-Discrimination Measure within the Community Legal Order through the accession to International Agreements.

A topic that has been much discussed in recent years is whether fundamental human and/or social rights can be included within the Community legal order through the accession by the Community to existing international agreements such as I.L.O. Conventions or the

European Convention on Human Rights (ECHR)/the European Social Charter (ESC) of the Council of Europe[122].

There seem to be two major problems with this process as a means of adopting a disability employment anti-discrimination measure at E.C. level. Firstly, it is not clear that it is in fact possible for an international organisation such as the E.C., as opposed to a state, to ratify international agreements so committing its own Member States to the agreement. Secondly, even if this were possible there seems to be no international agreement which actually requires the adoption of disability anti-discrimination legislation.

4.3.1 Can the European Community accede to International Agreements covering Human/Social rights?

It is clear that both the ECHR and the ESC already have a place, albeit a small one, within the Community legal order. The European Court of Justice stated as early as 1974 that it was prepared to consider "international treaties on which the Member States have collaborated or of which they are signatories"[123]. In that case the Court referred to the ECHR, but in Case 24/86 Blaizot and the University of Liège v. Belgium[124] reference was made to the ESC for the first time. This was particularly notable since, at this time, the defendant state of Belgium had not acceded to the Charter.

Furthermore reference to both the ECHR and the ESC is made in the Preamble to the Single European Act, where it is stated:

"Determined to work together to promote democracy on the basis of fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for

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[122] See, for example, The Economic and Social Committee of the European Communities - consideration of the possible content of a Charter of Basic Social Rights at Community level, Social Europe 1/90, p.80, and Lammy Betten (ed.), The Future of European Social Policy, European Monographs, Kluwer, 1991.

[123] Case 4/73 J. Nold, Kohlen and Baustoffgrosshandlung v. Commission (Second Nold Case) [1974] ECR 491, 507.

[124] [1988] ECR 379.

the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice".

These initiatives, however, clearly do not amount to an incorporation of the rights and freedoms referred to in the ECHR and the ESC within the Community legal order. Neither individuals nor Member States can demand that the Community acts to enforce or protect rights referred to in these documents unless some additional cause of action can be relied upon.

The situation would be different if the Community were to accede to these agreements. During the 1980s, with increased attention being paid to the need to develop a "social" Europe, the possibility of acceding to the ESC and other international agreements in this field attracted interest. The Economic and Social Committee, in its report on the possible content of a Charter of Basic Social Rights at the Community level[125], made extensive reference to agreements protecting social rights existing at the international level. Francis Blanchard, Director General of the ILO, when visiting the Committee in 1988 suggested that the Community could achieve the protection of social fundamental rights by adopting norms recognised in ILO Conventions and the ESC[126]. The Committee stated that these norms could be formalised by a solemn declaration by the Community. The European Parliament has stated that the ESC is no longer an effective document, but has not objected to the protection of social rights through the incorporation of international agreements on principle[127]. Franco Foschi, Chairman of the Social, Health and Family Affairs Committee of the Council of Europe, and a member of the Parliamentary Assembly believes that accession to the ESC is "an easy step"[128].

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[125] Op.cit.

[126] Press release of the Economic and Social Committee PC 85/88, Brussels, 15 December 1988.

[127] Draft Resolution on the extension of social and human rights in the European Community, European Parliament, Doc. 1-476/80.

[128] Betten, op.cit., p.177

The attitude that the accession of the Community to such agreements is unproblematic seems to be somewhat naive. There is no precedent for an international organisation binding its Members be acceding to such an agreement. Furthermore, it seems that incorporation of the ESC, or any other agreement in the social field, is restricted by the division of competences under the Treaty of Rome. The Community could only incorporate rights in those areas where the Member States have accepted a transfer of sovereignty, and it is likely that the Court would take a strict view and ensure that the Community did not exceed its powers in this respect. In any case, it is highly unlikely that the Member States would agree to such a step. Betten points out that the Member States have, on the whole, been anxious to prevent the ESC having a dramatic impact on their national legal order. They have been slow to implement the Charter, if they have done so at all, and have generally done everything possible to ensure that it has a low profile[129]. These comments apply equally well to other international agreements in this field. A majority of Member States would therefore almost certainly object to the possibility that, through Community law, the ESC or any other international agreement could become part of their domestic law.

Realistically the incorporation of any international agreement which would oblige the Community to take steps to ensure that disabled people are not discriminated against with respect to employment is highly unlikely. Regardless of this difficulty though, there does not seem to be any international agreement capable of obliging those States (or organisations) which ratify it to adopt such a measure.

4.3.2 Existing International Agreements do not refer to Disability Employment Anti-Discrimination Legislation.

International agreements covering the employment situation of people with disabilities do exist. However many of these are of a non-binding nature and even those which are intended to impose obligations on ratifying states are too vague to be capable of requiring the adoption of disability employment anti-discrimination legislation.

[129] Op.cit., p.147.

Article 15 of the ESC[130] covers "the right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement".

In order to achieve this right contracting states are obliged:

"to take adequate measures for the placing of disabled persons in employment, such as specialised placing services, facilities for sheltered employment and measures to encourage employers to admit disabled persons to employment".

Anti-discrimination legislation could obviously contribute to the guaranteeing of these rights - however it is difficult to interpret the Charter in such a way to say that this is actually required of the contracting parties.

The relevant ILO Convention is equally vague. Convention 159, concerning vocational rehabilitation and employment (disabled persons)[131] includes a number of principles which Member States are required to apply. These include:

"Article 2: Each Member State shall, in accordance with national conditions, practice and possibilities, formulate, implement and periodically review a national policy on vocational rehabilitation and employment of disabled persons.

Article 3: The said policy shall aim at ensuring that appropriate vocational rehabilitation measures are made available to all categories of disabled persons, and at promoting employment opportunities for disabled people in the open labour market.

Article 4: The said policy shall be based on the principle of equal opportunity between disabled workers and workers generally."

The Convention goes on to state in Part III:

[130] The ESC has been ratified by all the Member States of the European Community.

[131] Adopted by the Conference at its sixty-ninth session, Geneva, 20 June 1983.

"Each Member shall, by laws or regulations or by any other method consistent with national conditions and practice, take such steps as may be necessary to give effect to Article 2,3,4...."

Once again the Convention could be interpreted to cover anti-discrimination legislation but, even though it refers to the principle of "equal opportunity", it is difficult to read it as requiring the adoption of such a measure. Indeed, most of the countries which have ratified this Convention have not adopted such legislation (and none of the countries which have ratified the ESC have done so). A further barrier to the ratification of this particular Convention by the European Community is that, at present, it has only been ratified by four Member States - Denmark, Greece, Ireland and the Netherlands[132] - and, even if these four States were prepared to accept an additional ratification by the Community, it is extremely unlikely that the remaining eight States would.

Other international agreements, even those of a non-binding nature, are equally general and vague in this area. ILO Recommendation 168, also concerning vocational rehabilitation and employment (disabled persons)[133] states that:

"Disabled persons should enjoy equality of opportunity and treatment in respect of access to, retention of and advancement in employment..."[134]

but does not refer to anti-discrimination legislation as a means of achieving this objective.

The United Nations World Programme of Action Concerning Disabled Persons[135] states that:

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[132] Information correct as of 20 August 1993. Information provided by Daniel Lekatompessy of the Dutch Ministry of Foreign Affairs.

[133] Adopted by the Conference at its sixty-ninth Session, Geneva, 20 June 1982.

[134] Part II, para. 7.

[135] United Nations, New York, 1983.

"Member States should assume responsibility for ensuring that disabled persons are granted equal opportunities with other citizens"[136] and

"Member States should take the necessary measures to eliminate any discriminatory practices with respect to disability"[137].

In relation to employment the Programme states:

"Member States should adopt a policy and supporting structure of services to ensure that disabled persons in both urban and rural areas have equal opportunities for productive and gainful employment in the open labour market"[138].

The Programme however never actually calls upon Member States to adopt anti-discrimination legislation.

In one sense one could claim that the failure to recommend such legislation is simply a reflection of the time in which these documents/agreements were drawn up. As already stated, it is only very recently that disability anti-discrimination legislation has begun to attract attention. This excuse, however, cannot apply to the most recent recommendation of the Committee of Ministers within the Council of Europe which was produced in 1992[139]. The Recommendation states:

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[136] Para. 108.

[137] Para. 109.

[138] Para. 128.

[139] Recommendation No. R(29)6 of the Committee of Ministers to Member States on a Coherent Policy for People with Disabilities - adopted by the Committee of Ministers on 9 April 1992 at the 474th meeting of the Minister's Deputies.

"In order to ensure equality of opportunity in employment for people with disabilities, measures should be taken to avoid all discrimination in obtaining and keeping a job, remuneration and career prospects"[140].

This document, like all its predecessors, balks at recommending anti-discrimination legislation as the best means of achieving this aim.

An alternative approach would be for the Community to accede to international agreements which deal with the problem of discrimination generally, and in this way to incorporate an anti-discrimination instrument within its legal order. However this approach seems to be equally futile, for although such agreements do exist they do not refer specifically to disabled people as a group which is exposed to this phenomenon and which requires protection. The Convention and Recommendation of the ILO on employment discrimination, for example, which was mentioned in chapter one, refer to numerous minority groups but make no reference to disabled people[141]. The standard approach at the international level seems to be to produce documents and agreements covering the problem of discrimination generally, but to produce a separate instrument with regard to disabled people. Thus, general international agreements can also not provide a basis for the incorporation of an anti-discrimination measure.

International agreements, therefore, seem a most improbable source for an E.C. disability employment anti-discrimination initiative. Not only is it highly questionable whether the E.C. can actually accede to such agreements, it is extremely unlikely that they can be relied upon to oblige the Community to take an initiative in this area. If the Commission were to argue that such agreements, once ratified, did provide a legal basis for the introduction of an anti-discrimination directive, a Member State could challenge this interpretation. The imprecise language and vagueness of these agreements mean that it would

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[140] Para. 2.1, p.35.

[141] Convention and Recommendation of the ILO on employment discrimination adopted in 1958 - Discrimination (Employment and Occupation) Convention Number 111 and Recommendation Number 111.

be very unlikely that the Court would hold that the ratified agreement(s) was capable of providing a satisfactory legal base.

The competences of the Community institutions are however constantly evolving - both through the case-law of the European Court of Justice and, more drastically, through amendments to the Treaty of Rome. A case in point is the recent agreement on a Social Protocol which was reached by eleven of the twelve Member States[142] at the Conference on Political and Economic Union held in Maastricht in December 1991. The Protocol, along with the remainder of the "Maastricht" Agreements, have yet to be ratified - nevertheless it is worth analysing its contents to establish if it could provide further competences relevant to this field.

4.4 The "Maastricht" Protocol and Agreement on Social Policy.

The Agreements on a European Political Union and European Monetary Union (the "Maastricht" Agreements) which were signed by all Member States on 7 February 1992 contain a number of Protocols. Amongst these is the Protocol on Social Policy, to which is annexed an Agreement, which was signed by eleven Member States[143]. The Agreement on Social Policy is structured in a similar way to Articles 117-121 of the existing Treaty and it has been argued that it imposes an obligation on the Eleven to "consider themselves bound by the Protocol" rather than these Articles[144].

Article 2 of the Agreement, which replaces Article 118 of the existing Treaty, refers to certain fields in which legislation can be adopted by qualified majority voting or unanimous voting, and also lists those areas where the Community cannot claim legislative competences on the basis of the article. The Protocol provides that, by way of derogation

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[142] The United Kingdom being the dissenting Member State.

[143] The Protocol was signed by all twelve Member States. It contains an agreement to allow the Eleven to have recourse to the institutions of the Community to implement social policy adopted under the annexed Agreement, and for the U.K. not to be bound by any decision made under the Agreement. The Agreement, which contains the new Articles on Social Policy, was only signed by the Eleven.

[144] Manfred Weiss, The Significance of Maastricht for European Community Social Policy. The International Journal of Comparative Labour Law and Industrial Relations, Spring 1992, p.6.

from Article 148(2), measures adopted by qualified majority voting under the new Article need only receive 44 of the possible 66 votes available, rather than 54 out of 76 votes as is the case, for example, with the present Article 118A. Unanimity will naturally be achieved without the United Kingdom. The Protocol also provides for the Eleven to "have recourse to the institutions, procedures and mechanisms of the Treaty" in order to adopt and implement acts and decisions made under the Agreement. Amongst those areas in which qualified majority voting is provided for is "the integration of persons excluded from the labour market"[145].

It is notable that the Agreement refers to those "excluded" from the labour market, rather than those who are merely "discriminated" against. The latter term seems to cover both exclusion caused by discrimination and unfavourable treatment, such as restricted promotion opportunities or low pay, experienced whilst in employment. Many groups experience discrimination; less experience total exclusion and it seems that the group which is currently excluded from the labour market to the greatest extent is that of disabled people. Surveys throughout the Community consistently show disabled people making up a disproportionate percentage of both the unemployed generally, and specifically the long term unemployed[146]. A recently produced Eurostat report demonstrates the extent to which disabled people are excluded from employment in a number of Member States. For example, whilst the general unemployment rate in Italy in 1989 was just over 10 per cent, it was more than 50 per cent for disabled workers. Similarly, although unemployment amongst the total

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[145] Other areas which may be of particular relevance to the introduction of a policy to promote the integration of disabled people in the working world are "improvement in particular of the working environment to protect workers' health and safety"; "working conditions"; "the information and consultation of workers" (qualified majority voting) and "social security and protection of workers"; "protection of workers where their employment contract is terminated"; "representation and collective defence of the interests of workers and employers, including co-determination" and "financial contributions for promotion of employment and job-creation, without prejudice to the provisions relating to the Social Fund" (unanimity).

[146] With regard to this a United Nations Report has commented:
"In times of unemployment and economic distress, disabled persons are usually the first to be discharged and the last to be hired. In some industrialized countries experiencing the effects of economic recession, the rate of unemployment among disabled job-seekers is double that of able-bodied applicants for jobs". United Nations Decade of Disabled Persons, 1983-1992, World Programme of Action Concerning Disabled Persons, Para. 69, United Nations, New York, 1983.

population was approximately 7 per cent in the United Kingdom in the same year, it was 30 per cent for disabled people[147]. It is extremely likely that disabled people are excluded to a degree which exceeds that of other (minority) groups - for example, women or ethnic minority workers. These groups experience discrimination, but this probably generally takes the form of being confined to low status/poorly paid jobs rather than being excluded from the labour market altogether. Young and elderly workers are possibly more likely to experience total exclusion, but even here it is unlikely that the exclusion reaches the same degree as that experienced by workers with disabilities. Furthermore, since the prevalence of disability increases with age, it is likely that at least part of the exclusion of the latter group is explained by this factor. Given this, and given the argument that the main barrier to the economic integration of disabled people is discrimination, the most effective way of promoting the integration of this presently excluded group would be an anti-discrimination directive. In addition this provision of the Agreement would also allow for the adoption of further measures to promote the employment of disabled people, including those requiring positive action. In one fell swoop, therefore, it seems as if the problem of finding competences within the Treaty has been removed, and that the new Article 118 provides a clear basis for action.

This is indeed a tempting conclusion - however, in reality at least, it seems unlikely that the Article will be used in this way in the immediate future. It is true that the provision is sufficiently related to the aim of promoting the economic integration of disabled people and, if one accepts the basic argument of this thesis, could justify the introduction of an anti-discrimination directive without the need for a "constructive" interpretation of the Treaty. However, the exact legal status of the Social Protocol and Agreement is unclear.

The Protocol itself, signed by all twelve Member States, is clearly within the Community's legal order by virtue of Article 239 EEC - what is less clear is whether the Agreement which is annexed to the Protocol, signed by only eleven States, is capable of having the same effect.

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[147] Rapid Reports, Population and Social Conditions, Disabled People - Statistics, Eurostat, 1992/5.

The Agreement certainly constitutes an agreement which is binding at the level of international law, but its status at Community level is uncertain. It can obviously not constitute an amendment to the Treaty since it was not unanimously endorsed in accordance with the procedure required by Article 236. However it was clearly the intention of the Eleven (and possibly of all twelve Member States) that the Agreement should take effect as an element of Community law, and for the Court to hold otherwise, on the grounds of an insufficient legal basis, would be to thwart those intentions.

As long as the legal status of the Agreement remains uncertain the status of secondary legislation based upon it will also be unclear. To be effective such legislation needs to be justiciable before the Court (for example through Article 177 or Article 189 procedures), and it is unclear whether the relevant measures will constitute "acts of the institutions" so bringing them within the jurisdiction of the Court. The Protocol allows the eleven signatory States to "borrow" the machinery of the Community institutions when adopting measures - the Court must determine if this is sufficient. In this respect Barnard[148] points out that in the context of judicial review proceedings the Court has often been prepared to ignore technical arguments on the nature of the measure in question in order to assume jurisdiction[149]. It would be a bold Court indeed which was prepared to hold legislation adopted under the Agreement, or the Agreement itself, invalid on the grounds of the absence of an adequate legal basis. As already stated, this would be to thwart the will of the Member States and to throw the future of an E.C. social policy into jeopardy. The Court has in the (recent) past taken great efforts to avoid much more minor confrontations than this with individual Member States. Given the drastic political consequences of a rejection by the Court of the Agreement on Social Policy, it seems hard to envisage it taking such a step. To do so would be to threaten its own credibility with the Member States and the Commission. It therefore seems likely that the Court, wishing to give effect to the Protocol and secondary legislation produced under it for political reasons, will

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[148] Catherine Barnard, A Social Policy for Europe: Politicians 1:0 Lawyers. The International Journal of Comparative Labour Law and Industrial Relations, Spring 1992, pp.15-31.

[149] Ibid., p.25.

hold that it has the competences to give a ruling and will generally find in favour of any challenged legislation. If this were to be the case greater scope for the introduction of social policy would exist.

However, even if the Social Protocol and the secondary legislation produced are held to be part of the body of European Community law, the new Article 118 only provides the competence for the Community to "support and complement the activities of the Member States" in the listed fields. This goes further than the existing Article 118, which confers on the Commission "the task of promoting close cooperation between Member States", but its exact scope remains unclear. An anti-discrimination directive would certainly "support and compliment" the attempts of Member States to integrate disabled people in the labour market - however, it is foreseeable that a Member State which found itself on the wrong side of a qualified majority vote when such a directive was adopted may challenge it on the grounds that it exceeds a supporting and complimenting role, and instead seeks exclusive competence in the field, thus breaching the principle of subsidiarity. Once again the attitude of the Court of Justice would be the decisive factor in determining the legality of any such directive - the fact that the majority of the eleven Member States felt that the Article did give the competence to introduce such a directive would weigh heavily in its favour, and it seems unlikely that the Court would, in these circumstances, take a contrary view.

Assuming that the Social Protocol is ultimately ratified, and that it is held to be valid in European Community law, it will provide a relatively clear legal basis allowing for the adoption of a disability employment anti-discrimination directive. It also has the added advantage of only requiring a qualified majority vote. If the Commission is not prepared to propose such a measure on the basis of the existing Treaty, or the opposition of the United Kingdom prevents the adoption of a directive, then, given a sufficient degree of political will amongst most, but not all Member States, this Article seems to provide the most likely basis for action in this field. However these initial assumptions may be too great. Recent events have demonstrated that the ratification of the "Maastricht" Agreements is not a straightforward process, and the Community institutions have never sought to rely on, nor the Court been called upon to interpret, a hybrid agreement such as this. The Community is charting new territory with the adoption of the Social Protocol and Agreement and its

scope and legality is likely to be initially tested in areas other than disability policy. Should the adoption of binding measures under the Agreement prove possible though, it will spur on the development of social policy within the Community, which would hopefully be to the benefit of disabled people as well as many other presently disadvantaged citizens.

Conclusion.

It is argued that the core of any E.C. policy to promote the economic integration of people with disabilities should be an anti-discrimination directive. The purpose of this chapter has been firstly to consider the possible substantive content of any such directive, principally through an examination of U.S. legislation in this field, and secondly to consider whether the Community presently has any competences which would enable it to take such an initiative.

It is clear that the formulation of a disability employment anti-discrimination directive is not a simple process and, should the Community take such a step, careful consideration needs to be given to the experience of states where such legislation already exists, and in particular to the U.S. where relatively detailed legislation has been in force for some time. An analysis of the U.S. legislation has shown that when defining the protected class, a detailed and explicit definition must be developed so as to reduce the scope for uncertainty and that, even where this is the case, a defining period, whereby courts and administrative agencies elaborate on the meaning of the relevant concepts will be necessary. The analysis has also shown the care that needs to be taken when formulating a definition of "discrimination". Any definition must be broad enough to encompass two concepts of discrimination - firstly the traditional concept, covering direct and indirect discrimination, and secondly the "unequal burdens" concept which was elaborated upon in the opening chapter. In addition, the legislation must represent a compromise between the interests of employers and the interests of disabled people since these can at times conflict and, because of the idiosyncratic nature of disability and employment the instrument must make extensive use of requirements for individualised analysis.

The importance and relevance of these points at the E.C. level is even greater than was the case for the U.S.. An E.C. directive must be as precise as possible in order to attempt to achieve a single coverage with regard to the beneficiaries and to ensure that the measure has the same effect throughout the Community. Since a directive is implemented through national provisions the possibilities for misinterpretation are even greater than is the case for domestic legislation - not only is it necessary that employers and disabled people understand their rights and obligations under the law, but Member States must comprehend exactly what rights and obligations they are to create through their implementing instrument. In fact, as the U.S. experience illustrated, a maximum level of certainty is unlikely to be achieved immediately and legislation of this kind must necessarily be flexible. This reality needs to be appreciated by the Community and the Member States before a directive is adopted and at least an initial element of uncertainty must be regarded as acceptable.

The chapter then went on to consider whether the Community in fact has the competence to adopt a directive in this field. A number of Treaty articles were considered, and although it is possible to argue that one or more of these articles does provide the competence to act, it seems unlikely that any of them will actually be used in this way. It is also unlikely that an anti-discrimination measure could be incorporated into the Community's legal order through the accession to international agreements referring to the rights of disabled people. This does not necessarily mean, however, that the Community will not obtain the competence to act at some stage in the future, particularly given that such a measure would have an important economic as well as social impact. Of particular relevance in this respect is the "Maastricht" Social Protocol which allows for eleven Member States to adopt instruments to promote "the integration of persons excluded from the labour market" through qualified majority voting. If the Protocol becomes a valid instrument within Community law it has the potential to provide the basis for a disability employment anti-discrimination directive, as well as for a number of other instruments which would benefit disabled people.

THE QUOTA SYSTEM

It was argued in chapter two that the principle of distributive justice, and specifically Rawls' principles of social justice, justified positive action in the employment sphere in favour of people with disabilities. Work is an important source of self-respect, and if disabled people are denied access to employment they will also be denied access to the main source of obtaining this "vital primary good". Therefore rational individuals in the original position would accept the need for positive action in favour of disabled people, and a social system which does in fact provide for such measures can be regarded as just.

In this chapter one particular form of positive action shall be analysed: the quota system, whereby employers are obliged to employ a certain percentage of disabled people. The quota system had its origins in the post First World War period when many countries adopted it in order to promote the employment of disabled veterans. Following the Second World War the system was expanded to cover the disabled civilian population as well, and today all Member States of the European Community countries, with the exception of Denmark, have some form of quota.

In the initial sections of this paper the various forms which the quota system can take will be analysed. A brief history of the development of the quota system in Europe will be given, and two particular systems - those in the United Kingdom and the Federal Republic of Germany - shall be analysed, and their success (or lack of it) commented upon. Following this, the general strengths and weaknesses of the quota system will be discussed. Lastly the particular problems involved with adopting such a measure at E.C. level, and the desirability of such a policy will be considered. It will be argued that although an E.C. quota system would not be incompatible with an anti-discrimination directive, which it was claimed should be the core of any E.C. policy, practical reasons, not least of all that it would breach the principle of subsidiarity, dictate that a global Community quota should not be incorporated within an E.C. policy. Member States, however, should remain free to continue their own quota systems, as long as these do not threaten to distort competition.

1. The Origins and Development of the Quota System in Europe.

Proposals to reserve jobs for the war disabled through quota systems were first discussed at the Inter-Allied Conference in Brussels in December 1920. The Conference recommended that legislation be used to oblige public and private employers to employ disabled ex-soldiers. This proposal was also supported by a committee of experts which met under the auspices of the International Labour Organisation in 1923. The Committee's task was to find ways and means of employing disabled veterans. It favoured the use of legal obligations, and stated that the experience gained in employing disabled veterans could also be of use in employing other disabled people. They felt that all employers having a designated number of employees should be covered by the legislation, although there should be waivers for those who experienced certain difficulties. Those employers which were exempted should be obliged to pay a fee or a fine.

These recommendations formed the basis of the legislation that was ultimately adopted in many European states in the post First World War period and, as will be seen later, the system proposed at the meeting of I.L.O. experts has only been subjected to slight refinements since. This is inspite of the fact that modern day quotas are operating in a wholly different economic and social environment, and that the expectations of disabled people have radically changed since the experts met.

In the early 1920s, therefore, several European countries adopted legislation mandating the employment of disabled veterans. Germany was the first country to do so through a decree issued in January 1919. By 1923 the German system had been further modified, and included a quota of 2 per cent for public and private employers, fines for contravention of the Act, and extra protection from dismissal for those disabled workers covered. Other countries, including Austria (October 1920), Italy (August 1921), Poland (November 1921), France (January 1923) and Danzig (October 1925) also adopted quota legislation. In Britain the system was rejected in favour of a voluntary scheme known as the King's Roll. This encouraged employers to ensure that 5 per cent of their employees were disabled veterans by placing those firms that obliged on a roll of honour, known as the King's Roll. In fact a Select Committee, reporting on the training and employment of

disabled ex-servicemen in 1922, found that this voluntary scheme was failing and that firms were withdrawing from the King's Roll, but nevertheless balked at recommending the incorporation of an element of compulsion[1].

It can be seen that these original quota systems, confined as they were to those disabled through military service, were based on a concept of duty. In the post Second World War period, however, the systems were extended to cover disabled civilians, and became part of a more comprehensive package encompassing services to all disabled people.

Concrete signs that a broader approach would be adopted can be found in the conclusions of the 24th session of the International Labour Conference held in Philadelphia in 1944. The conference was convened to discuss the social problems arising out of the war, and amongst the topics considered was the employment of disabled workers. The conference recommended:

"(1) Special measures should be taken to insure equality of employment opportunity for disabled workers on the basis of their working capacity. Employers should be induced by wide publicity and other means, and where necessary compelled, to employ a reasonable quota of disabled workers."

(2) In certain occupations particularly suitable for the employment of seriously disabled workers, such workers should be given preference over all other workers"[2].

The quota system, however, was not favoured in all countries as a means of (re-)integrating disabled people into the workforce. Whilst this was the approach adopted in a number of states, and particularly those which already had a limited system aimed at veterans[3], other counties, particularly those outside Europe (U.S.A. and Canada), but also the Scandinavian countries (Denmark and Sweden) favoured the development of an extended

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[1] Report from the Select Committee on Training and Employment of Disabled Ex-service Men, The House of Commons, HMSO, 1922.

[2] Transition from War to Peace, Part X, Recommendation 43.

[3] Although some countries, such as the United Kingdom and the Netherlands, introduced quota legislation for the first time after the Second World War and also followed this trend.

vocational training and rehabilitation system, and attempted to promote the employment of disabled workers by persuading rather than compelling employers to act. It was the former approach, however, which was adopted by most of the present members of the European Community[4].

Having given this introduction covering the general development of the quota system, case studies shall now be made of two particular systems: those of the United Kingdom and the Federal Republic of Germany. This will illustrate two different approaches in terms of beneficiaries and the degree and means of enforcement of the quota. These two systems represent the most common kinds of quota.

The British system is much criticised, widely discredited, not effectively enforced, and not surprisingly seems to do little to improve the employment situation of disabled people. The German system however, at least outside of Germany, is admired and has provided a model for similar legislation in other countries. Nevertheless within Germany the system is also criticised (although to a lesser degree than the British system), and partly as a result of the economic difficulties of the last decade it too has become less effective in securing employment for disabled people.

1.1 The United Kingdom.

The quota scheme was established by the Disabled Persons (Employment) Act 1944 (DPEA). It was based on the principles enunciated by the Tomlinson Committee[5] which produced a report on the rehabilitation and resettlement of disabled persons in 1943[6]. This report formed the basis of the post-war disability employment policy, and it identified two related principles that heavily influenced the subsequent legislation:

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[4] Denmark, as already stated, being the exception. To this day Denmark does not have a quota system, and the government and organisations of disabled people oppose the adoption of such a system. However disabled people are given priority access to certain jobs in the public sector.

[5] An inter-departmental committee, popularly known as the Tomlinson Committee after its chairman, George Tomlinson.

[6] Report of the Inter-departmental Committee on the Rehabilitation and Resettlement of Disabled Persons, 1943, Cmnd. 6415.

1."...disabled persons, given the opportunity[7], are capable of normal employment: the use of institutional or sheltered employment must be limited to that small group who cannot hold their own on level terms and under competitive conditions."[8]

2. disabled people should be afforded "their full share within their capacity of such employment as is ordinarily available."[9]

The quota scheme established by the DPEA requires that all private employers with 20 or more employees ensure that at least 3 per cent of their workforce is made up of registered disabled people[10]. Public employers are not bound by this duty, but have agreed to accept the same responsibilities as the private sector[11]. It is not an offence for an employer to be below this quota, but an employer is not allowed to engage a non-registered person when below quota, or, where doing so would bring him/her below the quota, unless s/he has a permit granting exemption from this requirement. A permit should theoretically only be issued where there are an insufficient number of registered disabled people to fill the position(s) in question[12].

The Act also allows for the designation of certain positions which are only to be held by registered disabled people[13] - a measure recommended at the 1944 I.L.O. Conference

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[7] Presumably the phrase "given the opportunity" refers to the situation in which disabled people are given the chance to work in a non-discriminatory environment (which would include the making of certain accommodations where necessary).

[8] Para.9.

[9] Para.71(a).

[10] Unless a separate quota has been set for the particular industry in which the employer operates - see below.

[11] The National Health Service and Community Care Act removed all Crown immunity within the National Health Service (NHS). As a result all NHS employers are now also legally bound by the DPEA.

[12] Section 11.

[13] Section 12.

(see earlier). The Secretary of State for Employment has thus far only designated two such positions - car park attendant and lift attendant[14].

An employer who contravenes the quota or reservation of jobs requirement is liable to a fine of not more than £500[15] or a term of imprisonment of not more than 3 months.

The Act also allows the Secretary of State to set a special quota, which can be either higher or lower than the standard quota, for industries or trades which have "distinctive characteristics as respects [their] suitability for disabled persons"[16]. Thus far the only special quota which has been set applies to the merchant navy, where a quota of 0.1 per cent is in force[17].

In order to be covered by the Act a disabled person must be someone who "on account of injury, disease, or congenital deformity, is substantially handicapped in obtaining or keeping employment, or in undertaking work on his own account of a kind which apart from that injury, disease or deformity would be suited to his age, experience and qualifications"[18], and be registered as such. There is no obligation to register, but those who do not, even if they fit the definition given in Section 1(1), can not benefit from the Act[19].

The British quota system has not been successful in promoting the employment of disabled people. Four government sponsored reviews of the quota system have been held

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[14] Disabled Persons (Designated Employments) Order 1946, S.R. & O. 1946 No. 1257; 7 Halsbury's Statutory Instruments, title Employment (Part 5).

[15] The limit was originally £100, but was raised to the present sum by the Criminal Justice Act 1982.

[16] Section 10(2)(b).

[17] Disabled Persons (Special Percentage)(No.1) Order 1946, S.R. & O. 1946 No. 236; 7 Halsbury's Statutory Instruments, title Employment (Part 5).

[18] Section 1(1).

[19] Section 6.

since 1970[20], and all have referred to its ineffectiveness and recommended drastic amendments or the total abolition of the system; a proposal which, not surprisingly, has been supported by employers. On each occasion, however, the government of the day, faced with demands from disabled people that the system not be abandoned but instead effectively enforced, has failed to act[21], leaving neither side content. The existing system is discredited and unpopular, and although it is unanimously agreed that it cannot continue in its present from, this is exactly what happens, since a consensus on a more appropriate policy cannot be reached. There are a number of reasons for the failure of the British quota system, and it is important to analyse these to identify the weaknesses to which all quotas of this kind are prone.

1.1.1 Weaknesses with the British Quota System

1.1.1.1 Unwillingness on the part of the Government to Enforce the Quota.

The government has always been unwilling to prosecute employers who breach their quota obligation. Since the Act came into force there have been only ten prosecutions for non-compliance, resulting in fines totalling £334. The government of the day has a very strong position with regard to limiting prosecutions since the permission of the Secretary of State is needed before any action is commenced. Instead governments have always been prepared to issue exemption permits to employers allowing them to recruit non-registered workers. The vast majority of the permits issued are bulk permits, covering all appointments and lasting for 6 months. As no analysis is carried out to establish the exact employment situation, the Act's requirement that permits only be issued if there are insufficient registered disabled people to fill the position(s) is not generally observed. Compliance with the Act is

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[20] The first review (1973-1974) was carried out by the Department of Employment. The second and third reviews (1981-1982 and 1985-1986) were carried out by the Manpower Services Commission whilst it was responsible for enforcing the quota. The last review (1990-1991) was carried out by the Employment Department Group to which responsibility for the quota has been transferred.

[21] On September 17 1991, following the most recent review, the Employment Secretary, Michael Howard, announced that there would be no amendments to the legislation for the time being, but that the position would be kept under review.

now seen as obtaining an exemption permit before hiring non-registered workers, rather than achieving the 3 per cent quota.

Not surprisingly the number of firms which do meet the 3 per cent target has been continually declining and today less than a third of private employers meet the set quota. The public sector has an equally poor record which has also been deteriorating[22]. The message going out to employers is that they do not have to meet their quota obligations, and although the present government denies that there is a policy not to enforce the quota scheme[23], in reality its official policy on prosecution does not seem to have changed since 1980 when it stated that prosecutions would only be brought where there was a "flagrant or blatant" infringement of the regulations[24].

1.1.1.2 Failure of Disabled People to Register.

A quota scheme that relies on a register to determine eligibility for protection clearly faces dire problems when disabled people fail to join the register. This is exactly what has happened in Britain, where the number of registered disabled people has been declining steadily so that, since 1979, it has been statistically impossible for all employers to meet their 3 per cent quota obligation.

Disabled people fail to register for a number of reasons. Firstly, many see little point in registering since they believe that it confers no advantage. The register is mainly used to

[22] In May 1991 the 3 per cent quota was only met by 13 of the 366 District Councils, one government department (the Employment Department Group), and no County Councils or London Borough Councils, The Employment Gazette, February 1992, p.61, Dept. of Employment, HMSO.

[23] In a recent case in which a disabled employee who had been dismissed by an employer who was below quota challenged the Secretary of State's refusal to consent to a prosecution, the Minister stated: "The decision to prosecute will take into account the evidence against the employer, including whether the court is reasonably likely to be persuaded that the employer has a sufficient defence to the case against him, the public policy interest in mounting the prosecution, in particular whether the prosecution will be in the interests of disabled people generally, will also be considered". Quoted in Rehab Network, Winter 1992, p.3, "Clarification from the Secretary of State".

[24] 979 H.C. Debs., Col. 389-90. 22 February 1980.

administer the quota system[25] and, as the quota is not effectively enforced, many disabled people believe that they have nothing to gain by registering. Townsend states that in the context of rising unemployment and non-enforcement of the scheme:

"Registration for the purpose of securing employment must ... seem... increasingly unproductive both to people with disabilities and employment office staff"[26].

When the register was first established hopes were high that the system would work and a large number of people chose to register. The numbers registering have declined ever since as it has become clear that the government would not force employers to meet their obligations. This suggests that if a stricter enforcement policy were adopted more people would choose to register. This is the argument put forward by organisations representing disabled people, who reject the contention that the failure to register demonstrates that disabled people no longer need statutory protection. They claim that this is refuted by the disproportionately high number of people with disabilities who are unemployed.

Secondly, many people may choose not to register because they do not wish to identify or label themselves as "handicapped". They may refuse to accept the negative connotations associated with this word, or believe that registering will actually disadvantage them when looking for work. This is a problem for all quota systems which rely on voluntary registration, but it seems to be particularly severe in the British case where the incentives to registration are often not seen as great enough to overcome the stigmatism associated with it. Where the benefits of registration are demonstrable, such as is the case with local authority registration which can give access to free parking or concessionary passes, or under the German Schwerbehindertergesetz (see later), disabled people are prepared to accept the labelling associated with the process. This problem may actually be compounded by the definition used in the DPEA. A "disabled" person is defined as someone

[25] It is also used to determine eligibility for a limited number of other employment related benefits. Most benefits, however, do not require that the recipient be registered as disabled.

[26] Peter Townsend, "Employment and Disability" in Alan Walker with Peter Townsend (eds.), Disability in Britain: A Manifesto of Rights, Martin Robertson, 1981, p.66.

who is "handicapped in obtaining or keeping employment" - the problem is that disability and handicap are not synonymous, as has already been illustrated, and one cannot be defined in terms of the other. This confusion of terms may also deter some disabled people from registering.

1.1.1.3 Flawed Administration of the Quota System.

The agency which is responsible for supervising the quota system is also responsible for placing disabled people who need special assistance in employment. Disablement Resettlement Officers (DROs), working within the Resettlement Service, must check whether employers are meeting their quota obligations and assess applications for permits, whilst at the same time attempting to find placements for disabled people. The duties related to administering the quota system are time consuming, and also place the DROs in the role of policing the scheme. Herein lies a fundamental contradiction - for on the one hand DROs are expected to develop a good rapport with employers and encourage them to take on disabled people, whilst, on the other, they are required to judge the actions of those same employers and decide whether to recommend prosecution when the law is breached. DROs, faced with this dual role, have opted for a policy of persuasion and encouragement, rather than of strictly policing employers to ensure that they comply with their obligations, no doubt encouraged by messages they have been receiving from central government. Their task has been made even more difficult as their numbers were reduced in the early 1980s, and the size of their caseloads correspondingly increased. This means that the enforcement of the quota system, at grass-roots level, is ineffective, and the problem can only be removed through a separation of the roles imposed on DROs.

1.1.1.4 The Purpose of the Quota may not concur with the objectives attributed to it.

The above problems could all apply equally well to other quota systems operating within different legal systems. Major though they are, there seems to be an even greater difficulty with the British system which meant that it was doomed to failure from its inception, and which may be specific to the British situation. It has been argued that the negotiations which shaped the DPEA and the quota scheme were motivated by sectional

concerns which were not in the interests of disabled people and that, in fact, the quota scheme was never intended to guarantee the employment of a large number of people with work related disabilities[27]. It is therefore not surprising that it has failed to meet the expectations of disabled people.

Bolderson argues that the quota arrangements in the DPEA were shaped by the concerns of the trade union movement and employers whose main aim was to ensure that less productive disabled workers were kept out of the open labour market. The trade unions did not wish to see disabled workers struggling to hold down jobs which were above them, and feared competition for their members from disabled workers who were prepared to work for low wages. They therefore wanted to ensure that only those disabled workers who could compete in the open labour market and command a market wage were in fact in open employment. This meant that less able workers had to be kept out of that market, either by being placed in sheltered employment or by being excluded from open employment until they have been rehabilitated. The trade unions recognised, however, that some guarantee of employment had to be provided for those workers who were effectively rehabilitated, and were therefore prepared to accept the creation of a quota. They nevertheless feared that disabled workers, through this quota, would be given preference over non-disabled workers in times of unemployment, and were anxious to ensure that disabled workers were only guaranteed their "fair share" of employment. The trade unions thus saw the scheme as a means of excluding less productive workers, but also of ensuring that an excessive number of disabled workers did not find employment and displace their non-disabled members.

Employers shared the trade union's interest of excluding less productive disabled people from the open labour market, so ensuring that they were not burdened with such workers. Bolderson argues that pressure from these two groups led the final report to stress that "unfit workers should not go into competition with the fit"[28]. This led directly to a conclusion which shaped the ultimate legislation - that only those disabled workers who

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[27] Helen Bolderson, The Origins of the Disabled Persons Employment Quota and its Significance, Journal of Social Policy, Vol. 9, No. 2, 1980, pp.169-186.

[28] Ibid., p.177.

could hold their own in open employment should be covered by the quota. The rest should either be placed in sheltered employment, or be provided with rehabilitation until they were able to compete in open employment. This concept is reflected in the principles cited earlier and the DPEA, which divides disabled people into "effective workers" who are able to compete, and "ineffective workers" who are consigned to sheltered employment. The Act makes no provision for those with a sporadic or fluctuating disability who do not fit easily into either category.

If Bolderson is correct the quota scheme can be seen as protecting the concerns of trade unions and employers in two ways. Firstly the quota is a "quid pro quo" for sheltered employment and the exclusion of partly rehabilitated workers, both of which removed less productive disabled workers from the labour market. Secondly, Bolderson implies, it was a means of limiting the number of disabled workers in open employment in a situation where trade unions and employers feared an even greater number of such workers entering the labour force. If this is true it does not sit easily with the principles upon which the quota system is based. Bolderson argues however that the quota scheme was motivated by the stated concerns, which preceded the construction of the principles which came to underlie the DPEA, and that these principles were used to gain support for the enacted provision. The quota system has in fact developed in such a way as to meet the alleged concerns of trade unions and employers. Under the DPEA less productive workers with severe disabilities are pushed into sheltered employment, whilst only the relatively able are encouraged to compete (often unsuccessfully) in the open employment market. Workers who under the German quota system would be eligible for open employment are effectively denied this opportunity under British law, implying that there is some truth in Bolderson's arguments[29]. If this is so, then something much more fundamental than an improved enforcement and administrative mechanism and greater registration is needed if the quota

[29] In fact workers who are eligible for sheltered employment will be covered by the quota scheme if they do attempt to find open employment. Such severely disabled workers though will not be given any extra assistance through the scheme, as is the case under the German law, since the DPEA was not designed with the needs of these workers in mind. Furthermore, since such workers will generally be less productive than those with whom they are competing, at least unless they are provided with the relevant accommodations, they are unlikely to be successful in their search. In order for this to be the case they would need extra assistance which is not forthcoming under the British system.

system is to work in Britain. Nothing less than a radical reassessment of disability employment policy and a drastically amended law will be needed.

The quota system, in fact, does not even seem the most appropriate means of achieving the aim outlined above. Instead anti-discrimination legislation, covering only those disabled people who are able to compete in the open labour market (as the U.S. legislation has been shown to do), would seem to be a much more suitable tool. This would leave the quota system free to perform the function to which it is better suited: promoting the employment chances of those people with disabilities who, even with an accommodation, are not able to compete equally, and who need positive action in their favour if they are to find employment.

Having analysed the British system, attention will be turned to the German quota scheme, which operates on a slightly different principle, and which is targeted at a different client group.

1.2 The Federal Republic of Germany.

The German quota system has a long history. Germany was the first country to adopt such a system in the aftermath of the First World War, and it was also the favoured approach following the 1939-1945 War. In the immediate post Second World War period different quotas, varying from 2 to 10 per cent, directed at different groups (e.g. those disabled through war and industrial accidents, those disabled as a result of National Socialist activities, or those who had a work-related disability of 50 per cent or more) were adopted in the various occupied zones. An attempt was made to harmonise these systems through the Schwerbeschädigtengesetz of 16 June 1953. This basically only covered those people who had been disabled through war or industrial accidents. It set a quota of 10 per cent for public employers and for the banking and insurance industries, and a quota of 6 per cent for private industry. All employers with seven or more workers were covered.

It quickly became clear that there were not enough eligible disabled people to fill the quota places, and by 1960 320 000 such places stood unoccupied whilst only 6000 disabled

people who were covered were registered as unemployed. In an attempt to solve this problem the law was amended[30]. The amendment aimed at reducing the number of quota places - by setting one quota of 6 per cent, with the cut off point raised to 9 employees for public employers and 15 for private employers - but also at reducing the number of eligible disabled people by requiring that those covered had to have a work-related disability of at least 50 per cent. The law was still restricted to those disabled through war or industrial accidents. The discrepancy between the number of unoccupied quota places and the number of eligible workers however remained, and in 1971 337 358 places stood unoccupied.

In response to this the government adopted the Schwerbehindertergesetz (SchwbG)[31] of 29 April 1974. This modernized the quota system, and has formed the basis of the German policy ever since. The quota was extended to cover all severely disabled people, whatever the origin or nature of their disability. The requirement that the disability must amount to at least a 50 per cent reduction in working capacity remained[32], although the employment office can now extend the protection of the law to those with a work-related disability of between 30 and 50 per cent if it is satisfied that the individuals concerned experience difficulty in obtaining or maintaining employment as a result of their disability[33].

The law sets one quota of 6 per cent for all employers with 16 or more employees, whether in the public or the private sector. This can be reduced to as low as 4 per cent or increased to 10 per cent. In calculating the quota certain workers will be counted as occupying two or three quota places. This applies to those individuals which the Employment Office feels, because of their degree of disability, are particularly difficult to employ[34], and disabled people receiving vocational training within the firm[35]. No special

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[30] Amendment of 3 July 1961.

[31] Severely Handicapped Persons Act.

[32] §.1.

[33] §.2.

[34] §.10(1).

quotas will be set for specific industries or employers; however, employers are free to choose how to distribute the severely disabled workers within their organisation.

Employers who do not meet their quota obligations are obliged to pay a levy of, at present, 200 DM per month for every unfilled quota place[36]. This money is used exclusively to promote rehabilitation and employment of severely disabled people[37] and can, for example, be used to provide grants to employers which exceed their quota obligations - either because their workforce contains more than the 6 per cent quota, or because they do not have sufficient employees to be covered by the law but nevertheless employ severely disabled workers - to help them meet any extra costs, such as adaptations to buildings or the provision of special training.

The law is based on the principle that all employers above the set limit should contribute to the economic integration of severely disabled workers. Ideally this should occur through the actual provision of employment for such workers, but where this does not occur, a contribution should be made via the levy procedure. The levy serves two purposes - firstly an "antriebsfunktion"[38] for those employers who fail to meet their quota obligations; and secondly, an "ausgleichsfunktion"[39], for those employers who exceed them.

The SchwbG places certain other burdens upon employers, and provides severely disabled people with additional protection. All employers, whether they have met their quota or not, are obliged to examine every vacant position to see if it is appropriate for a severely disabled worker[40]. Employers must also organise the workplace to ensure that it is suitable in relation to health and safety requirements for at least their minimum quota obligation[41],

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[35] §.10(2).

[36] §.11(3).

[37] §.11(3).

[38] "Incentive function".

[39] "Equalising function".

[40] §.14(1).

[41] §.14(3).

i.e. at present 6 per cent of their workforce. In addition they must ensure that severely disabled workers are given the maximum opportunity to achieve their full potential, and are obliged to provide vocational training for such workers where such training is carried out within the firm[42].

The Act also provides severely disabled workers with additional protection from dismissal[43], and requires that such workers be able to elect their own representative within the firm to protect their interests[44].

The German quota system has managed to avoid many of the pitfalls that have hampered the British scheme. It does not seem to have been born out of an agreement to keep less productive disabled workers out of the open labour market - indeed, unlike the British system, it is specifically targeted at people who are severely disabled with a working capacity of 50 per cent or less. In one sense it could be argued that this limited coverage is itself a problem, since those workers with a degree of disability which is less than 50 per cent and who in addition have not been recognised as severely disabled by the employment office, receive no protection from the quota system. This is true - however it does not seem to be a problem in practice. Workers with lesser degrees of disability are not ignored under by the German policy, but instead have access to a number of other measures, such as extensive vocational training (albeit in specialised institutions) and rehabilitation programmes, which contribute to their economic integration. Furthermore there is a risk that if these more able workers were included within the quota scheme they would displace those with severer disabilities. The German system is therefore targeted at that group which most needs positive action rather that at disabled people who simply need a non-discriminatory atmosphere in order to be employed and, as shall be argued later, this seems to be the most appropriate use of the quota system.

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[42] §.14(2).

[43] Vierter Abschnitt - Kündigungschutz §.15-22.

[44] Fünfter Abschnitt §.24-29.

Furthermore, since the system is enforced rather than honoured in the breach, there is little difficulty in encouraging eligible disabled people to register. Registration also gives access to certain other benefits, such as a week extra holiday from work and travel concessions. There are significant advantages to being recognised as severely disabled, and this has encouraged people to overcome any fears of being stigmatised by the process. Lastly the administration of the system through the Employment Office and regional Hauptfürsorgestellen[45] is effective, and these institutions do not find themselves attempting to fulfil a dual and conflicting role.

Despite this the system is not regarded as being particularly successful within Germany, although it is much admired abroad, and a similar system has recently been adopted in France.

Criticism revolves around the fact that the German quota has been progressively less effective in securing the employment of severely disabled people. Since 1982, when the average actual quota achieved was 5.9 per cent, the situation has steadily worsened, and by 1990 the average percentage of severely disabled workers within firms was 4.9 per cent. This figure hides regional differences, ranging from 4.1 per cent in Bavaria to 6.1 per cent in North Rhine Westphalia. In January 1990 127 300 severely disabled people were registered as unemployed.

The German quota has proved itself incapable of maintaining the targeted level of employment for severely disabled people during a period of economic recession. The economic difficulties, combined with the relatively low levy, seem to make payment a more attractive option for many employers who feel that at the present time this is a safer option than the unknown risks of hiring a severely disabled worker. The burden seems to have fallen most heavily on those who are looking for work, who have had little success, rather than on those who experience disability whilst in employment. The quota law and the extra protection from dismissal may encourage employers to retain the latter group, and an increasingly large number of quota places are being filled by such workers.

[45] Welfare Assistance Offices.

Just as was done in the British case, the reasons for the increased ineffectiveness of the German quota shall be considered. These problems may also confront other quota systems, particularly those based on a grant-levy scheme and/or operating in a time of economic recession (as all schemes in the E.C. presently are).

1.2.1 Weaknesses with the German Quota System

1.2.1.1 Amount of the Levy.

Organisations representing disabled people argue that one of the main problems with the quota system is that the levy is too low, and that many employers prefer to pay this sum rather than engage severely disabled people. The Bundesarbeitsgemeinschaft Hilfe für Behinderte, which is the umbrella group representing organisations of and for disabled people in Germany, argued that the levy should be increased from 150 DM to 400 DM in 1989. Many groups are unsatisfied with the recently increased levy of 200 DM. There is evidence, however, that even such a step would not solve the problems associated with the quota. A study carried out by Franz Brandt in 1984 for the ISO - Institut für Sozialforschung und Sozialwirtschaft, Saarbrücken, claimed that only 25 per cent of employers would employ more disabled people if the levy were doubled. Employers stated that they feared increased costs if they took on severely disabled workers, and preferred to pay the levy rather than meet their quota obligation. On the basis of this Renate Oyen, writing in the Süddeutsche Zeitung in 1990, claimed that neither financial incentives nor sanctions could persuade employers to employ more disabled people. However, Brandt's report has been criticised for being methodically flawed by Bieker of the BAG Hilfe für Behinderte[46]. He argues that, since employers do not wish to be obliged to employ severely disabled people or pay a high levy, it was in their interest to reply in the negative to Brandt's question, as a confirmation that the level of the levy affected their employment decisions would have encouraged policy-makers to increase that levy. Bieker argues in addition that a higher income would be generated by increasing the levy, and that this has a value in itself. He acknowledged though that the only way in which the levy can be guaranteed to work is if it is increased to such

[46] In an interview with the author on 30 March, 1990.

a degree that it becomes cheaper to employ a severely disabled person than to pay the contribution - a position which he felt was politically impossible to achieve.

Inspite of these problems with the German levy it does serve some beneficial purposes. It is an incentive, albeit a small one, for employers to employ severely disabled people. Although it is true that in 1982, when the 6 per cent quota was nearly met, 70 per cent of employers preferred to pay the levy rather than employ their full quota of severely disabled people, this can still be regarded as a major achievement when compared to the effectiveness of the British quota at this time - which is lower and aimed at a much less severely disabled group of workers.

Furthermore, even though the levy is a relatively weak incentive, it is a valuable source of income for measures to promote the employment of disabled people. In 1986 the levy brought in about 245.3 million D.M.. Even so, the 55 per cent of this sum received by the Hauptfürsorgestellen[47] only amounted to 10 per cent of their income.

1.2.1.2 Operating in a period of economic recession.

The German quota has become increasingly less effective in securing the employment of severely disabled people as the European economic situation has deteriorated. This is reflected in the downward trend visible since 1982, which has been worsened by the difficulties experienced since reunification. The major achievement of the quota has become encouraging the retention of severely disabled workers, rather than the recruitment of such workers. Employers may increasingly feel that they cannot afford to employ someone with the perceived liabilities of a severely disabled person, and regard the levy as a cheaper and safer option.

These case studies have illustrated some of the problems with two of the most common kinds of quotas - the straightforward percentage quota, and the levy-grant system - operating in two particular Member States of the European Community. Before going on to address the desirability and scope for a quota (of whatever kind) at the E.C. level, some

[47] The remainder went to the federal government. It was also used to support the employment of severely disabled people. The levy revenue is always divided in this manner.

more general points on the strengths and weaknesses of the quota system will be considered. Reference will be made to these case studies to illustrate some of the comments made.

2. Strengths of the Quota system.

2.1 Imposes a duty on employers.

It has been argued that the responsibility to provide for the employment of people with disabilities can be traced back to the principles of social justice supported by Rawls. The quota system can be regarded as a recognition of this duty. The quota system clearly and precisely embodies the standard which employers are expected to meet, and turns a moral duty into a legal obligation.

2.2 Maintains the support of disabled people.

Despite the mixed record which the quota system has it enjoys widespread support amongst disabled people and, in all countries in which it is in operation, disabled people demand that the system be strengthened rather than replaced. In countries where the levy-grant system does not exist, such as the United Kingdom, the demand is usually that such a system be adopted - as was in fact done in France in the late 1980s; in countries where the levy-grant system already exists, the most common demand is that the levy be increased[48]. Interestingly, it seems to be rarely argued that the quota percentage should be altered.

Even in the United Kingdom, where the quota system as presently operated is wholly discredited, disabled people have not rejected it. They see the fault as lying in the manner in which the system is administered rather than in the system itself, and their vociferous support has ensured that the quota has not been abolished - although it has not been enough to ensure that the system is effectively administered. Bolderson argues that this support is derived from "deeply felt and widely shared values"[49] which the DPEA has come to

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[48] See earlier comments on the B.A.G. Hilfe für Behinderte.

[49] Op.cit., p.169.

symbolize, which were themselves derived from the principles enunciated by the Tomlinson Committee, i.e. that most disabled people are capable of working in the open labour market, and that they should receive their "fair share" of the available jobs. This is so inspite of the fact that these principles were used to justify the adoption of a quota system which Bolderson believes is not in the interests of most disabled people.

2.3 Levy-Grant system as a source of revenue.

It has already been illustrated in the German case study how a levy-grant quota system is an important source of revenue which can be used to support the employment of people with disabilities. It was argued in the previous chapter that such a system could be a source of funds to assist employers in making accommodations to the needs of disabled employees.

It should be pointed out, however, that as more and more firms take on disabled workers (which is, after all, the aim of the quota system) the revenue raised through the levy will decrease, whilst the demand for financial support will rise. Only a relatively unsuccessful system, in terms of actually generating employment, can therefore provide a reasonable source of income, and the aim should always be to maximise employment rather than revenue. A successful quota which operates on a levy-grant basis will require additional financial support from the government, and indeed it has already been shown that the levy provides only a small percentage of the funds used to support the economic integration of disabled people in Germany, and that the federal and regional governments must provide most of the necessary support.

Therefore, whilst any means of raising revenue to support the employment of disabled people is to be welcomed, it needs to be recognised that income generation is not the major concern of a quota-levy system. Instead the focus is on employment generation, and the main purpose of the levy is to encourage employers to meet their quota target rather than to raise revenue.

2.4 The Quota System is presently the main method of promoting the Employment of Disabled People in Europe.

This is obviously not to suggest that the system should not be replaced if a more appropriate means of securing the employment of disabled people were to be found; however it is politically and administratively difficult to drastically alter or replace a system which is so widely established and which has a relatively long history. This would be particularly so if disabled people perceived the alterations as weakening or dismantling the system. Furthermore, as Bolderson has pointed out, the quota system has come to be widely favoured by people with disabilities, and it can only be regarded as a strength that those in whose interests the quota ostensibly exists support it to such a degree.

3. Weaknesses of the Quota System.

3.1 Labelling of Disabled People.

It was stated in the previous chapter that the definition chosen for an "individual with a disability" is dependent on the policy objective to be achieved. Whilst it is appropriate to use an extremely broad definition when formulating anti-discrimination legislation, a more restrictive concept must be used when drawing up positive action measures. Since most disabled people, given the appropriate non-discriminatory environment, are capable of competing in the open labour market, it is only a minority which require assistance in the form of the quota. Quota systems must include some means by which those eligible disabled people are identified. This involves a definition of disability which focuses on the functional disadvantages and limitations caused by impairment, and a means by which such people are administratively identified, e.g. a system of registration.

Therefore, in order to assist those disabled people who could potentially benefit from the quota system, they must be identified - or labelled - and this can have certain negative consequences for the self-esteem and self-image of the individuals concerned. Through this labelling process individuals are placed outside the "normal" system of job recruitment, are regarded as being in a separate category, and the factors which make them different are

emphasized. It seems that in order to achieve economic integration an initial process of segregation and separation must occur.

This problem appears to be impossible to overcome. The best that can be done seems to be to ensure that very real benefits accrue to those who have been labelled as "disabled" by this process, as occurs in the Federal Republic of Germany. Where this is not the case disabled people will simply regard the costs of registering as too high and boycott the system, so making it unworkable. Therefore if registration is only related to the quota system, that system must provide some real incentive to register, i.e. it must be relatively successful; when registration is also connected to other benefits, though, it will not be so vital that the quota is effective if a high level of registration is to be achieved.

3.2 Employers prefer to pay the levy than to employ Disabled People.

This phenomenon has already been illustrated in relation to the German quota system. As was pointed out, the only way of avoiding such a situation would seem to be to increase the levy so that it becomes more expensive to pay it than to employ a disabled person. This would require a commitment to achieving the economic integration of people with disabilities which no government has yet demonstrated.

This is a problem in that the aim of a quota system is to secure employment for the target group. However, the revenue raising aspect of a levy-grant system is one of the advantages of the system, and the preference of employers for paying a levy rather than meeting their quota cannot be regarded as an argument against a levy-grant system as it was by the British Employment Department Group 1990 Consultative Document[50].

3.3 Difficult to establish effective sanctions to enforce a Quota System.

A quota system involves a duty to employ a certain percentage of disabled workers, backed up with the threat of punishment, or other negative consequences, if that duty is not met. The problem in all systems seems to be that the threatened sanction is frequently not enough to spur on employers to meet their quota. Under a levy-grant system employers often

[50] Employment and Training for People with Disabilities, Consultative Document, Employment Department Group, 1990.

see the levy as a cheaper and preferable option. Criminal prosecutions, which could result in imprisonment (United Kingdom) or heavy fines, are not generally resorted to and, in the British case, employers are not even obliged to pay the moderate fines which the law provides for.

It therefore seems difficult to find some form of sanction which would motivate a significant number of employers to meet their obligation, which is at the same time politically acceptable. The British government appears to believe that there is no such sanction, and has instead increasingly been emphasizing the need to encourage employers to employ disabled people. This approach has also been unsuccessful.

3.4 "Quantity not Quality".

The quota system is concerned exclusively with the number of disabled people in employment, not with the quality of that employment. It has already been stated that the German system leaves employers free to choose how to allocate severely disabled workers throughout their organisation, and this is the normal approach adopted. Employers may therefore meet their quota by hiring a disproportionately high number of disabled people for menial, low-status jobs, leaving the higher echelons of their business free for those workers who are non-disabled, and who they perceive as being more competent or less of a liability. The quota also does nothing to combat disability discrimination in the forms of under-employment or low wages. For this reason many of those representing disabled people argue that the quota system needs to be complimented by disability employment anti-discrimination legislation[51].

3.5 A blunt instrument for meeting the needs of a heterogeneous group of workers.

The disabled workforce consists of a very heterogeneous group in terms of disability, skills and experience, age and expectations. The needs of a disabled school leaver, for

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[51] Oliver in The Quota Scheme for the Employment of Disabled People - A Response to the Discussion Document, The Spinal Injuries Association, London, 1979, and McNeal in The Disabled Persons (Employment) Act 1944: The Quota Scheme. Report of a Local Survey, Southwark Law Project/RADAR, London, 1989.

example, are very different from someone who suddenly experiences disability after twenty or thirty years in employment. Equally, the needs of someone with a mental disability differ greatly from those of a physically disabled person. The quota system seeks to provide one solution to the employment problems of all covered disabled people, but for some this may not be the appropriate solution.

3.6 Little evidence that the Quota System actually promotes the employment of disabled people.

There is little empirical evidence showing that the quota system does actually encourage the employment of disabled people. However, as a British government review has pointed out, it is impossible to be certain that the quota has no beneficial effect in this respect:

"It is impossible to be sure that the existence of the quota scheme, even in its present unsatisfactory form, does not exert some influence on employers to engage and retain disabled people"[52].

3.7 Less effective in times of economic hardship.

The above problems are all compounded during periods of economic recession. In times of economic difficulties many employers reduce the size of their workforce, or at least restrict recruitment, and require that those employees who remain achieve a high degree of productivity. Disabled workers are often amongst the first to lose out when such a process occurs. Some employers may regard disabled workers as a "marginal workforce", to be used in times of economic growth, but to be ignored in times of recession. These employers perceive disabled workers as a liability - because, for example, they believe them to be less productive than non-disabled workers, or in need of additional time off work - and do not believe that they can afford to employ such workers in a period of economic difficulty.

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[52] The Quota Scheme for Disabled People: Consultative Document. Department of Employment, London, 1973, paragraph 120.

The quota system does nothing to confront such prejudiced attitudes, and painfully fails to protect the interests of disabled workers during a recession. However, it may well be unfair to expect it to do so. It needs to be recognised that quota systems were designed to function in a full employment situation, and the present economic difficulties were not foreseen by those who framed the post Second World War quotas. The criticisms of the system need to be seen in this light.

This does not mean though that the quota becomes an irrelevance in times of economic difficulty. Instead it is necessary to reassess the role of the quota system and to compliment it with other measures (a strategy which is required in any case regardless of the existence of a recession). Quotas operating in the present climate cannot be expected to guarantee jobs for large numbers of disabled people; instead their greatest contribution seems to be more one of encouraging the retention of disabled employees rather than stimulating the hiring of such workers.

Having analysed the general strengths and weaknesses of the quota an assessment will now be made of some of the practical problems involved with developing a quota at the European Community level. Once that has been done the point will have been reached where an informed decision about the desirability of an E.C. quota can be made. It will be argued that such a global system is not in fact appropriate. Before this, however, the attention which the Community institutions have thus far paid to the possible adoption of an E.C.-wide quota shall be considered.

4. The Community Institutions and the adoption of a European Community Quota System.

The possibility of developing an E.C.-wide quota was first discussed in an official Community document in a 1981 resolution of the European Parliament[53]. The Parliament recommended that the Commission study the quota system, and in particular the German system, and consider "issuing directives to Member States on a 'workable' quota system"[54].

At the same time the quota system was assessed by the Economic and Social Committee[55]. The Committee made favourable comments with regard to the levy-grant quota system in Germany, but referred to the weakness of the system generally[56].

The possibility of developing an E.C.-wide quota was further discussed in 1984 in a report commissioned by the Commission of the European Communities[57]. Albeda identified a number of areas that should be considered when formulating an E.C. quota, and emphasized the need for any such measure to be flexible enough to take account of regional differences throughout the Community.

The quota system was also addressed in the 1986 Council Recommendation on the employment of disabled people. It is interesting to compare the first draft of this document with the final version, since the provisions relating to the quota system were toned down. The recommendation never referred to the possibility of developing an E.C.-wide quota - instead it was concerned with national governments' policy in this field.

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[53] Resolution on the motion concerning the economic, social and vocational integration of disabled people in the European Community with particular reference to the International Year of Disabled People, 1981, European Parliament OJ No. C 77/27 6/4/81.

[54] Para.7.

[55] Opinion on the situation and problems of the handicapped. OJ No. C 230/38 10.9.81, Section 10, Obtaining Employment, p.46.

[56] Section 10.3-10.5.

[57] Wil Albeda, Disabled People and their Employment, Commission of the European Communities, 1984.

The first draft of the recommendation[58] encouraged Member States to "take all appropriate measures to promote fair opportunities for disabled people in the field of employment and vocational training"[59], and specified that the policies adopted should provide in particular for positive action. With respect to the quota system the draft recommended:

"Bearing in mind differences in the character of various enterprises and in environmental circumstances, the fixing of realistic percentage targets for the employment of disabled people by public or private employers having more than 20 employees. Measures should be adopted for making these targets public and enforcing them"[60].

The recommendation was quite specific in stating that the cut-off point for the beginning of the obligation should be 20 employees. It refrained, however, from recommending a specific percentage quota or from stating that both public and private employers should be covered. The draft also contained a detailed annex in which existing measures to promote the employment of disabled people in the European Community were analysed[61].

The European Parliament felt that this draft was too weak, and believed that it should incorporate a requirement that an E.C.-wide quota be adopted. It stated that it considered:

"...apart from their non-binding nature, one of the main flaws in the proposals set out in the draft recommendation is precisely the unwillingness to recommend - let alone to lay down specific provisions for - the application of a quota system in respect of the

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[58] Council Recommendation on the employment of disabled people in the European Community COM (86) 9 final. Submitted by the Commission to the Council on 29 January 1986 COM(86)9 final OJ No. C 136/6 4/6/86.

[59] Para.1.

[60] Para.1(b)(i).

[61] Annex - Analyses of the situation and measures concerning the employment of disabled people in the European Community.

employment of the disabled throughout the Community; this omission is all the more regrettable in view of the inevitable link between such quotas and competitivity"[62].

The Parliament submitted an amendment to this effect, and specified exactly the form which it wished an E.C.-wide quota to take. It stated that:

"public and private undertakings having more than 25 employees shall be obliged, by means of national legislation or other appropriate measures, to make at least 5% of their posts available to disabled people"[63].

The Parliament further invited the Commission to draw up a directive on this matter if it became apparent after two years that the 5% quota was not being fulfilled.

These amendments were not heeded, and the actual recommendation includes an even weaker commitment to the quota than the original draft. It recommends that Member States should adopt policies providing for positive action in favour of disabled people, including:

"Bearing in mind differences in sectors and enterprises, the fixing by Member States, where appropriate and after consultation of disabled people's organizations and both sides of industry, of realistic percentage targets for the employment of disabled people in public or private enterprises having a minimum number of employees; such a minimum might be set at between 15 and 50. Measures should be adopted for making these targets public and achieving them"[64].

In fact such a recommendation, as the Council must have known, was likely to have little effect on the actual policies adopted by Member States since, with the exception of the quotaless Denmark, all Member States already had a quota that complied with this

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[62] Resolution of the European Parliament on the draft Council Recommendation, OJ No. C 148/57 Para.10.

[63] Memorandum on the employment of disabled people in the Community. Text amended by the European Parliament, OJ No. C 148/95 16/6/86.

[64] Council Recommendation of 24 July 1986 on the employment of disabled people in the Community 86/379/EEC OJ No. L. 225/43 12/8/86. Para.2(b).

recommendation. The lowest cut-off point for the beginning of the quota obligation is 16 employees in Germany, whilst the highest is 50 in Spain - it seems unlikely that the figures referred to in the recommendation match the existing upper and lower limits so closely by coincidence. In addition the recommendation refrained from recommending that both public and private employers should be covered, and would be satisfied if a quota was applied to either. The only reason for this can be the fact that quotas in some Member States are restricted to only one sector. There is no logical reason relating to the employment of disabled people for restricting the quota to either one or the other. The Member States, by adopting this recommendation in the Council, seemed to be telling themselves that their existing policies were appropriate, and that there was no need for an E.C. quota. Furthermore, no Member State is likely to admit that its quota percentage is unrealistic and still refuse to change it[65]. The recommendation, as was revealed in chapter three, has had little practical effect on Member State's quota policies, and this is reflected in the fact that the Council conclusions on the employment of disabled people in the Community makes no specific mention of national or an E.C. quota system(s)[66].

In recent years little attention seems to have been paid to the quota system as a means of promoting the employment of disabled people, whether at national or E.C. level, within the Community institutions. One of the reasons for this may be the complicated nature of the considerations involved with drawing up a quota system[67], particularly on a Community-wide scale. The nature of these considerations will now be analysed.

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[65] In Italy the quota is presently set at 15 per cent - this covers not only disabled workers, but other groups such as war widows and orphans as well. It is recognised that this quota is too high, and attempts have been made to reduce it - these attempts, however, were not motivated by the Council recommendation.

[66] Conclusion of the Council of 12 June 1989 on the employment of disabled people in the Community, OJ No. C 173/1 8/7/89.

[67] Probably an equally important reason, however, is the unwillingness of Member States to act. This unwillingness is of course partly explained by the difficulties involved.

5. Considerations relevant to the formulation of an E.C.-wide Quota.

Whenever a new quota system is adopted there are a number of important policy decisions to be made which determine the group of disabled people to benefit, the kinds of employers to be covered, and the nature of the obligation created under the system. In relation to the group of beneficiaries, it must be determined whether to extend the protection to all disabled people who are disadvantaged in obtaining or maintaining employment[68], or to confine it to those who experience difficulty as a result of functional incapacity caused by impairment. In both cases some definition identifying the degree of the disadvantage or reduced capacity must be found - whether this be through the use of a technical term such as "severely limited" or "substantially handicapped"[69] (as in the United Kingdom), or through a percentage denoting reduced working capacity (as in Germany).

With respect to the range of employers to be covered, a decision must be made whether to extend the obligation to both public and private employers, or to one or the other. Examples of all three approaches can be found within the Member States of the Community. The size of employer to be covered must also be determined, and the means of calculating the size of the workforce must be specified. For example, it must be clarified if only permanent employees are to be considered, or also those on fixed contracts of less than a year. If the latter group are included it must be specified what the relevant period of employment is for the calculation. This is particularly important for employers who take on employees seasonally, as occurs in the tourist or agriculture industries. Care must be taken not to restrict employers' freedom to quickly respond to changes in demand, but also to protect the interests of disabled people in the workforce.

Thirdly, the nature of the obligation must be determined. This includes not only the size of the quota which, in any case, will be heavily influenced by the two factors mentioned

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[68] This would cover both those disabled people who are disadvantaged by an impairment causing a reduction in functional capacity, and those who are in addition disadvantaged as a result of discrimination.

[69] It has already been pointed out, however, that the term "substantially handicapped" is inappropriate, and should not be used when defining "disability".

above, but also the sanctions by which the quota is to be enforced. A levy-grant system is one option; an alternative would be a system of fines[70], and, if breaching the quota is to be a criminal offence, possibly even imprisonment. In addition it may be possible to enforce the quota system through civil law suits brought by aggrieved disabled workers/job applicants, who would be given the right to sue for compensation or specific performance. This approach is not adopted under any of the quota systems in operation in the Community at present which fail to give individual disabled people any specific rights.

The matters that will influence how some of these decisions will be made, should a European Community quota be adopted, will now be considered. Underlying the discussion is the recognition that an E.C. quota cannot distort competition between firms established in the Community, and that in fact it must go further, and encourage equal competition between such firms. An E.C. quota must ensure that burdens regarding the employment of disabled people are the same throughout the Community.

5.1 Distribution of small, medium-sized, and large firms throughout the Community.

The problems which firms face when employing disabled workers, and their capacity for incorporating such workers, varies according to the size of the firm in question. Generally smaller firms seem to provide a greater degree of social integration, whilst larger firms are better able to meet any additional costs[71].

When selecting a percentage and cut-off point for an E.C. quota, not only must the degree to which firms of a particular size can suitably offer disabled people employment be considered, but also the distribution of such firms throughout the Community's Member States. The economic importance of the different sized firms in terms of employment is not uniform throughout the Community. If the cut-off point for the quota is set at a low level - such as the 16 employee requirement in Germany - then clearly many employers will be

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[70] This is the approach which is adopted in Spain and Italy for example.

[71] Writing on the scope for integrating disabled workers in large and small firms Simpson comments: "Large firms are able to invest in training and recruitment as well as manipulate their own internal labour markets for those fortunate enough to gain entry. Small firms, though bereft of such resources, are able to respond flexibly and adapt work patterns to suit varied experience and skills of their workforce."J.Simpson, Workability, Rehab Network, Winter 1992, p.10.

covered. Such a low level, however, may not pay sufficient attention to the problems which small employers in certain Member States experience. For example, small employers in rural areas in some Member States may face difficulties which do not present themselves to similar sized urban employers, or to small rural employers in other Member States, and vice versa. Therefore a quota which applies to small employers must attempt to incorporate some method of distinguishing between those employers, where national or regional circumstances require this. This is particularly important in view of the significance which the Treaty of Rome, as amended by the Single European Act, and the Protocol on Social Policy contained in the "Maastricht" Agreements place on the need to ensure that small and medium-sized undertakings are not restricted by E.C. directives[72].

If the quota is only to be applied to relatively large employers - such as firms with 50 or more employees as occurs under the Spanish quota - then in those countries where a high percentage of employers have fewer than 50 workers, an important source of employment will be excluded. This could lead to the anachronistic result whereby, with the same cut-off point, 70 to 80 per cent of the workforce in one Member State is employed by an employer covered by the quota, whilst in another Member State the relevant figure is only 50 per cent or less. This would seem to be incompatible with one of the aims of a common E.C. quota, which should insure that a similar percentage of the workforce is covered, giving all relevant disabled people roughly the same chance of obtaining employment in a covered entity. Furthermore, since the employment of disabled people can involve extra costs (e.g. through accommodations) for the firms concerned, those Member States where a large number of small enterprises were excluded from the quota obligation would be given a competitive edge over Member States where a higher percentage of firms/the workforce are covered.

[72] Both Article 118a(2) of the Treaty of Rome (which was added by Article 21 of the SEA) and Article 2(2) of the Agreement annexed to the Protocol on Social Policy state that directives based on these articles: "shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings".

5.2 The size of the public sector.

When considering whether to confine the quota to only public sector employers, as is the case in Ireland, the relative importance of this sector in terms of employment in each Member State must be appreciated. The problem of varying coverage, with respect to the proportion of the workforce to which the quota applies, which was outlined above also applies here.

The size of the public sector and a Member State's current quota policy will also be relevant in that national administrations will play the main role in enforcing the system. The ability of the administration to undertake this role, and the experience it has already gained, will help to determine how effectively the system is enforced.

5.3 The relative size of the agricultural, industrial and service sectors.

The relative size of these sectors differs among the Member States. Each sector offers different possibilities for employing people with varying kinds of disabilities. Furthermore, even within sectors there are variations which are determined by the particular production processes which are in use. The most obvious example is the contrast between labour intensive farming, as often occurs in the less developed Member States (but also in France), and the highly mechanised system of farming used in the United Kingdom and the western part of Germany. These clearly offer different possibilities for the employment of disabled people.

A single inflexible quota percentage would not take account of the relative importance of these sectors in the various Member States, and nor would it take account of the differences in the way production in these sectors is organised. Therefore a quota percentage which may be appropriate for a country such as Germany, where the tertiary sector is a particularly important source of employment, may be inappropriate for an economy in which agriculture, or heavy industry, are proportionately more important with respect to employment. This must also be considered when formulating an E.C. quota.

5.4 The level of technological development.

The level of technological development varies among Member States and, as a consequence, occupations for a given industry can sometimes be organised differently within the Community. Labour intensive employment offers wholly different integration possibilities than that in which the new technologies play an important part - the former would initially seem to be more appropriate for those with a mental disability, whilst the latter may favour physically disabled people. Reference has already been made to the agricultural sector as an example of this phenomenon. This too must be considered when drafting policy.

5.5 The size of the workforce of Disabled People.

The size of the workforce of disabled people may differ between Member States. This is important because, where a single percentage quota is set, employers established in a Member State with a relatively high number of disabled workers may be able to meet their quota obligations, and thus avoid any sanctions, more easily than employers operating in a Member State with a lower percentage of disabled workers. This could threaten to distort competition.

Reliable statistical data on the size of the population of disabled people within the various Member States is difficult to obtain; however, the information which is available does suggest that the disabled population is not spread evenly throughout the Community. A series of reports published recently by Eurostat[73] have estimated the population of disabled people as a percentage of the total population. The data was gathered from census information, national surveys and public services providing disability-linked assistance. Estimates on the percentage of disabled people in the population ranged from 2.5 per cent (Italy) to 14.9 per cent (Spain). The four Member States which produced data on the percentage of people of working age who are economically inactive due to a disability also showed variations ranging from 2.4 per cent (Belgium) to 7.6 per cent (Denmark).

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[73] Disabled Persons: Statistical Data, Volume I, Eurostat, 1990.
Disabled Persons: Statistical Data, Volume II, Eurostat, 1992.
Rapid Reports, Population and Social Conditions, Disabled People - Statistics 1992/5, Eurostat.

Gathering accurate information on the size of the workforce of disabled people is, as the Eurostat reports emphasise, extremely difficult. This is nevertheless a factor which would be relevant to the drawing up of an E.C.-wide quota.

5.6 The characteristics of the workforce of Disabled People.

In addition to the variations in the size of the workforce of disabled people, the characteristics of such workforces may also differ. This may be, for example, as a result of differing health and safety requirements in the workplace - it would seem that more lax standards, or standards which are not enforced, would lead to a higher number of people disabled in work-related incidents - or different employment patterns or life styles. It has for example, been established that diet, which differs throughout the Community, plays an important role in causing, or limiting, many disabilities.

The Eurostat reports give credence to this theory. The reports provide data classifying disabled people according to the nature of their impairment. It is estimated, for example, that 21.3 per cent of the disabled population in Belgium has an intellectual or mental impairment, whilst only 5.4 per cent have such impairments in the United Kingdom. Similarly 8 per cent of the disabled population in Denmark are classified as having a linguistic, speech-related, auditory or visual impairment, but 38.1 per cent of the same population are so classified in Italy. Once again, because of the differences in the classification processes in the various Member States, these statistics should not be taken too seriously, but they do provide an interesting point of comparison. The characteristics of the workforce of disabled people is important because it can determine the suitability of the quota target group for certain kinds of employment.

Albeda, in his 1984 report "Disabled People and their Employment", argues that factors such as those illustrated above do not militate against the application of an E.C.-wide quota, but instead demonstrate the need for any successful quota to be flexible enough to take account of these differences. He argues that, if a quota scheme is adopted, it should be compulsory and accompanied by financial incentives, and that it should be complimented by a number of measures. He states that any quota needs to ensure that small employers are

shielded from economic constraints, and research must be carried out in this field. Employers' confidence in the disabled workforce should also be enhanced through more information on technical aids and relevant equipment. This should be supported by provisions for loaning special aids to disabled workers to allow them to perform the necessary job-related tasks. In addition financial assistance should be made available to help employers meet the cost of adapting premises or equipment used by disabled people at work, and to allow employers to offer a "job trial" to disabled people in occupations where they are under represented, or where new opportunities arise through use of new technologies[74].

Such a broad approach is also supported in the annex to the first draft of the Council Recommendation on the employment of disabled people in the European Community produced in 1986[75], where it is stated that "no quota system, however effective, can be regarded as a sole solution to all the problems of the employment of disabled people; the recognition of the need for coherent sets of measures ... appears to be gathering force"[76].

Now that a detailed background, covering the history and development of the quota system in Europe, its strengths and weaknesses, and the particular dimensions that need to be considered at an E.C. level, has been established, the question of the appropriateness of adopting an E.C.-wide quota shall be addressed.

6. The appropriateness of a European Community Quota.

The discussion in sections two and three revealed that although the quota system has certain strengths, it is also associated with a number of significant weaknesses. The system, at best, has a mixed record, and in no Member State is it enforced to the satisfaction of

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[74] Op cit. pp.36-37.

[75] COM(86)9 final. Submitted by the Commission to the Council on 29 January 1986 OJ No.C 136/6 4/6/86.

[76] Ibid., paragraph 24.

either disabled people or employers. In the light of these findings serious thought should be given before the adoption of any new quota scheme at whatever level.

In addition to the general weaknesses with the quota system which have been identified it is necessary to consider the particular problems at the E.C. level of adopting such a system. These were discussed in section five. It was argued that in order to set an appropriate percentage consideration had to be given to national factors, and possibly even regional factors (e.g. the importance of small v. large employers, the importance of various kinds of industries, the relevant level of technological development, the size and characteristics of the workforce of disabled people etc.). This could lead to the exceptional situation whereby different industries or sectors - such as the agricultural sector or heavy industry - have separate quotas, depending on the employment opportunities for disabled people which they offer - but with various Member States or regions diverging from these separate quotas because of relevant local circumstances.

Such a quota system would be exceptionally complicated and costly to administer - but a simple system of, for example, one uniform quota for all employers of the same size, would pay insufficient attention to national and regional differences.

These three points, relating to the mixed record of the system, the complications of formulating a quota and the difficulties of administering such a system, are enough to suggest that the Community should not attempt to adopt an E.C.-wide quota. There is, however, an even more fundamental objection to such a measure, in that such a system would almost certainly breach the principle of subsidiarity.

For elaboration on the principle of subsidiarity one can now look to the "Maastricht" Agreements which make specific reference to the concept for the first time within the Community's legal order. The Agreement states:

"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In the areas which do not fall within its exclusive jurisdiction, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and

can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."[77]

The Article specifies two conditions which must be met before the Community can take action in an area where competences are concurrent: firstly, the **objectives** of the proposed action cannot be **sufficiently achieved** by the Member States, and secondly, that those objectives, because of the scale or effects of the proposed action, can be **better achieved** by the Community.

If one applies these two conditions to the quota question it can be seen that the subsidiarity principle, as defined in the "Maastricht" Agreements, would be breached by the adoption of an E.C.-wide system. Reference has repeatedly been made to the importance of national and regional considerations. Because a quota system is so dependent for its success on the nature of the local employment situation there seems initially to be little benefit which would accrue from direct Community involvement. Whilst it is true that the quota system is one attempt to find a solution to a problem which all Member States face, this does not always lead to the conclusion that the Community should intervene to provide a model solution. Unlike an E.C. employment anti-discrimination directive, which would be of relevance wherever discrimination occurs and which could help prevent distortions of competition, an E.C. quota would not necessarily be suitable at the point of application.

On the other hand the present national quotas are relatively unsuccessful and, implemented through inadequate mechanisms and operating in times of recession, they fail to provide to any large extent for the employment of disabled people. Despite the fact that, in theory at least, regional and national authorities are the most suitable bodies to operate a quota system, existing evidence strongly suggests that within the European Community they are in fact unable to administer a satisfactory system. One could therefore argue, taking the policy objective to be, for example, ensuring that 5 per cent of workers within the

[77] Article 3(b) of the "Maastricht" Agreements.

Community are disabled, that Member States are unable to sufficiently achieve the desired objective. However, even if this first condition is satisfied it is not sufficient for the Community to assume the competence to act. For this to be the case the second condition, that the objectives can be better achieved by the Community, must also be met.

Whilst national quota systems have thus far been unsuccessful there is no evidence that a Community initiative would be any more effective. Indeed, it would almost certainly create additional problems without contributing any positive dimension. The requirement that full consideration be taken of national and regional aspects would remain - it seems difficult to see how the Community, with its institutions at least one step removed from the relevant level, would be able to meet this challenge more successfully than national governments. Furthermore, even if one overlooks this problem, the work involved in administering such a system at the Community level would be immense, and the staff of the Commission do not have the relevant experience.

The consequences of setting an incorrect quota would also be more serious at the Community level than at national level. A Community system could distort competition if it placed different obligations on employers. This would occur, for example, where competing enterprises are obliged to employ the same percentage of disabled workers, but where one enterprise finds it much easier to reach its target because of a greater supply of suitable disabled workers in the region where it operates, and where the other enterprise is obliged to pay a significant fine because it fails to recruit a sufficient number of such workers in a region where they are scarce.

It must be recognised that the test for determining the use of the subsidiarity principle proposed in the "Maastricht" Agreements is ultimately relative. The argument made here is that although national governments may be unable to guarantee the employment of a large number of disabled people through a quota system, it does not seem that the Community would be able to achieve this objective any better and indeed, its intervention may lead to problems which do not exist on a major scale at present.

Whilst an E.C.-wide quota should therefore play no part in a Community policy to promote the economic integration of disabled people, it does not necessarily mean that the Community should take no interest in this particular area. The fact that the quota is the most

important policy tool used to enhance the employment of disabled people in most Member States makes this an impossibility. At the most basic level the Commission should ensure that Member States are adequately informed about other quota systems in operation within the Community, and even outside the Community, for there are undoubtedly areas where an exchange of information would be beneficial for national policy-makers. In fact a number of valuable studies in this area have been commissioned by the Division Action in Favour of Disabled People in the past.

In addition, since any Community policy must co-exist with national policies in this field, the Community must pay particular attention to the quota systems in operation within its borders. It has been argued that the core of any Community policy should be an employment anti-discrimination directive. Positive action, such as a quota system, is not incompatible with such a directive. Disability anti-discrimination measures must be aimed at equalising opportunity, where this term has the broad meaning attributed to it in chapter one. However the anti-discrimination principle cannot be used to justify measures in favour of those disabled people who experience disadvantage solely as a result of reduced functional capability caused by impairment. This group require positive action in order to allow them to compete in the labour market. In principle, therefore, it is quite possible for Member States to continue to maintain some kind of quota system within a global E.C. policy to promote the economic integration of disabled people. Indeed, a successful quota measure would compliment the E.C. policy, and vice versa. However the difficulties outlined earlier with regard to the creation of an E.C.-wide quota - namely the mixed record of the system, the complications of formulating a quota, and the difficulties of administering such a system - also apply at the national level, albeit to a lesser degree, and may in fact make the creation of a "successful" quota impossible and encourage national legislators to replace or abolish the system. It is not the purpose of this thesis though to consider the desirability or applicability of national policy where this has no relevance to Community policy. Nevertheless, although Member States should not be required to abolish existing national quota systems, it may be necessary for the E.C. to lay down some restrictions as to the form which such systems should take.

More Disabled Than Others

At this point we return once again to the subsidiarity principle. Two points need to be made - firstly, the argument above which referred to subsidiarity assumed that the relevant objective was the employment of disabled people - if the objective becomes the prevention of a distortion of competition through the operation of different quota schemes within the E.C., the Community may have a more active role to play. Secondly, as Bercusson[78] comments, subsidiarity does not necessarily involve an exclusive allocation of powers, but it can also mean that competences in a particular field are shared, with each level having a role:

"The test of relative sufficiency indicates that it is not a question of exclusive allocation. Instead, deciding which level is <u>better</u> implies that <u>both</u> have something to contribute".

It has been argued, with regard to developing an E.C.-wide quota, that a system which does not take sufficient consideration of local factors could distort competition. This danger also exists when Member States are allowed to set their own quotas in an unregulated manner. Once again competing firms could face significantly different costs, depending upon the Member States in which they are established, and this could affect the conditions of competition. This suggests that the Community may have a limited role to play in determining national quota policies - not to achieve the objective of employing disabled people, but to ensure that competition is not distorted through differing national quota systems. The Community may have the competence to lay down limits on national quota systems, leaving Member States to decide on the specifics of any system.

This intervention could consist of a number of elements: firstly, confining national quota systems to those disabled people who experience disadvantage as a result of functional impairment. Those who are disadvantaged because of present discrimination should be covered by the anti-discrimination element of the E.C. policy. This element should also partially cover those who are disadvantaged because of prior discrimination - for example,

[78] The dynamics of EC labour law after Maastricht, Industrial Law Journal, forthcoming.

an employer will not be able to discriminate against a disabled person who, as a result of prior discrimination, has not obtained the appropriate qualification for the job, if that individual can in fact perform the functions of the job. Where the qualifications are actually necessary the individual concerned may need to be given access to (vocational) training, but should still not be covered by a quota system. Broader coverage cannot be justified on a theoretical level, and, if an anti-discrimination directive were effectively implemented, should not be necessary. If such coverage were to continue then firms established in those Member States where it existed may find it much easier to meet their quota obligations than firms operating in States where the quota was confined to more severely disabled people.

Secondly, it may be necessary for the Community to set upper limits on the quota percentage and/or on the amount of the levy/fine which employers can be required to pay. Both these factors could impose extra costs on employers, which would place them at a competitive disadvantage when compared to firms established in other Member States where the percentage or levy are lower or non-existent.

The possibility of differing quota systems distorting competition should not be exaggerated though. It has already been shown that the quotas in existence within the Community at present are not particularly effective at promoting the employment of disabled people, and seem to have little effect on employers' decisions whether to employ disabled people or not. It is to be hoped that an effectively implemented anti-discrimination policy would have more success throughout the Community in this respect. As presently operated, however, quota systems cannot be regarded as distorting competition by forcing employers to engage less productive workers, and this is reflected in the fact that the Member States where the quota system is enforced through a quota-levy system (Germany, France) are amongst the countries with the strongest economies in the Community at present.

A stronger argument exists with respect to the levies which employers are obliged to pay in some countries (but not in others). At present, however, these levies are relatively low - and therefore ineffective incentives to meet the set quota - and are not regarded as sufficiently important for the Community to interfere. An E.C. policy may require that levies remain at such a low level. This move would be unpopular with disabled people (but probably popular with governments and employers). However, the quota system generally

seems an anachronistic and not particularly successful tool (and this cannot be explained solely in terms of the amount of the levy), and this restriction must be regarded as an acceptable price to pay for a coordinated E.C. policy, which focuses on the emphasizing the ability of most disabled people (through creating opportunities by countering discrimination), rather than on the alleged inability of disabled people (through implying that most disabled people are unable to compete in the normal labour market, and therefore need a quota system).

Conclusion.

Inspite of finding a theoretical justification for positive action in the employment sphere in favour of disabled people in chapter two, it has been argued in this chapter that one form of positive action, the quota system, should not be incorporated within an E.C.-wide policy to promote the employment of people with disabilities. This is based on pragmatic reasons in that such a system would be extremely complicated to formulate and administer, and the fact that such a measure would almost certainly breach the principle of subsidiarity. In addition the quota systems in operation within the Community at present do not have a particularly successful track record, and one cannot convincingly argue for their extension to an E.C. level. It has been shown, however, that the Community cannot afford to ignore the national quota systems already in operation when formulating a global policy. Any E.C. policy must compliment national policy, and vice versa. This is particularly important since an E.C. policy cannot aim to cover all the areas necessary to promote the economic integration of disabled people, and ultimately a division of competences, with each level formulating policy in the areas where it is best suited, must prevail. Care must therefore be taken to ensure that national policies, such as quota systems, do not conflict with E.C. measures, by, for example, distorting competition.

VOCATIONAL TRAINING.

Any policy to promote the social and economic integration of disabled people must pay attention to the education system. The provision of adequate and suitable education for disabled children and adults, in either regular or specialized establishments[1], is a vital component of this policy since this education nearly always plays a fundamental part in equipping (or failing to equip) the disabled individual with the skills necessary to lead an independent life. The purpose of this chapter is to consider the scope for the adoption of a directive to improve the access to, and value of that area of education most directly related to the employment of people with disabilities: vocational training. The chapter shall begin with a brief introduction focusing on the importance of vocational training to the economic integration of disabled people. This shall be followed by suggestions as to the possible substantive content of a policy instrument in this field. Lastly the question of the legal basis for such a directive shall be addressed, with attention focused on Article 128. Comments shall also be made on the relevant amendments which will be made by the "Maastricht" Agreements if ratified. This chapter differs from the previous two in one important respect. The earlier chapters were concerned with specific policy instruments - namely measures covering employment anti-discrimination and the quota system - and the discussion on the substantive content of these policy instruments was therefore also very specific. This chapter is concerned with a much broader area and it will only be possible to raise general areas which could be incorporated within a directive.

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[1] This is an area where the Community institutions and the Member States have already taken a number of initiatives.
See Conclusion of the Council and the Ministers of Education meeting within the Council of 14 May 1987 concerning a programme of European collaboration on the integration of handicapped children into ordinary schools. OJ No. C 211/1 8/8/87.
One of the LMAs in the Helios I Programme was also concerned with school integration, and educational integration is one of the four areas to be covered by the exchange and information activities under Helios II.

1. The Importance of Vocational Training within a Policy to Promote the Economic Integration of Disabled People.

1.1 The General Significance of Vocational Training.

Vocational training has long been regarded as an important element of the economic and social policies of Member States, and this is particularly true at present with the challenges presented by the internal market and rapid technological change. Industry requires additional skilled workers and is unable and/or unwilling to train a sufficient number to meet its needs, whilst the demand for unskilled workers is declining. Furthermore, technological and structural changes mean that in-service training is also taking on a new significance.

It is therefore not surprising that the importance of vocational training has already been recognised by the Community. The European Social Fund has always played a vital role in supporting vocational training projects and a number of Community action programmes in this area have been produced over the years. Because of the growing importance of such training one can argue that an increased commitment from the Community is now required. Furthermore, Community intervention in the field of vocational training can make a contribution to the process of European integration and the completion of the internal market. This is the view expressed in a Commission report on the social dimension of the internal market, which proposed a number of priorities for further Community action, and stated:

"... as training in general and in-service and further training in particular is a means of creating a European pool of skills which can be used to amplify the positive effects of the internal market, it merits a significant investment in terms of financial and other resources."[2]

Vocational training is naturally also important for disabled workers. Indeed, this group may be particularly affected by the changes that are occurring at present since many disabled people have traditionally found employment in the unskilled sector. Whilst general

[2] Social Europe - The Social Dimension of the internal market. Special Edition, Commission of the European Community, Directorate General for Employment, Social Affairs and Education, 1988. p.58.

improvements in the provision and quality of vocational training will benefit some disabled people - namely those who are able to gain access to mainstream training courses - it will be of no use to many others unless specific consideration is taken of their needs and abilities, and steps are taken to allow them access to such courses.

1.2 The Vocational Training of Disabled People within the Community.

The arguments above and, more obviously, the economic situation in which the Member States of the Community presently find themselves, makes it clear that there is a general need to increase the quantity and quality of vocational training. Apart from these global deficiencies in vocational training, disabled people who wish to receive such an education find themselves faced with additional problems which do not hamper the non-disabled community.

1.3 Difficulties specific to the training of Disabled People.

1.3.1 Inaccessibility of Standard Vocational Training Centres which prevents access to any form of Organised Training.

Firstly, and most fundamentally, disabled people in many cases are not being given the opportunity to receive vocational training at all - buildings where the training takes place may not be accessible; the necessary specialized equipment may not be available; or those providing the training, and possibly the disabled individuals as well, simply do not believe that people with such a disability are capable of acquiring such a skill. This problem of total exclusion from vocational training will be exacerbated where, in addition, there are only limited opportunities to receive training within specialized institutions. This is especially true in some of the southern European Member States[3] where many disabled people cannot gain access to a suitable vocational training establishment. Unless the disabled person is capable of participating in a normal course at an unadapted centre, s/he will be denied access to organised vocational training. In Portugal, for example, the few specialized establishments

[3] This was a point made to me on a number of occasions by members of the Helios Team. It is a matter which was discussed at various LMA conferences under the Helios I Programme including the Dublin Conference in April 1990, which concerned integration in mainstream vocational training centres.

which exist are run by private organisations or local municipalities[4]. If a disabled person cannot gain access to one of these specialized centres they may well not be able to receive any organised vocational training at all[5], since the barriers referred to above prevent participation in mainstream courses.

1.3.2 Excessive reliance on Specialised Institutions.

A problem of a different nature exists in other Member States where provision for the vocational training of disabled people is usually made in specialized and segregated institutions. Irrespective of the quality of the training provided in these centres, they do little to promote the integration of disabled people. These centres are often residential and isolated from the surrounding community so that the disabled trainees gain little experience in living in a non-disabled environment and relating to their non-disabled peers[6]. This is a particular problem in the Federal Republic of Germany where over 80 per cent of the vocational training provided for disabled people in rehabilitation centres is based on residential establishments[7].

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[4] Referred to in Local Services for Disabled People, A European Community Guide - A Handbook of Local and Regional Authority Services for Disabled People in the Member States of the European Community, Portugal and Spain, Philip Waddington, International Union of Local Authorities, 1989, pp. 7-8.

[5] It is naturally possible that some disabled people will find employment where "on-the-job" vocational training is provided. It is unlikely, however, that many disabled people receive high quality vocational training in this manner.

[6] Some commentators, however, argue that in certain cases specialized residential training for young disabled people can be beneficial as it removes the individual from over-protective parents and encourages independence. See P. Newton et al Rehabilitation of the disabled adolescent, British Medical Journal, Vol 291, 24 August 1985, pp.521-524. It should also be noted that specialized training presents more of a barrier to the integration of young disabled people than it does for those who experience disability during their working life. The latter group will already be integrated into society as a result of their previous non-disabled status, and a short, intensive training course in a specialized establishment may in fact be the most suitable form of training. For young disabled people however such training can hamper social integration and lead to isolation.

[7] This point is made in New Semi-sheltered forms of employment for disabled persons, CEDEFOP, Thibault Lambert and Erwin Seyfried, at p.122.

It can be argued that for people with severe disabilities such specialized establishments offer the only opportunity for receiving vocational training. This is certainly generally true at the moment, although in the long run there is no reason why it should remain so. However, even today, it is highly likely that many people receiving training in the specialized establishments are capable of participating on mainstream integrated courses if minor adaptations were made to the way in which courses were taught or to the physical structure of the training centres.

An additional problem with specialized establishments is that the training provided is often in fields where the demand for workers is falling and which therefore provide little prospect of finding rewarding and lucrative employment. This problem is not specific to specialized centres, but for reasons which will be elaborated upon later it can often be particularly pronounced for such centres. New ideas, such as training in computing are spreading, but this is a slow process. In the Federal Republic of Germany, for example, it remains true that few courses are offered in areas relating to computing, whilst a large number are available in the metal working industry and other declining sectors[8].

In addition to these problems, which are common to many of the vocational training systems in the Member States, particular difficulties exist in some individual countries, such as the United Kingdom, where the training system generally is going through a period of drastic re-organisation and re-structuring.

Community intervention with regard to the vocational training of disabled people is therefore necessary on two counts. Firstly, because the unevenness in the provision of vocational training for disabled people within the Member States of the European Community leads to wide variations in the quality and accessibility of training which acts as a barrier to the achievement of the aim of freedom of movement for workers and serves

[8] See Berufsbildungswerke - Einrichtungen zur beruflichen Eingliederung jugendlicher Behinderter - Der Bundesminister für Arbeit und Sozialordnung, 1988.
Berufsbildungswerke - Einrichtungen zur beruflichen Eingliederung erwachsener Behinderter -Der Bundesminister für Arbeit und Sozialordnung, 1987.

to distort competition. Disabled workers are discouraged from moving to Member States where the provision of vocational training is particularly low or inadequate, and competition may be distorted because of the differing costs placed upon firms established in various Member States with regard to the vocational training of disabled people[9].

Secondly, a directive on the vocational training of disabled people is a vital element of a global policy to promote the economic integration of people with disabilities. This policy will fail if disabled individuals are not equipped with the skills necessary to become workers and, at present, Member States are not achieving this objective. The addition of a Community dimension to the vocational training provided in the Member States would be an important factor in promoting the necessary improvements. For a directive to be successful it would have to identify means of overcoming the problems identified - lack of access, lack of integration, outdated training courses - which could be adopted and applied within the separate training systems of the Member States. The directive would in addition have to allow Member States a degree of flexibility in the manner of implementation. This reflects the diverse organisation of vocational training throughout the Community. Such an initiative would naturally prompt and require research, discussion and consultation throughout the Community, and, as a result, would have the advantage of being based on experiences of the twelve Member States.

[9] These costs could take a number of forms - for example, in those States where firms are obliged to employ disabled people through a quota system (some form of quota exists in eleven of the twelve Member States), employers will face different costs depending on whether they are able to recruit from an already well trained disabled workforce, or whether they are required to provide initial training for new disabled recruits because the vocational training system has failed to equip them with the necessary skills. Where firms are required to make a direct financial contribution to the training of disabled people, or to participate actively in some way, costs will also be affected.

2. Possible Substantive Content of a Policy Guideline on Vocational Training.

The aims of the measures suggested below are to enhance the integration of disabled people in mainstream vocational training courses[10] and to promote the provision of effective training which is capable of meeting the needs of both trainees and employers. The proposals attempt to identify areas where all Member States desire to improve the vocational training provided to disabled people, and to focus on practical means of doing so. The adoption of measures such as these throughout the Community would amount to a "common vocational training policy" for disabled people - an objective which is referred to in the potential legal basis for the directive, Article 128 (see section three of this chapter). Such a policy, if effective, would lead to numerous social and economic benefits, and would compliment other areas included within a global policy to promote the economic integration of disabled people. It is hardly necessary to add that it is not claimed that the areas mentioned below are the only ones which should be included in any Community instrument. It is merely intended to raise possible themes for inclusion. The decision as to which areas to include is one for Member States, the Commission, Council and Parliament, representatives of disabled people and the vocational training establishments, and the social partners, and should be made on the basis of detailed research - in short, representatives of all who are involved in the vocational training of disabled people should be involved in determining the content of such a guideline.

2.1 Themes which could be incorporated within a Directive.

2.1.1 Anti-Discrimination / Equal opportunities.

The significance of ensuring that disabled people are not denied access to employment as a result of discrimination - which was defined to include direct, indirect and "unequal burdens" discrimination - has already been stressed in chapters one and four. In chapter one it was argued that a limited concept of the equality of results theory was of the most use when analysing the meaning of 'equality' in relation to employment. In that chapter

[10] As noted earlier though, for some disabled people a short intensive course in a specialized establishment may be more suitable.

it was claimed that people who are able to carry out a particular job equally well, if necessary with accommodation, should be regarded as 'equal'. That simple model can be adapted to the case in question by substituting the requirement that all people who can complete a specific vocational training course successfully, if necessary with accommodation, be regarded as 'equal'. The disabled individual need not be the most capable applicant since it is not simply ability which determines whether an individual is admitted to a course. This is reflected in measures which are often adopted to encourage certain people - such as women, the long-term unemployed, and people with low qualifications - to apply for and complete training. The basic requirement should therefore be that the disabled individual has sufficient ability to complete the course successfully.

Many of the arguments made in relation to the elimination of discrimination in employment in chapter four can also be applied to the training situation. This would cover, for example, the need to ensure that entrance examinations and standards do not discriminate against disabled people who may have had a reduced opportunity to gain a basic/advanced education, that buildings and training situations are physically accessible, and that the organisation of training courses and modules (for example, full time training, or limitations on the number of breaks) does not unnecessarily exclude people with certain disabilities.

This concept of 'equality' could form the core of a common vocational training policy for disabled people. Such a principle embodied in Community and national legislation would render illegal discrimination based solely on the grounds of disability and also imply the right to facilities to enable a disabled person to overcome his or her handicap and to receive suitable training.

If, under these circumstances of 'equality' of competition, a selection process is still necessary, the disability of an individual may become relevant. The chances of an unskilled disabled individual finding employment are less that those of an equivalent non-disabled person, and training may therefore be more necessary for the former. This argument also applies to the groups mentioned above. Selectors must in addition consider the need to balance the intake of trainees. In that case the number of eligible disabled applicants and the nature of their disability must be considered, since it is important not to include too many disabled trainees, so making the integration process less effective. This can be justified by

reference to the Rawlsian arguments made in chapter two, where it was claimed that any distribution of resources (in this case training places) which reduced the benefit flowing to the most disadvantaged group (by hampering the opportunities for integration) was not to be supported.

The fact that an individual has a disability which is common to a number of applicants may lessen his/her chances of acceptance. At times therefore a disabled person who is capable of completing a training course may nevertheless be denied this opportunity when the course is oversubscribed. As long as this decision is not motivated by the limitation caused by the impairment no discrimination will have occurred, and the principle of 'equality' will not have been breached.

2.1.2 Integration in Mainstream Training Establishments.

All Member States support the aim of integrating disabled people in mainstream training establishments. There are a number of reasons why such training is, on the whole, to be preferred to that provided in specialist (and often residential) centres. Most importantly, it is an active step towards full integration since disabled people are not isolated in a special environment, and have the opportunity to socialise and work alongside non-disabled people and remain in touch with their community, whilst non-disabled people can learn from associating with their disabled peers. Furthermore, in many cases providing training in mainstream centres may represent an economy, since there may be reduced travelling or residential expenses. In addition, a greater choice of training courses and opportunities can be provided for disabled people since they are not restricted to the limited number of specialized centres which can only offer certain courses.

However, whilst this general aim of integration in mainstream training establishments exists, there is nearly always an assumption that people with a certain degree of disability are unable to be trained in such establishments, and that specialized non-integrated centres are necessary to provide vocational training for such people. There is no specification anywhere as to what this 'degree of disability' is, and agreement at Community level does not exist. Member States do not seem to define this concept in legislation or elsewhere, and

it appears that for the most part local administrators are left to decide whether mainstream or specialized training is appropriate.

An additional problem is that the relative emphasis placed upon mainstream and specialized establishments as centres where disabled people can receive vocational training is at different stages of development within the various Member States.

Despite these two major differences it should be stressed, once again, that all Member States share the aim of promoting the economic integration of disabled people, and recognise that integration in mainstream vocational training is a way of working towards that aim. Despite the acceptance of this common aim, however, different approaches have been adopted in the Member States; one cannot claim that a common policy exists - a person with the same kind and degree of disability may be offered training in a mainstream or specialized establishment, or no training at all, depending on which Member State s/he is resident. It requires an initiative at Community-level to establish that common approach or policy to promote the common aim of integration on mainstream courses, and provide guidance as to how that aim could be achieved. This would be a major contribution to the Community policy on the economic integration of disabled people.

The first problem one comes across is the fact that there is no accepted definition of the degree of disability which prevents such integration. There are many problems with attempting to produce a Community-wide definition which would clearly state what degree of disability justified special training, and what degree allowed integration in mainstream establishments - the decision as to whether integrated or specialized training is suitable depends not only on the degree of disability, but also on the size, nature, funding, experience of staff, and the facilities of the training centre. It may, however, be possible to produce a definition of the kind of disability[11] which should not prevent someone from

[11] The disabled population is not a homogeneous group, and it might therefore be difficult to produce a definition which could cover all disabled people who are capable (or incapable) of receiving integrated training. One way of doing this might be to define the disability in terms of a percentage such as is done in the SchwbG in relation to the quota system. If this approach were adopted the directive might state, for example, that within 5 years Member States should ensure that all disabled people with a degree of disability not greater than 40 per cent have the opportunity of receiving vocational training in an integrated setting.

having access to integrated vocational training, and then give Member States time to work towards achieving that integration. In this sense the other elements of the guideline would be vital for they would provide information as to how training centres could be made more accessible to disabled trainees. If Member States complied with the proposed directive all mainstream training centres throughout the Community would gradually be capable of offering vocational training to people with similar degrees of disability. The specialized centres would only remain for those with the severest disabilities and for those for whom such training is more beneficial than that received in an integrated setting.

Such an approach would also be of benefit in those Member States where few specialized establishments exist at present. By implementing the directive, and making the mainstream centres more accessible, the need for specialized centres would be reduced, whilst the availability of vocational training for disabled people would increase. The specialized establishments that exist could then focus specifically on those with the severest disabilities and the limited resources available for funding (additional) specialized centres could be directed at those with the greatest need for such facilities.

Naturally any directive would require detailed research into the effectiveness of the various measures that exist within the Community at present, and, on the basis of this, an instrument could be produced. A number of areas where proposals might be made, however, are already clear.

Firstly, as things presently stand, many of the standard centres where vocational training is provided are not ready to accept disabled trainees. Buildings, for example, are often inaccessible and in order to admit wheelchair users to training programmes alterations may be required - these might well involve the installation of lifts and ramps, broader doorways and special toilet facilities. Such alterations will often be highly expensive, and it would be unrealistic to expect all existing training centres to be made wheelchair accessible (although it would be quite reasonable to require that all newly built centres

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Alternatively the policy instrument could refer to specific kinds of disability which should never lead to an individual being confined to specialized training, and to those kinds which may, because of their severity (and this could again be measured in terms of a general percentage or through some other means specific to that disability) make integrated training difficult in some circumstances.

should be accessible). Most disabled people, however, are not wheelchair users, and it may be that only minor alterations are needed to make buildings accessible to certain groups of disabled people - for example, those with mobility related disabilities would benefit from more ramps and hand rails, those with a hearing disability would benefit from visible fire alarms, and those with a visual disability would benefit from signs in braille or in large writing, and so on. These are minor, but vital alterations which would open up presently inaccessible buildings to many disabled people.

The equipment used in the training process may also be unsuitable for disabled trainees - trainees who use wheelchairs may require higher tables, blind trainees may require manuals in braille and many trainees will require specially adapted tools. In addition, a number of trainees may require extended training periods, either because their disability prevents full-time attendance or simply because they need extra time to acquire the necessary skills. To meet this need training courses would have to become more flexible. Progress in this respect has already been made in a number of specialised centres included within the Helios II networks, where experimentation with module based training has occurred. It may be possible to transfer some of these experiences to integrated training centres. Furthermore instructors must be ready to train disabled people, and this will often require additional education on their own part so as to enable them to be able to offer an adequate vocational education to all their trainees.

It is clear that, in certain cases, the overall adaptation of training centres and retraining of trainers may be expensive - however, relatively minor changes could make major differences to many trainees with disabilities. These could be made within a relatively short time whilst the aim of making all centres accessible to all disabled trainees should be viewed as a long term project (but one where progress must be made).

In order to achieve the integration of a large number of disabled trainees into mainstream training courses it will also be necessary, in many cases, to adapt the structure of the entrance requirements to the course so as to take account of the trainee's disability. At present the way in which entrance requirements to training courses are designed do not necessarily take account of the problems experienced by applicants with disabilities. Some Member States, however, have already taken action to ensure that the needs of disabled

trainees are not neglected in this area. In the Federal Republic of Germany, for example, legislation requires that those organising vocational training courses take account of the problems and requirements of disabled people when organising entrance tests. This covers both the time required to take the test and the testing methods. A number of other Member States have adopted similar measures, or even provided for disabled people to enter training schemes without taking tests. The Commission Report on the application of the Council Recommendation on the employment of disabled people of 24 July 1986[12] has highlighted a number of ways that entry tests to mainstream training programmes could be adapted to take account of the needs of potential trainees with disabilities[13]. These include:

-the adaptation of the methods of assessment, e.g. the replacement of oral examinations by more suitable examinations for those with hearing difficulties.

-the use of aids justified by the disability concerned, e.g. using an interpreter in sign language for the deaf.

-the elimination of questions which are not connected with the occupation concerned, but which might put candidates at a disadvantage solely on grounds of their disability.

-the reorganisation of the time allowed for the examination.

-priority for, or reservation of, training places.

-relaxing conditions concerning age limits for entrance to training courses.

Such a detailed policy guideline would assure that a policy was developed which would benefit disabled people significantly.

As well as including precise measures of this nature, a directive would need to allow for a certain degree of flexibility which would enable adaptation to national circumstances. One way of achieving flexibility would be to leave Member States free to decide which centres are (initially) to be made accessible, and to allow them a certain amount of scope in determining how they should be made accessible. For example, a directive could state that within 5 years 50 per cent of all training centres (or of centres providing 50 per cent of all training places) are to be accessible to blind and/or deaf trainees, 30 per cent to trainees who

[12] COM(88)546 Final 15/12/1988.

[13] Ibid, p.75.

use wheelchairs, and so on. Member States would then be left to decide which centres should be made accessible and the decision could be based on cost, the number of potential disabled trainees, and the appropriateness of the training provided at each centre for disabled trainees. In short, the decision would be based on national circumstances, but it would contribute to the development of a common vocational training policy.

The directive might also give Member States some scope in deciding how to make centres accessible, although if it took the form outlined above it would be relatively precise in relation to this area. For example, it may be that in some cases, because of the different cultures, teaching methods and/or expectations, people with similar disabilities will require different adaptations according to the Member State in which they live. This is particularly so in the case of deaf people. In the United Kingdom deaf people are generally taught to communicate through sign language, so instructors may need some experience in this area; however, in France or the Federal Republic of Germany, where deaf people are taught to lip-read rather than use sign language, this skill will not be necessary; instead the instructors will need to speak slowly and clearly, and to look at the trainees when talking.

It is clear that even a relatively precise directive aimed at promoting the integration of disabled people in mainstream centres could be flexible enough for account to be taken of the national circumstances and, nevertheless, be able to contribute to the formulation of a common vocational training policy and the improvement of training opportunities for disabled people.

2.1.3 Providing Effective Vocational Training.

A further common aim held by all Member States is the desire to provide effective vocational training so that the training succeeds in meeting the needs of industry and trainees. This requires that there is some awareness of the (local) employment opportunities and that consideration is given to which forms of work offer the best chances of employing disabled people, and of the capabilities and aspirations of the trainees. In fact the desire to provide effective training is a general one which does not just apply to training for disabled people, although the present section will concentrate on this group.

Member States are not necessarily as successful in fulfilling this aspiration as they would wish to be. It is often difficult to encourage disabled people to become actively involved in planning their training, and this may be particularly so in residential establishments where disabled trainees may feel isolated and powerless. Furthermore, there may be problems in adapting the training courses to the current needs of industry, and in coordinating the vocational training with other facilities and services offered to disabled people. Therefore, whilst the aim of providing effective training is widely accepted, in practice Member States have problems in achieving this objective. A directive which could help Member States to achieve this target would make a significant contribution to the promotion of economic integration. The following are guidelines which should be considered when attempting to achieve this aim:

2.1.3.1 Coordination of Vocational Training with other Services provided for Disabled People.

Disabled people, more than most other members of society, must deal with a number of government departments and services, private bodies and charities; this is necessary in order to enable them to receive assistance to help them overcome, or live with, their impairment - e.g. social security, unemployment benefit, aids to employment, medical rehabilitation and treatment, vocational rehabilitation and so on. At present the general tendency is for those providing the service to see the disabled person only in relation to that specific need, and there is no coordinated approach to the client's problems. What is needed is a 'global approach' to the problems of disability, with coordination between the various bodies enabling the client with disabilities, as far as possible, to progress smoothly through the system.

In the case of vocational training this involves a number of factors. Firstly, in respect of young disabled people, contact should be made and a programme prepared whilst the individual is still receiving full-time compulsory education. For those who require vocational training at a later stage contact should be made as soon as the need is identified. This necessarily involves greater contact with the other services which will be expected to make referrals and to provide assistance before and during training.

Secondly, contacts between the training agency and potential employers need to be improved. This may be done, for example, by providing for short work placement schemes in open industry. It has already been shown that, in some cases, these can lead to offers of permanent employment following the training[14]. It is also necessary that thought be given at a sufficiently early stage to the post-training future of the disabled person, and that guidance is provided.

A directive aimed at promoting coordination is highly important, and would make for a much more effective provision of vocational training if applied[15].

2.1.3.2 Greater involvement of Trainees.

Linked to the need to develop a coordinated approach is the need to develop a more 'consumer-orientated' approach, with greater involvement of disabled trainees. Such an approach involves adequate consideration being given to the needs and potentials of the trainees, and therefore to a certain extent focuses on individual requirements. It also necessitates the active involvement of the trainees in the training process. In the case of disabled people this very involvement may have a beneficial impact in that it encourages self-advocacy. It would also help to ensure that the needs of disabled trainees in integrated training centres are not overlooked. Such involvement could, for example, take the form of representation on the policy making committee of the training institution. This would present a problem in centres where there is a high turn-over of trainees, but could easily be accommodated in cases where trainees enrol for a lengthy course. This process may also include the involvement of organisations of disabled people. In this way those managing the

[14] Pierre Olivier, Analysis of current needs and initiatives in the field of the adaption of vocational training for young handicapped people to the new employment realities - Final Report, Commission of the European Communities, November 1984.

[15] However, the various services may not see it as their role to develop or provide a coordinated approach; indeed, they may feel that it is not in their vested interests to do so. For this reason a number of previous attempts at coordination have failed (see, for example, the history of the Rehabilitationsangleichungsgesetz in the Federal Republic of Germany, described in Petra Buhr, Programmenentwicklung in politisch-administrativen System, Universität Bielefeld, Institut für Bevölkerungsforschung und Sozialpolitik).

courses would remain in touch with the needs and desires of the trainees, and the trainees would be well informed about the training process and possibly able to make some input at times of decision making.

2.1.3.3 Review of Courses.

A final and very important guideline which could be adopted is that of providing for a continued review of training methods and courses to ensure that they are still up to date and making the best use of resources. As the structures of the national economies within the Community change demands for certain kinds of skilled workers increase, whilst the need for other skills declines. The challenge for all vocational training courses is to meet the ever new demands of employers and trainees. Those providing training for disabled people are particularly weak in this area. This may be because there is a proportionally higher investment in special equipment and staff in such specialized centres and policy makers may resist changes on the grounds of expense. Those running the centres may also have a vested interest in maintaining the status quo. As a result such centres often offer obsolete training courses which do not meet the needs of either trainees or employers. New technology, such as computers, robotics and some forms of electronics, can play an important role in providing aids to training and offering potential employment after training. Whilst some centres have adopted such methods and amended their courses, this is not generally true.

A continued review of courses is also necessary to ensure that limitations and restrictions are not being unnecessarily imposed. It may be felt, for example, that only two trainees who are wheelchair users can be accommodated on a particular course but, as the skills or confidence of the trainers increases, or following additional funding, it may become possible to increase this number.

2.2 The Relevance of National Factors when implementing the Directive.

Whilst a directive could be relatively precise in defining these objectives it would have to leave Member States a great deal of discretion in deciding how to achieve them. Because of the different structures and organisations within the various Member States no one formula could be laid down for, for example, the coordination of services. In some

States services will be provided on a centralised basis, whilst in others on a local basis; different emphasis will be put on public, private and voluntary services. The successful coordination of the services and facilities depends upon adequate consideration being given to the structure and purposes of all the services involved. Consideration must also be given to the structure of the training centres when attempting to promote greater trainee participation. Factors such as whether the centre is integrated or specialized, the length of the training period, and the degree and kind of disability of the trainees must be considered. In the case of reviewing courses full consideration must again be given to the structure of the centre, the most appropriate means of consulting with industry, trade unions, and trainees, and the possibilities for adaptation of courses within the centre. No uniform form could be adopted throughout the Community - however, a uniform aim could be enunciated in a directive, giving Member States the flexibility to decide how to best achieve that aim. In this way progress could be made towards a common policy.

3. The Legal Basis for a Community Directive to improve the Quality and Quantity of Vocational Training provided to People with Disabilities.

Having argued for the necessity of a Community policy instrument on the vocational training of disabled people, it is necessary to consider the legal basis within the Treaty of Rome for producing such a measure. It has already been argued that future elements of the Community policy on disability will, if possible, be produced in the form of directives and it is therefore imperative that a suitable legal basis be found within the Treaty.

It is nowhere clearly stated in the Treaty that the Council is vested with the power to produce legislation in the general area of vocational training, let alone in the area of vocational training for disabled people. Vocational training is however referred to in a number of Treaty articles (for example Articles 41 and 125 of the EEC Treaty and Article 56 Ic and IIb of the ECSC Treaty). Article 118 confers on the Commission the task of promoting close cooperation between the Member States in various areas in the social field,

including basic and advanced vocational training. Article 128 expands on this. This latter Article is unusual in a number of respects, and it is worth quoting in full:

"The Council shall, acting on a proposal from the Commission and after consulting the Economic and Social Committee, lay down general principles for implementing a common vocational training policy capable of contributing to the harmonious development both of the national economies and of the common market."

The exact nature of the power conferred on the Council by virtue of this Article is unclear. Some commentators argue that Article 128 conveys no power on the Council to produce norms which are binding on Member States. Alternatively it has been argued that at least some of the 'general principles' referred to in Article 128 are capable of having the characteristic of directives in that they can oblige the Member States to achieve the objectives referred to therein. A third approach, and the one that seems to have been favoured by the Commission (and by the European Court of Justice) in recent times is that Article 128 conveys on the Council the power to adopt legal measures providing for Community action in the sphere of vocational training which are capable of imposing certain obligations on the Member States[16].

Before going on to consider the relative merits of these arguments the general principles which have been produced on the basis of Article 128 shall be referred to.

3.1 The General Principles - Decision 63/266/EEC.

The Council took the first step in laying down the general principles required under Article 128 in its decision of 2 April 1963 - 63/266/EEC. The decision consists of ten principles.

A common vocational training policy is defined in the First Principle as:

[16] It should be noted, however, that so far the Court has only referred to "obligations of cooperation" being imposed on Member States by sui generis decisions (i.e. decisions not based on Article 189) based on Article 128. It is unclear what such obligations involve, or if further obligations could be imposed.

"a coherent and progressive common action which entails that each Member State draw up programmes and shall ensure that these are put into effect in accordance with the general principles contained in the decision and with the resulting measures to apply them" and it is stated:

"it shall be the responsibility of the Member States and the competent institutions of the Community to apply such general principles within the framework of this Treaty".

The Second Principle outlines the fundamental objectives of the common vocational training policy. These include:

-the bringing about of "conditions that will guarantee adequate training for all";

-enabling "every person to acquire the technical knowledge and skill necessary to pursue a given occupation and to reach the highest possible level of training, whilst encouraging, particularly as regards young persons intellectual and physical development";

-offering "to every person, according to his inclinations and capabilities, working knowledge and experience, and by means of permanent facilities for vocational advancement, the opportunity to gain promotion or receive instruction for a new and higher level of activity".

The Tenth Principle of the decision states that special measures may be taken when applying the 'general principles' to ensure that "special problems concerning specific sectors of activity or specific categories of persons" are not neglected.

As well as addressing the requirements of trainees the general principles naturally refer to the needs of industry, reflecting the economic nature of the Treaty. Included in the fundamental objectives are:

-organising "suitable training facilities to supply the labour forces required in the different sectors of economic activity"; and

-relating "the different forms of vocational training to the various sectors of the economy so that ... vocational training best meets the needs of the economy and the interests of the trainees".

Decision 63/266 refers to future action which Member States and the Commission may take in order to implement the ten principles. The preamble states that the attainment of the objectives requires that action be taken at national level, and that the Commission should be able to propose measures to the Council or Member States. It is envisaged that this will involve close cooperation between Member States and the competent institutions of the Community. It also states that it is the responsibility of both the Member States and the Community institutions to apply the general principles within the framework of the Treaty. The Fourth Principle declares that the Commission may propose to the Council or to the Member States such measures under the Treaty as may appear to be necessary, and that the Commission, in close cooperation with the Member States, shall carry out any studies and research which will ensure the attainment of a common policy. The Fifth Principle states that the Commission shall take steps to collect, distribute and exchange any useful information, literature and teaching materials and that Member States shall provide the necessary help and support in carrying out these tasks. Finally, the Sixth Principle states that the Commission, in cooperation with the Member States, shall encourage direct exchanges of experience in the field of vocational training.

The implementation of the common vocational training policy is clearly seen as a partnership, involving cooperation and shared responsibilities between the Member States and Community institutions.

In addition the Seventh Principle refers to the need to work towards the aim of harmonising instructor training, and the Eighth Principle states that the common vocational training policy must "be so framed as to enable levels of training to be harmonised progressively". Harmonization, then, seems to be the ultimate goal of the common vocational training policy.

3.2 What powers does Article 128 vest in the Community Institutions?

3.2.1 The 'General Principles'.

The first question that is raised by Article 128 relates to the nature of the 'general principles'. The Article clearly confers the power to 'lay down' such principles, but does not state whether those principles are capable of imposing binding obligations on Member

States, and nor does it state what form the 'general principles' should take. It is necessary to briefly consider the nature of the obligations, if any, which can be imposed by the 'general principles' before going on to consider whether Article 128 can provide the basis for additional legal measures.

It has been argued by some commentators that Article 128 gives no competence to the Council to produce measures which are binding on Member States. If this were true then the 'general principles' referred to above could only amount to a declaration of aims.

Hochbaum[17] claims that the terms 'general principles' and 'common policy' in Article 128 are too vague to confer a power to produce binding norms, and that it is therefore obvious that no such power was intended or established.

Hochbaum refers to the discussions in the West German Parliament to add strength to her arguments. In these discussions it was concluded that Article 128 could not confer a legislative power. During the debates on the EEC Treaty in the Bundestag the 'general principles' were called 'guidelines'('Leitbilder') for the individual Member States, with "no obligatory character whatsoever"[18]. This opinion was restated in the Bundestag and Bundesrat during the debate on the first draft of the general principles contained in the 1963 decision, where it was argued that the principles could only have the nature of recommendations[19].

Hochbaum concludes that:

"The 'common policy' is therefore a 'sui generis' policy compared to other Community policies, its unique feature being that it is to be implemented by the Member States on their own responsibility, with the Commission having only a subsidiary role of 'promotion'"[20].

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[17] In European Community Law of Education, ed. Bruno De Witte, Nomos Verlagsgesellschaft, Baden-Baden, 1989.

[18] BT-Drs 3660 of 28 June 1952, cited in Hochbaum's article at p.153, para. 23.

[19] Hochbaum, op.cit., p.154, para.25.

[20] Ibid, p.154, para.26.

and states that she "cannot share" the Commission's view that the Article attributes law making powers to the Community[21].

The problem with this argument is that it overlooks the aim referred to in Article 128 which the general principles are to achieve - namely the implementation of a 'common vocational training policy'. Although it is true that it is nowhere defined what is meant by a 'common policy', it does not necessarily follow that the term is so vague as to be incapable of clearly expressing the objective to be achieved. It is this fact which has led other commentators to conclude that some of the 'general principles' are capable of imposing binding obligations on the Member States, and that they are capable of having characteristics similar to those of directives.

Some commentators have argued that the phrase 'general principles' is a technical term, and that at least some of the principles are measures capable of having binding force. This is so even though the 'general principles' are not referred to in Article 189 as a measure which is capable of being binding on Member States. The commentators who adopt this approach have drawn this conclusion from the fact that the aim of implementing a common vocational training policy requires the use of binding measures. On the basis of this Stabenow claims that some of the 'general principles' must be binding as to the objective to be achieved. He claims that it is possible to distinguish between those elements which have characteristics similar to a directive and those which have characteristics similar to a recommendation by considering whether the aim of achieving the common policy requires of any principle that it be binding:

"Ihre Zweckbestimmung, eine gemeinsame Politik herbeizuführen läßt jedoch darauf schließen, daß die Grundsätze Elemente enthalten müssen, die entweder der Empfehlung oder Richtlinie verwandt sind, also je nach den sachlichen Notwendigkeit zu einem Teil nicht verbindlich, zu einem anderen Teil für den Adressaten verbindlich sein können"[22].

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[21] Ibid., p.153, para.22.

[22] Stabenow in Kommentar zum EWG-Vertrag Artikel 1-136, ed. Groeben, Boeckh, Thiesing, Ehlermann, third edition, 1983, Nomos Verlagsgesellschaft, Baden-Baden.

Ipsen also argues that some of the general principles are capable of having an effect similar to that of a directive. He suggests that the Community does not have the competence to legislate on vocational training since Article 117 reserves the power of regulating social policy to the Member States. Furthermore, since the general principles are not referred to in Article 189, they cannot amount to Community legal measures. He nevertheless concludes that the general principles, because of their aim of implementing a common vocational training policy, must have the function of a directive, and that they leave the Member States free to choose the method of implementation:

" ... können Ratsgrundsätze dieser Zielbesetzung rechtlich nur die Funktion von Richtlinien haben, die als solche der erstreben Ergebnisfixierung verbindlich sind, den Staaten jedoch die Wahl der Form und Mittel Ergebnisherstellung überlassen"[23].

These arguments can be criticized on two grounds. Firstly, as both commentators recognise, in order to achieve the aim of the implementation of a 'common vocational training policy' some binding measures are required, and yet, the 'general principles' mentioned in Article 128 as the means for implementing that policy are not a Community legal instrument referred to in Article 189. The conclusion that Stabenow and Ipsen draw is that the 'general principles' themselves are capable of being a binding instrument. If this were so then the 'general principles' would be an important additional legal instrument and,

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"However their purpose of bringing about a common policy leads to the conclusion that the general principles must contain elements that are either of the nature of recommendations or directives; that is, partly not binding and partly binding on those to whom they are addressed, depending on whether they are necessary or not to achieve the common policy".(My own translation).

[23] Hans Peter Ipsen Europäisches Gemeinschaft, J.C.B. Mohr (Paul Siebeck), Tübingen, 1972, 51/21 bb.
"...the principles of the Council with this aim can legally only have the function of directives, and are similar to recommendations or directives; those principles may be binding or not binding depending on the objective to be achieved". (My own translation).

from the lack of reference to such principles in Article 189 it is not at all clear that this was intended[24].

A second problem is that the criteria for distinguishing between those 'general principles' which are capable of binding Member States, and those which are not, is too vague. It is not necessarily self-evident, as Stabenow claims, that specific principles must be capable of obliging the Member States to act - such an approach leaves the way open for confusion and misinterpretation.

An analysis of the academic literature therefore leaves it unclear as to whether the 'general principles' are capable of imposing binding obligations upon Member States. The matter can also not be resolved by reference to the case-law of the Court of Justice. The question was however considered by Advocate General Mischo in Case 242/87 Commission v. Council[25] where he concluded that Article 128 could not be interpreted as setting the Community an objective whilst simultaneously providing no practical way of achieving that objective. He stated:

"It follows without a doubt that the general principles that the Council may lay down are not simple guidelines but mandatory legal rules"[26].

If the Advocate General is correct it shows that the Community can rely on Article 128 to introduce legal measures capable of having a significant impact on the organisation of national vocational training policies. However, this would not necessarily expand to directives.

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[24] However, it is important to note that the Court has held that the list of legal measures in Article 189 is not exhaustive, and that it is possible to have a legally binding act which does not fall into any of the categories referred to in this Article. Case 22/70 Commission v Council [1971] ECR 213 'The ERTA' Case.

[25] [1989] ECR 1425.

[26] Para.29, p.1441.

The argument that the 'general principles' are capable of imposing binding obligations upon Member States may also be strengthened by reference to other decisions of the Court which have examined the significance of the term 'principle' elsewhere in the Treaty. Of most note in this respect is Case 43/75 Defrenne v. Sabena (No.2)[27]. This decision established that the term 'principle' as used in the Treaty is capable of indicating the basic nature of a provision and that it can impose obligations having direct effect on the Member States. The Court rejected the argument that the term 'principle' in Article 119 of the Treaty indicated that it was concerned with a concept of a very general nature and stated:

" ... in the language of the Treaty, this term (principle) is specifically used in order to indicate the fundamental nature of certain provisions"[28].

and declared that serious consequences would result if the term was reduced to "the level of a vague declaration"[29].

The Court, in its judgment, confined itself to considering the significance of the term 'principle' and it does not necessarily follow that a similar interpretation would be given to the term 'general principles'. However, since it is the same term which is used in both Articles it may be that the 'general principles' for implementing the common vocational training policy can also be regarded as being fundamental in character.

The Commission, in its submission in Case 56/88 United Kingdom v Council also referred to Case 43/75 Defrenne v Sabena (No.2), and commented on the definition given to the phrase 'principle' in that case:

"... the use of the word 'principle' in Article 128 should not be taken as an indication that all that can be adopted is a vague expression of intent. In the Commission's view the

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[27] Case 43/75 8 April 1976, [1976] ECR 455.

[28] Para.28 of the judgment.

[29] Para.29 of the judgment.

interpretation of Article 119 of the Treaty contained in the judgment of ... Case 43/75 Defrenne v Sabena (No.2) ... shows, on the contrary, that the word 'principle' can indicate the fundamental nature of a provision and strengthen the possibility of its having a practical effect."

However there are important differences between the principle (of equal pay) referred to in Article 119 and the 'general principles' of Article 128. The relevant principle was expressly elaborated within Article 119 and no further action by the Community institutions was found to be necessary to define its meaning. The Court emphasized that for the principle of equal pay to have direct effect it had to be sufficiently precise, and found that this criteria was met. The situation is very different with regard to Article 128. There further Community action to define the 'general principles' was required. For the Court to find that these principles have direct effect it would have to be satisfied that not only do they meet the precision requirement set down in Sabena, but that the fact that the principles are not contained within the Treaty itself, but rather within a Council decision, does not make the nexus too remote to apply the Sabena decision.

An alternative interpretation of the nature of the 'general principles' is that they do not serve the function of a legal instrument which is capable of having a binding effect at all, but rather that they only introduce guidelines or the framework within which the 'common policy' is to be formulated, and that additional Community legal instruments are required to actually implement the policy. This idea seems to have been ignored in the literature which has concentrated on the question of the legal form of the 'general principles'. It is this idea however which brings us to the second, and more important question raised by Article 128.

3.2.2 The Introduction of Additional Legal Measures to Implement a Common Vocational Training Policy.

The second question raised by Article 128, and the one which is of specific interest here, is whether the Article gives the scope to introduce additional legal measures which can

contribute to the implementation of the 'common vocational training policy'[30]. On the basis of a number of recent measures adopted by the Council, based wholly or partly on Article 128, it is possible to argue that this is the approach now being adopted by the Community institutions.

The Community institutions have only recently begun to use Article 128 as a legal basis for measures. In the period immediately following the adoption of the decision establishing the 'general principles' little attention was paid to the area of vocational training within the Community. In 1971 a Community action programme on vocational training was set up[31] and the social action programme, established in 1974[32], referred to the need for a common policy in this area. In 1983 the Council produced a resolution on a Community vocational training policy for the 1980's[33]. The resolution made reference to the 'general principles', but not to Article 128 itself.

Recently, however, Article 128 has been begun to be used as a legal basis for measures. The Council decision establishing the ERASMUS programme[34] was based on both Articles 128 and 235. The Erasmus Programme is designed "to increase significantly" the mobility of students "in the Community and to promote greater cooperation between universities" (Article 1 of the decision). The decision specified that this was to be done in a number of ways. Firstly a European university network to promote the exchange of students and teachers between universities was to be established. In addition a system of grants to enable students to carry out periods of study in other Member States was to be organised and measures to promote student mobility and the academic recognition of

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[30] The discussion here is focused on a common vocational training policy generally. It is assumed that if the competence to introduce such a policy exists, it will also cover the vocational training of disabled people.

[31] OJ No. C 81/5, 26/7/1971

[32] OJ No. C 13/1 21/1/1974

[33] OJ No. C 193/2 11/7/1983

[34] OJ No. L 166/20 25/6/1987

diplomas and periods of study were to be implemented. A budget with which to fund the programme was also included.

The decision establishing the programme was challenged by the Commission in Case 242/87 Commission v Council, which argued that the Council was competent to adopt the decision on the basis of Article 128 and Decision 63/266 alone, and that it was not necessary to rely on Article 235 in addition.

The Court found that in principle the Council could adopt the decision on the basis of Article 128. It agreed with the Commission and the Advocate General that it was not possible to interpret Article 128 in such a way as to deny the Council the means of adopting a 'common vocational training policy' on the basis of that Article alone. It stated in paragraph 9 of the judgment:

"As the Commission has rightly pointed out, the fact that the implementation of a common vocational training policy is provided for precludes any interpretation of that provision which would mean denying the Community the means of action needed to carry out that common policy effectively".

The Court stated that the task of implementing the 'general principles' of the 'common vocational training policy' was one for the Member States and the Community institutions working in cooperation (Paragraph 10) and went on to say:

"From an interpretation of Article 128 based on that conception it follows that the Council is entitled to adopt legal measures providing for Community action in the sphere of vocational training and imposing corresponding obligations of cooperation on the Member States"[35].

[35] Para. 11 of the judgment.

The Court also held that most of the activities provided for under the decision came within the ambit of vocational training, and the few occasions where this was not true could not justify holding that the programme exceeded the scope allowed for by Article 128.

The Commission, however, lost the case on the grounds that the scientific research elements of the programme could not be covered by Article 128 alone, and it was therefore correct to rely on Article 235 in addition (Lonbay points out that following the adoption of the Single European Act Article 130g would be a suitable additional legal base[36]. The Court also makes reference to this in paragraph 36 of the judgment).

The decision and judgment of the Court are important for two reasons. Firstly it has been clearly re-stated that Article 128 can provide a legal basis, albeit only partial, for a Community measure. The decision states in the preamble:

"Whereas this action programme includes aspects relating to education which, at the present stage of development of Community law, may be regarded as falling outside the scope of the common vocational training policy provided for in Article 128 of the Treaty".

This shows that the Article does provide at least some scope for introducing legal measures, and this is confirmed in the Court's judgment.

In fact it has been established that Article 128 could provide the legal basis for a sui generis decision since at least 1963, when the 'general principles' were established. The more recent decisions made on the basis of Article 128 (and which also generally refer to Decision 63/266) are important because they show that further measures are now being taken to achieve the aim of the implementation of the common vocational training policy. The Court was not however called upon to decide whether Article 128 could provide a legal basis for directives or regulations referred to in Article 189. It specifically confined its judgment to the sui generis Council decision, which it stated only provided for Community information projects and promotional activities and imposed upon Member States obligations of cooperation. Nevertheless, the Court did make a general reference to the fact that Article

[36] In Education and Law: The Community Context, Julian Lonbay, European Law Review, Volume 14, No. 6, December 1989, pp.363-387.

128 allowed for the adoption of 'legal measures', and did not specifically exclude directives or regulations.

Secondly, by relying on Article 235 to provide an additional legal basis for a measure to promote the exchange of students and research, the way has been opened for the further use of this article to support Community measures in the field of education and vocational training. The ability to use this Article in this way has not been challenged, and Article 235 may become an important legal basis in the future for measures which cannot be covered in their entirety by Article 128. This point shall be returned to shortly.

Possibly of more significance in relation to determining the scope of Article 128 is the Council decision of 1 December 1987 concerning an action programme for the vocational training of young people and their preparation for adult and working life[37]. This decision was based solely on Article 128. It set up a five year action programme which involved "specific implementing measures and significant expenditure for the Community"[38], and allowed the Commission to supplement Member States' activity that promoted a common vocational training policy - by extending the availability of vocational training after full-time education - and to add a 'Community dimension' to the design and implementation of Member States' programmes[39]. The decision was once again sui generis and was not formally addressed to the Member States. However, it imposes certain obligations on the Member States and, according to Article 5 of the Treaty, the decision must be regarded as binding in relation to those obligations.

The United Kingdom, in Case 56/88 United Kingdom v Council, challenged the decision on the grounds that Article 128 provided an insufficient legal basis for such a wide ranging decision, and claimed that Article 235 should be relied upon in addition.

The United Kingdom presented a number of arguments to support its claim. Firstly, the wording of Article 128 was referred to, and this was contrasted with the wording of

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[37] Decision 87/569/EEC OJ No L 346, p.31.

[38] Para.4 of the judgment in Case 56/88 United Kingdom v Council [1989] CMLR 789.

[39] Article 3 of the decision.

other articles, such as Articles 126 and 127, which make use of terms such as 'rule' or 'determine'. The United Kingdom also claimed that the fact that measures adopted under Article 128 only required a simple majority in the Council, whilst other articles concerning vocational training, such as Articles 41(a) and 125 (1)(a) required a qualified majority, showed that the authors of the Treaty could not have intended to establish a power to adopt an action programme under Article 128. This was also the conclusion they drew from the fact that Article 128 does not require consultation with the Parliament before any measure is adopted. A further point raised was that the expenditure provided for under the action programme, which amounted to some 40 million ECU, was non-obligatory, and the budgetary allocation for such expenditure required a qualified majority in the Council and consultation with the Parliament. The United Kingdom therefore claimed that it would be inconsistent with the general scheme of the Treaty to enable the Council to adopt such a decision on the basis of Article 128 alone. These arguments were similar to those which were raised unsuccessfully in Case 242/87 Commission v Council. Finally reference was made to the Council's practice of using Article 235 in addition to Article 128 for measures which went beyond the laying down of general principles, as occurred in the ERASMUS decision.

These arguments were challenged by the Council and the Commission, which intervened in support of the Council. Both the Council and the Commission argued that Article 128 did give the competence to introduce such an action programme, but they disagreed as to the scope of the action provided for by the Article.

The Council argued that it was necessary to consider all of the wording of Article 128 - the aim of implementing a 'common vocational training policy' showed that at least some binding action by the Council was provided for by the Article:

"The Council contends that the expression 'lay down general principles' should not be considered in isolation but only in combination with the words 'for implementing a common vocational training policy' which complete it. Although the first part does indeed

suggest that its scope is limited, the complete text shows that it would be going too far to rule out any programme of concrete action"[40].

The Council argued that the initiation and conduct of vocational training policy remained with the Member States, but that Article 128 gave the Community the task of coordinating national policies so as to ensure their effectiveness in the conditions of the common market. The Council distinguished 'coordination' from 'Community action', whereby policy is initiated and implemented by the Community institutions, and stated that Article 128 could not provide a legal basis for such action.

The Commission, in its submission, rejected this distinction and argued that Article 128 did give the power to carry out the common policy by means of specific action programmes. The Commission relied on the arguments it had raised in Case 242/87 Commission v Council and stated:

"Article 128 speaks of a 'common policy' for vocational training which should be implemented. It is not possible to say that the authors of the Treaty could have intended the Council to have to resort to other articles of the Treaty to fulfil the task conferred on it by Article 128".

The Court rejected the arguments raised by the United Kingdom and held that Article 128 was a sufficient legal basis for the decision. Once again it was quite clearly stated that Article 128 had established the aim of implementing a 'common vocational training policy', and that it could not be interpreted in such a way as to deny to the Community the means of achieving that aim:

[40] Submission by the Council.

"The fact that the implementation of a common vocational training policy is provided for precludes any interpretation of that provision which would mean denying the Community the means of action needed to carry out that common policy effectively"[41].

It followed from this that Article 128 did confer on the Council the power to adopt legal measures which could impose obligations on the Member States, and which had the aim of implementing the common vocational training policy:

" ... it follows that the Council is entitled to adopt legal measures providing for Community action[42] in the sphere of vocational training and imposing corresponding obligations of cooperation on the Member States. Such an interpretation is in accordance with the wording of Article 128 and also ensures the effectiveness of that provision."[43]

The Court rejected the argument that, simply because decisions adopted under this Article were subject to less strict procedural requirements than those applicable under various other provisions of the Treaty which gave the power to implement a common policy or coordinate national policies, in that the Article imposed no obligation to consult the Parliament and required only a simple majority vote, the Article could not confer such wide-ranging powers on the Council. The Court stated that the powers of the Community institutions and the conditions of their exercise derived from the specific provisions of the Treaty, and the differences between those provisions were not always based on coherent criteria[44].

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[41] Para.6 of the judgment.

[42] Although the Court used the term 'Community action' in the judgment, it was not referring to the kind of 'Community action' which the Council claimed could not be based on Article 128. Instead the Court stated that the action provided for under the decision was "restricted to providing for Community information projects and promotional activity and to imposing on Member States obligations of cooperation" (Para.15). This would seem to fall under what the Council classed as 'coordination'. The Court did not elaborate on whether further 'Community action' was permissable under Article 128.

[43] Para.8 of the judgment.

[44] Para.10 of the judgment.

The Court also rejected the arguments relating to the financing of the action programme by stating that under the Treaty the conditions under which legislative powers and budgetary powers were exercised were not the same, and it was therefore not necessary to consider the latter when determining the extent of the legislative competence conferred by Article 128.

Furthermore, the Court did not accept the claim that it was always necessary to rely on Article 235 as an additional legal base when introducing measures, other than those which amounted to a laying down of the 'general principles', under Article 128. The Court made it quite clear that Article 128 alone could provide a sufficient legal basis for the decision in question, and stated in addition:

" ... it follows from the very wording of Article 235 that its use as the legal basis for a measure is justified only when no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question"[45].

It is clear that the Court disagreed with the arguments submitted by the United Kingdom; it remains uncertain, however, as to what the exact scope of Article 128 is. Can it provide a legal basis for measures which are no more extensive than the challenged action programme, or is a greater scope given? The Court did not find it necessary to decide which of the two interpretations presented by the Council and the Commission was to be preferred, and therefore it is only possible to speculate on what the extent of the action provided for under Article 128 is.

The only legal measures based on Article 128 which have been adopted so far have been sui generis decisions, and it may be that no further Community legal measures can be produced. However, the possibility that Article 128 confers the power to produce additional instruments, such as directives, should not be rejected out of hand. It was stated both by the Commission and, more importantly, by the Court, that it was not possible that the authors of the Treaty could set the Council a task, but have provided no means of achieving that task. It was partly on this basis that the Court held that the Article did confer the power on

[45] Para.5 of the judgment.

the Council to adopt the action programme. However, the adoption of action programmes are not likely to lead to the implementation of a 'common vocational training policy', although they can make a contribution towards this.

It is argued that the adoption of further binding legal instruments is required in order to implement the common policy. Without this capacity to bind Member States the object of achieving a common policy would be impossible, for Member States would be left free to adopt their own individual and different national policies. It can be argued that there is an implicit requirement that Article 128 confers on the Council the power to oblige the Member States to act in a certain way - the aims of the Article in question demands this. Moreover, this conclusion is also the logical result of the Court's argument presented in paragraph 6 of the judgment in Case 56/88 United Kingdom v Council.

To do full justice to this argument a more detailed analysis must be made of the doctrine of "implied powers". If one adopts a narrow formulation of this doctrine, and argues that the existence of a given power implies only the existence of additional power(s) which are reasonably necessary to carry out the former, it would be difficult to argue that Article 128 could provide a legal basis for the introduction of legislation, since the only power which is actually referred to in the Article relates to the laying down of general principles. However, if a broader construction is adopted, which focuses not on given powers, but on given objectives, and which argues that the existence of the powers which are reasonably necessary to achieve the objective are implied, then one may be able to claim that Article 128 can provide a legal basis.

The former narrower interpretation was adopted by the Court of Justice in Fédération Charbonniere de Belgique v High Authority[46]. Recently however, the Court has given favour to the wide formulation in Germany and others v. Commission[47]. This case involved an examination of the competences conferred on the Commission by Article 118 EEC. That Article assigns to the Commission the task of "promoting close cooperation between Member States in the social field" and states that it "shall act in close contact with Member States by

[46] Case 8 /55 [1956] ECR 245, and Opinion of Advocate General Lagrande at 280.

[47] Cases 281, 283-5, 287/85 [1987] 1 CMLR 11.

making studies, delivering opinions and arranging consultation". On the basis of this Article the Commission adopted Decision 85/381/EEC of 8 July 1985 obliging Member States to provide information and engage in consultation with regard to migration policies covering non-Member countries. This was challenged by a number of Member States on the grounds, inter alia, that Article 118 could not confer the power on the Commission to issue binding measures such as this.

The Court rejected the Member States' argument and stated quite clearly:

"where an Article of the EEC Treaty ... confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task."[48]

and held accordingly that Article 118 did confer on the Commission all the powers necessary to arrange the consultation - namely the prior communications and actual organisation of meetings.

Advocate General Mancini, in his Opinion, expanded on the reasoning behind this principle of implied powers in Community law - or 'effet utile'. He stated that Article 118 imposed a 'duty' on the Commission to 'promote' consultation, and continued:

"the mandatory nature of the promoting is reflected in the nature of the result which it is intended to achieve, in the sense that it makes the result to be achieved binding too. Having regard to the logical pattern of the aims of the Treaty and of the means by which the Treaty pursues those aims, it is in fact inconceivable that an institution should be under a duty to obtain the co-operation of the member-States and that the latter should have a right to counter its efforts with a blank refusal"[49].

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[48] Para.28 of the judgment.

[49] Para.14, p.38.

He went on to state that whilst Article 118 did not contain express mention of the legal means by which the task set was to be achieved, this lacuna could be filled by implying a legislating power. Indeed, this was "to some extent essential" given the lack of success achieved in bringing about consultation in this area by relying on non-binding measures in the past[50].

It should be noted, however, that the Court expressly stated that the power concerned here was merely procedural, and that the Commission, whilst able to oblige the Member States to engage in consultation, could not determine the results of that consultation.

The case of Germany and others v Commission, and the principle of 'effet utile', were relied upon by the Commission in support of its claim in Case 242/87 Commission v Council. This argument relating to implied powers found favour with Advocate General Mischo and the Court, which interpreted Article 128 accordingly. The Advocate General however stated that there were clear limits to the powers which could be attributed to the Article through this principle:

"The appeal to the need to give full effect to Article 128 (its 'effet utile') should not, however, result in the practical means of taking action for which it makes express provision being replaced or added to by other means of a different kind, even if the latter would enable the objectives pursued to be attained more easily and effectively"[51].

He interpreted this to mean that the objective of establishing a common vocational training policy was to be "attained by setting out the general principles as precisely as possible"[52]. He concluded that since Article 128 did not:

"permit the institutions of the Community to undertake themselves or to instigate and finance concrete measures with a view to implementing the common vocational training

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[50] Para.16, p.43.

[51] Para.30.

[52] Para.34.

policy 'on the ground', it [could] not serve as a justification for the expenditure which those actions entail on the budget".

The Court, however, remained silent as to the scope of the powers attributable through Article 128, other than to hold that this Article was capable of providing a legal basis for a decision such as this, and that recourse to Article 235 was not always necessary.

An examination of the doctrine of implied powers in Community law therefore leaves one uncertain as to the exact scope provided for action by Article 128. The argument can be made that in order to achieve the objective of establishing a common vocational training policy it is not only necessary that the 'general principles' which are adopted under the Article be capable of having a binding effect, but also that the Community is entitled to adopt additional instruments extending beyond sui generis decisions to cover directives and regulations. The diversity that exists amongst the vocational training systems within the Community at present clearly demonstrates that the 'general principles' and the limited number of sui generis decisions have not achieved the objective in question. On this basis it can be argued that, inspite of the fact that it has not been so used in the past, Article 128 is capable of providing a legal basis for such instruments.

It cannot be questioned that the achievement of the common vocational training policy is an important and necessary objective of the Community. It has an important contribution to make to the promotion of the free movement of workers, and, in some cases, is a requirement for the mutual recognition of diplomas which is referred to in Article 57. For these reasons it has been argued that the need for the harmonisation of vocational training policies within the Community is actually indisputable:

"Die Notwendigkeit zu einer Harmonisierung der Ausbildungsgänge ist aber unbestreitbar, da insbesondere die Freizügigkeit der Arbeitnehmer und die gegenseitige Anerkennung der Diplomie von einer aufeinander abgestimmten Ausbildung abhängt.

Darüber hinaus ist eine verbesserte Berufsausbildung voraussetzung für die langfristige Bekämpfung von Arbeitlosigkeit und Unterbeschäftigung"[53].

Decision 63/266 and a number of judgments of the Court have made it clear that the task of implementing the general principles, and implementing the common vocational training policy "falls on the Member States and the Community institutions, working in cooperation"[54]. It is therefore quite certain that vocational training is not an area which can fall solely within the competences of the Community and indeed, previous judgments of the Court have established this[55]. The principle of subsidiarity is therefore of relevance in determining the distribution of competences[56].

This does not necessarily exclude the use of directives to implement the common vocational training policy since directives can involve the acceptance of responsibilities by both the Member States and the Community institutions, and require that all parties cooperate in defining and achieving the desired ends.

One way of drafting a directive would be to determine a number of common aims in the area of vocational training and to produce a measure which would help the Member States achieve those aims by referring to effective practices which could be adopted.

In addition any measure produced under Article 128 must contribute to the implementation of a common vocational training policy - as such the measures must not only make a contribution to improving the economic integration of disabled people, but must be seen within the wider context of vocational training policies generally, and as a policy which is capable of being of benefit to industry and employers also.

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[53] Jansen, op.cit. Para.4, Article 128.
"But the need for a harmonisation of training courses is indisputable; in particular the free movement of workers and the mutual recognition of diplomas depends on this. Furthermore, an improved vocational training is a necessary precondition for the longterm struggle against unemployment and under employment". (My own translation).

[54] Case 56/88 United Kingdom v Council para.7.

[55] See, for example, Case 52/82 Forchieri v Belgium [1983] ECR 2323.

[56] For further comments on the subsidiarity principle see chapter five on the development of a European Community quota system.

It is recognised, however, that there are problems with claiming that Article 128 gives an implied power to produce binding Community instruments to implement a common vocational training policy. In Case 56/88 United Kingdom v Council the Court only held that a decision which was "restricted to providing for Community information projects and promotional activity and to imposing on Member States obligations of cooperation"[57] came within the scope of Article 128, and only recognised that the Article gave the power "to impose ... obligations of cooperation on the Member States"[58]. This, however, does not mean that Article 128 cannot be the basis for additional Community legal instruments. In Case 56/88 United Kingdom v Council the Court confined its judgment to the question at issue. It was not obliged to give any statement defining the exact scope of Article 128 - it was sufficient to declare that the challenged decision came within the scope of the Article. Furthermore, the fact that Article 128 was judged to be incapable of providing the sole legal basis for the ERASMUS decision is also not fatal to this argument. In Case 242/87 Commission v Council it was not held that Article 128, per se, could not provide a satisfactory legal basis; but instead Article 235 was judged necessary because the decision included elements which did not amount to vocational training, and for that reason could not be covered by Article 128.

Of more significance, perhaps, is the fact that the phrase in the original version of the general principles, which stated that the Commission could make "concrete proposals in the form of recommendations, directives or regulations" was dropped and replaced with the existing Fourth Principle which simply states that "the Commission may propose to the Council or to the Member States, under the Treaty, such appropriate measures as may appear to be necessary". Although the former, if adopted, would have strongly suggested that Article 128 did confer the power to adopt such Community legal instruments, the latter does not necessarily rule out this possibility. The United Kingdom's argument in Case 56/88 United Kingdom v Council, that the Council had, by amending the principle, indicated that Decision 63/266 could not form the basis for legal measures envisaged in Article 189 which

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[57] Para.15 of the judgment.

[58] Para.8 of the judgment.

would be appropriate for a specific action programme entailing substantial expenditure was not commented on by the Court. In fact it is quite clear that Decision 63/266 cannot confer powers on the Council to produce measures which were not vested in it pursuant to Article 128. The Council, in its submission, claimed that one could not draw the conclusion "from the legislative history of the Fourth Principle of Decision 63/266 that action programmes having financial implications may not be adopted in the forms of decisions sui generis". The Court was also of this opinion.

Of most importance, possibly, is Article 4 of the Treaty which states that each institution "shall act within the limits of the powers conferred upon it by this Treaty". There is no express power contained within Article 128 to produce Community legal instruments, and unless the implied power exists to produce such instruments the Council would be in breach of Article 4 if it attempted to do this. In that case Article 4 would render any directive void. However, if an implied power did exist to produce directives the Council would remain within the "limits of the power conferred upon it".

In short, one can say that it is unclear whether Article 128 is capable of providing the legal basis for the adoption of Community instruments referred to in Article 189, such as directives. Ultimately only a decision of the Court can determine the scope of the Article, and until then one can only speculate. However, it seems difficult to envisage how the aim of implementing a common vocational training policy could be achieved if Article 128 did not empower the Council to adopt some binding legal instruments. This has already been recognised in relation to decisions sui generis, and it may be that the Article also provides scope for introducing further Community legal instruments.

3.3 Further Comments on Article 128.

3.3.1 Simple Majority Voting - The Advantage of Article 128.

It has already been stated that measures adopted under Article 128 require only a simple majority vote in the Council. This is unusual in that such a vote generally only suffices for measures which relate to Council procedure (see, for example, Article 151(1) - now Article 5 of the Merger Treaty, and Articles 152-153). It is therefore possible for a number of Member States, including large Member States, to vote against a proposal in the

Council, and for it to nevertheless be passed. Indeed, this is what happened in the case of the Action Programme for the Vocational Training of Young People where, despite the objections of the United Kingdom, the Federal Republic of Germany, and Denmark, the proposal was adopted by a simple majority vote.

The fact that only a simple majority vote is required may mean that the differences in the interpretation between the Council and Commission of the scope of Article 128 are not as important as they first appear. In such cases one cannot view the Council as a single unit where, should one member refuse to accept a proposal, it will automatically fail, and where only one interpretation of the scope of Article 128 is held within the Council. Instead it is the difference between the Commission and some members of the Council which is important - and, if enough members of the Council share the opinion of the Commission in relation to any single proposal then, from the point of view of securing the adoption of that proposal, the different interpretations held by the remaining members will cease to be important (unless a challenge was brought before the Court by such a State).

A recent amendment to the Council's Rules of Procedure may also be of significance in this respect. The amendment, adopted by the Council on 20 July 1987, states that:

"The Council shall vote on the initiative of its President. The President shall, furthermore, be required to open voting proceedings on the invitation of a member of the Council or of the Commission, provided that a majority of the Council's members so decide"[59].

This means that as soon as the Commission feels that it has sufficient support within the Council for its measure, and for a vote, it can achieve the adoption of that measure.

The situation is very different in relation to Article 235. Under this article unanimous support in the Council is needed to adopt any proposal. It is for this reason that the Commission wishes to defend the possibilities for majority voting. It was therefore prepared

[59] Article 5(1) OJ No. L 291/27 1987.

to request the partial, or even total, annulment of the ERASMUS decision in Case 242/87 Commission v Council. Lenaerts commented (before the judgment):

"The gravity of this consequence (having to start the political decision making process once again) resulting from an annulment of the ERASMUS Decision is proof of the fact that the Commission is convinced of the high stakes in this matter. The defence of these stakes in the long run seems to be worth a political upheaval in the immediate future."[60]

If directives could be adopted solely on the basis of Article 128 it would increase the chances of a policy instrument on the vocational training of disabled people being produced in the future.

3.3.2 The Limitations contained within Article 128.

Article 128 does not give an unlimited scope to produce measures covering all aspects of vocational training. It is necessary to consider the significance of these limitations.

3.3.2.1 'General Principles'.

It could be argued that the term 'general principles' implies that only broad and vague outlines can be produced under Article 128. A number of factors, however, suggest that this is not necessarily true, and that it may be possible to formulate relatively detailed instructions on the basis of the Article.

As the Council commented in Case 56/88 United Kingdom v Council, one must consider all of the wording of Article 128. If it were only possible to produce vague statements under Article 128 it would be difficult, if not impossible, to achieve the desired aim of the implementation of 'a common vocational training policy' since Member States would be left without guidance, and this would naturally lead to the adoption of different policies and practices. To effectively achieve the end referred to in the Article requires not

[60] In De Witte (ed.) op.cit.,p.116, para.116.

only that binding measures be produced, but also that these measures should contain detailed instructions.

The judgment in Case 43/75 Defrenne v. Sabena (No.2) also shows that elsewhere in the Treaty the term 'principle' can signify the fundamental nature of the relevant provision, and that a 'principle' is capable of having direct effect. However, as noted earlier, it is by no means clear that the 'general principles' are also capable of operating in this way.

3.3.2.2 'A common vocational training policy'.

Article 128 is confined to the area of 'vocational training'. Any matter which does not come within this area is outside the scope of the Article. The Court of Justice has in fact given a very wide interpretation to the term 'vocational training'. In Case 293/83 Gravier v City of Liège[61] the Court stated that:

"any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and the level of the training of the pupils or students, and even if the training programme includes an element of general education".

This interpretation has been reinforced by a number of subsequent judgments . In Case 263/86 Belgium State v Humbel[62] the Court held that the various years of a study programme must be assessed within the framework of the programme as a whole, so that what may initially appear to be basic general education may in fact amount to vocational training, if it can be viewed as part of a wider programme which leads to a qualification for a profession, trade or employment, or provides the training and skills for such an occupation

[61] [1985]ECR 593.

[62] [1988] ECR 5365.

(paragraph 13 of judgment). In Blaizot[63] and Brown[64] the Court also confirmed that vocational training could be received at universities.

It is clear that the Court is prepared to give a wide interpretation to the term 'vocational training'. This may benefit disabled people since vocational training aimed at this group may also have to attempt to compensate for inadequate education. In many cases young disabled people lack simple literacy and numeracy skills, since their disability has prevented them from benefitting from a basic education; in addition they may also lack social skills. Vocational training therefore has not only to attempt to impart professional skills directly relevant to employment, but also to improve the disabled person's ability to live independently, as is the case in some training units in France for mentally disabled trainees[65]. With such a broad interpretation being given to the term 'vocational training' it may be that the Court, should the question ever come before it, would include training in these basic matters within its definition.

3.3.2.3 An Economic as well as a Social Dimension.

Although Article 128 is included in the chapter of the Treaty entitled 'Social Policy' it contains an economic element as is made clear from the last phrase of the Article. The common vocational training policy must be "capable of contributing to the harmonious development both of the national economies and of the common market". This concern is reflected in Decision 63/266. The national economies and the common market will clearly benefit from a general policy which aims to provide good quality training, and which is geared to the needs of the labour market. There are in addition sound economic reasons for promoting the vocational training of disabled people.

It makes economic sense to encourage and help as many disabled people as possible to become financially independent through employment. This reduces the financial burden imposed on the state, and allows resources to be used for other purposes. Employment, in

[63] Case 24/86 [1989] 1 CMLR 57.

[64] Case 197/86 [1988] 3 CMLR 403.

[65] See New Semi-Sheltered forms of employment for disabled persons, op.cit., p.128.

some cases, may also have a therapeutic or rehabilitative effect in itself, and so reduce the extent of the disability. Lennox and Cobb, for example, claim that tasks which stimulate the mind and body are an important antagonist of seizures in people who suffer from epilepsy[66]. Employment could therefore help to reduce the disabling effect of this, and possibly other conditions. This possible reduction in the consequences of disability is also of economic significance for it means that less money needs to be spent, for example, on medical care.

3.4 Article 128 and the Helios Decision.

It was initially proposed that the Helios I action programme should consist of two Council decisions; one based on Article 128 and one based on Article 235. In fact the final action programme was one merged decision, covering both economic and social integration, and based on both Articles. By referring to the original proposal based only on Article 128, however, one can gain an idea about the Commission's view in 1987 of the scope of the Article in question and the potential which it gives to implement measures in favour of disabled people.

The proposal is notable for the wide ranging role which it assigns to the Community institutions, the significant amount of expenditure envisaged under the programme, and its ambitious objectives.

One objective referred to in the proposal was that of establishing and developing "a common Community approach to the problem of vocational rehabilitation and economic integration"[67]. This was to be done by "the preparation of policy guidelines" which would concern "practical issues" and be "based on the best experience in Member States"[68]. The development of a common Community approach is an ambitious aim and, unlike the earlier

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[66] Lennox W.G. and Cobb S., "Employment of Epileptics", Industrial Medicine and Surgery, Volume 2, December 1942, pp.571-575, cited in Kettle, Melvyn, Disabled People and their Employment, A Review of Research into the Performance of Disabled People at Work, Association of Disabled Professionals, 1979, p.22.

[67] Helios action programme, Article 3(a).

[68] Ibid.

resolutions, some practical means of achieving it, in the form of the policy guidelines, were referred to.

The proposal also allowed for the coordination and implementation at Community level of activities[69]. Reference was also made to the need to pay special attention to particular aspects of vocational training, such as the use of new technologies, the needs of particular groups such as disabled women, and to coordinate the action programme with various other initiatives, such as the Community programmes aimed at promoting the integration of disabled children and young people in the ordinary education system and the Community programmes on equality of opportunity for women.

It was envisaged that the implementation of this five year programme would involve considerable expenditure, and close cooperation with the action programme on social integration and independent living (i.e. that part of the action programme which was to have been based on Article 235).

When the two proposals were merged under Articles 128 and 235 their substantive content was in no way altered, and the Helios I action programme, in relation to economic and vocational integration, was based on the scheme outlined above.

The proposal is interesting in that it shows that the Commission now views Article 128 as giving a very wide scope for action. This is confirmed by the arguments presented by the Commission in Case 242/87 Commission v Council and Case 56/88 United Kingdom v Council. It can be argued that Article 128 does not in fact confer such wide powers, and that the Council could not, in any case, have adopted the proposal as it stood. This is because it went beyond the laying down of 'general principles' and contained "far-reaching and specific principles"[70] in that it covered the whole area of economic integration. The proposal undoubtedly outlined more ambitious plans, and envisaged a far greater Community involvement than the earlier resolutions relating to young people and vocational training generally.

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[69] Ibid., Article 3(b).
These activities amounted to the network of rehabilitation centres and the local model activities.

[70] The House of Lords Select Committee on the European Communities, Session 1987-1988, 13th Report, p.5, para.3.42.

The Commission, naturally, did not believe that the proposal exceeded the powers conferred on the Council by Article 128. Bernhard Wehrens, head of the Commission's Division Actions in Favour of Disabled Persons, argued that the Article and Decision 63/266 did provide a sufficient legal basis, since the proposal was "a precision and completion of the general rules of the general decision"[71].

The question of whether Article 128 could provide a sufficient legal basis for the proposal, however, was never answered since, once the two proposals were merged Article 235 covered by default all the areas not encompassed by Article 128. The proposal is nevertheless important, not because it establishes the scope for action given by Article 128, but because it shows how the Commission is prepared to interpret that scope.

4. The possibility of relying on Article 235.

Even if Article 128 is incapable of providing a legal basis for Community legal measures as defined in Article 189, or if it can only provide limited scope for their introduction, it does not necessarily mean that directives (or regulations) cannot be produced under the present Treaty in the area of vocational training for disabled people.

In the ERASMUS decision Article 235 was used as the joint legal basis for a measure which unquestionably contained areas relating to education and vocational training. It was not argued that this Article was incapable of providing a legal basis in this area, and it has now clearly been established that it can provide a basis for such Community legal instruments. This Article is obviously not confined to introducing decisions sui generis. Article 235, however, can only be used when no other measure provides the "necessary powers" to achieve "one of the objectives" of the Community[72]. Therefore, if Article 128 does provide the necessary implied power it is not necessary or possible to rely on Article 235 in addition. The judgment in Case 56/88 United Kingdom v Council, however, has

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[71] The House of Lords Select Committee, Evidence of Witnesses, op.cit., p.115.

[72] This point was stressed by the Court in Case 45/86 Commission v Council, [1987] ECR 1493.

established that Article 235 is not needed as a legal basis for all binding decisions involving Article 128, as some commentators have suggested in the past[73].

A limit on the use of Article 235 is imposed in that it can only be relied upon to support measures "necessary to attain, in the course of the operation of the common market, one of the objectives of the Community". De Witte claims that the substantive limits to using Article 235 are to be found in the words 'common market' "in the sense that new Community actions must at the same time have a transnational dimension and an economic flavour"[74]. In the case of a common vocational training policy, at least, there should be no question that these two requirements are met.

5. The "Maastricht" Agreements.

The discussion as to the possible legal basis for a directive to improve the quality and quantity of vocational training offered to disabled people has so far revolved primarily around Article 128. In a sense detailed arguments relating to this Article offered are academic, since at the point that serious consideration is given to the adoption of such a directive the Treaty of Rome will have almost certainly been amended and Article 128 will have been replaced. The "Maastricht" Agreements propose that the existing Article 128 be substituted with two new articles covering education and vocational training. These will extend the scope for action by the Community.

Of most interest is the new Article 127 which states:

"1. The Community shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organization of vocational training.

2. Community action shall aim to:

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[73] See, for example P.J.G. Kapteyn and P. Verloren van Themaat, Introduction to the law of the European Communities - after the coming into force of the Single European Act, Second Edition, Kluwer, 1989, p.636.

[74] De Witte (ed.), op.cit., p.17.

-facilitate adaptation to industrial changes, in particular through vocational training and retraining;

-improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market;

-facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people;

-stimulate cooperation on training between educational or training establishments and firms;

-develop exchanges of information and experience on issues common to the training systems of the Member States.

...4. The Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall adopt measures to contribute to the achievement of the objectives referred to in this Article, excluding any harmonization of the laws and regulations of the Member States."

The second area referred to under Paragraph 2, namely vocational integration and reintegration, seems to be particularly relevant to the problem in hand. It is submitted that the Article covers an area broad enough to encompass the measures referred to in the second part of this chapter. Should the "Maastricht" Agreements be ratified, Article 127 will be a suitable legal basis for a directive in this field. Paragraph 4 of the Article specifies that the Council may "adopt measures" in accordance with the procedure referred to in Article 189c. The latter Article calls for consultation with the Parliament and lays down certain other procedural requirements. Since no restriction as to the kind of measures which may be adopted is made under either Article 127 or 189c it seems as if the full spectrum of Community instruments, including directives, may be relied upon as long as the appropriate procedure is followed.

Article 189c requires a qualified majority in the Council for a directive to be adopted - this is a stricter requirement than the existing Article 128, but the new Article has the advantage of providing a clear competence to introduce directives. This competence is however limited to the introduction of measures which "support and supplement the action

of the Member States", and does not extend to instruments which go beyond this and infringe on the "responsibility of Member States for the content and organization of vocational training". This distinction will be vital, and the ambiguous terminology makes it difficult to determine the exact scope for Community intervention, and the division of competences will be determined by the subsidiarity principle.

Conclusion.

Although the provision of adequate vocational training has a vital part to play in encouraging the economic integration of disabled people, many deficiencies exist in the provision of such training within the Member States at present. Not only is a directive required in order to promote the necessary improvements, it would also be an essential element of a global Community policy on the vocational integration of people with disabilities. Such a directive should be based on the anti-discrimination principle, and have the general objective of improving the quantity and quality of vocational training available to disabled people. A vital component would be the promotion of training in an integrated setting, and this chapter has outlined some areas for possible inclusion within the directive in that respect. The directive would need to be flexible and provide wide scope for different forms of implementation. This reflects the diverse nature of the organisation and structure of vocational training within the Member States. Article 128 seems the most likely legal basis for such a directive within the existing Treaty. It was argued that this Article may contain an implied power to produce legislation in order to achieve the stated aim of a 'common vocational training policy'. This power has already been recognised in respect of sui generis decisions, and the Court's judgment in Case 56/88 United Kingdom v Council suggests that additional powers may also exist. Furthermore, once the "Maastricht" Agreements are ratified, the new Article 127 will provide a much firmer basis for such a directive, which may be adopted by qualified majority voting.

DRAFT DIRECTIVE TO IMPROVE THE MOBILITY AND SAFE TRANSPORT TO WORK OF WORKERS WITH A REDUCED MOBILITY.

The final chapter of this thesis shall examine the one area of substantive policy related to the economic integration of disabled people which has been the subject of a legislative proposal by the Commission: the transport to work of workers with reduced mobility. As such it shall take a slightly different form from the previous chapters, which have been concerned with the possibility of introducing directives in as yet unregulated fields. The present chapter shall begin with an examination of the general need to introduce policy and, more specifically, the necessity of Community intervention in this area. Consideration shall then be given to the content of the draft directive, its difficult history, and the proposed use of Article 118A as a legal basis. In the light of these comments, the proposal will be critically examined to establish its strengths and weaknesses, and possible alternatives will be considered. In addition Commission initiatives in this area which are planned for the future will be discussed.

The importance of a suitable environment and infrastructure in creating a climate which favours the employment of people with disabilities has long been recognised by the Community institutions. As early as 1981, following on from work carried out by the European Parliament and the Economic and Social Committee in that year, the Council Resolution and Commission "framework" which established the first Community Action Programme on the Social Integration of Handicapped People[1] mentioned the housing, mobility and access requirements of disabled people. It was eventually decided to focus on the physical environment, and specifically transport, so that a "guideline" in this area became the second piece of substantive policy produced by the Commission[2]. This "guideline", reflecting the lessons learnt from the relatively unsuccessful Recommendation on employment[3], has taken the form of a draft directive.

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[1] OJ No. C 347/1 31/12/81.

[2] The first being the Recommendation on employment of disabled people. The draft directive is however the first policy proposal which takes the form of "Community legislation".

[3] Council Recommendation and Guideline on the Employment of Disabled People in the European Community. Council Recommendation of 24 July 1986. OJ No. L 225/43 12/8/86.

The preparation period for this proposal on transport has been lengthy, with the Division Action in Favour of Disabled People commissioning a series of well-researched reports in the 1980s. The draft directive however fails to incorporate many of the proposals included within these reports, not least of all because of restrictions imposed through the use of Article 118A as a legal basis. As a result the proposal's focus is limited and it contains a number of serious weaknesses. The chapter shall conclude with an examination of the effect that a restrictive legal basis has had on this policy proposal and a discussion of further action planned by the Commission which may have a broader impact.

1. The Importance of Transport in Promoting the Economic Integration of People with Disabilities.

Neither the social nor economic integration of people with disabilities can be achieved unless the individuals concerned are enabled to move freely in their own neighbourhood and further afield. Without this freedom disabled people will be confined to their homes or dependent on others for their transport needs, and their opportunities for social and economic integration will be seriously curtailed. Work, other than that carried out exclusively at home, will be rendered impossible; mobility is therefore a basic prerequisite for integration, and measures to enable disabled people to travel freely to and from the workplace are a vital element of any policy to promote economic integration.

Logic suggests that in general a private car driven by the disabled person will be the most suitable means of meeting mobility-related needs. A car provides a flexibility and personalised service which cannot be rivalled by other means of transport. However, either because of the consequences of a physical or mental impairment, or financial restraints, this is not a feasible solution for many disabled individuals. Whilst some Member States provide grants or interest free loans to enable eligible disabled people to purchase or adapt cars, this does not meet the needs of all concerned. Furthermore, parking restrictions and restrictions related to granting of driving licenses can also limit the use made of private transport by

people with disabilities. Many disabled people are therefore dependent on public transport and/or transport provided by friends, family and charitable organisations.

The present situation with regard to public and specialised transport for those with mobility related disabilities within the Member States of the European Community is far from satisfactory. Many people with different forms of disability experience problems in using the existing public transport systems - it is not only those who have locomotor disabilities who face barriers when attempting to use public transport, but also people with visual and hearing disabilities, and those with mental impairments, all of whom, for differing reasons, have difficulty in assimilating the relevant information and utilising the services provided. In addition those who are allergic to certain materials can also experience problems in using public transport.

As a result of the inaccessibility of many forms of public transport numerous disabled people find themselves unable to utilise the standard services, and are dependent on the specialised "door-to-door" transport systems which are provided in many parts of the Community. These services can, however, never provide the flexibility of the standard public transport system. Rides must usually be booked at least 24 hours in advance and the services often stop early in the evening. Many services are only able to provide a set number of rides, or rides for specific purposes, to their clients. These services are rarely provided by the public transport authorities who see this as outside of their realm of responsibility. Instead welfare or charitable organisations are the providers, thus emphasising the difference between disabled and non-disabled travellers.

Whilst "door-to-door" transport may always be necessary for a minority of severely disabled people it is probable that at present, given the inaccessible state of most forms of standard public transport, the specialised services are being used by many disabled people who could use the general public transport system if adaptations were made. The existing organisation of public transport is therefore discriminatory, and forces many disabled people to rely on a second-rate service which should be reserved (and improved) for only the most severely disabled travellers for whom no other option is feasible.

Enabling disabled people to travel freely clearly cannot be the end of the matter, for there will be no point in providing an accessible transport system if disabled people are

unable to move around their environment before and after travelling. A policy to promote mobility must therefore include, at the very least, measures to ensure that areas used by the public during a journey are also accessible. These include not only the points of departure and arrival (e.g. bus stops, train stations) but also pavements, public telephone boxes and toilets and car parks.

Having demonstrated the importance of mobility and transport in promoting the economic integration of people with disabilities, and how the present organisation of private transport, the inaccessibility of the public transport networks, and the problems associated with specialised transport act as a barrier to integration, consideration shall be given to the question of Community intervention in this field.

1.1 The Need for European Community Intervention to Promote the Mobility of Disabled People.

In a number of Member States a general recognition of the problems referred to above is gradually occurring, and some attempts are being made to create more accessible public transport systems. These efforts are however presently carried out on a haphazard and localised basis with no attempt being made to coordinate the provision of services or to standardise facilities, symbols, concessions or procedures throughout the Community. If this tendency continues it will become a barrier to the free movement of disabled people within the Community who will find public transport networks in neighbouring Member States (and even within States) to be incompatible with each other. This must be regarded as unsatisfactory in a period when disabled people are increasingly needing to travel within the Community for both economic and recreational purposes, and Community intervention is required in order to ensure that this does not occur.

Rendering public transport systems accessible will clearly be costly, although the exact extent of the costs will depend on the degree of accessibility to be achieved and the time period over which an accessible system is introduced. Many adaptations, such as the provision of information in braille, announcing stops, clearly marking steps and obstructions, reserving seats etc. can be made relatively cheaply. Other adaptations, involving the lowering of steps and broadening of entrances involve greater expenditure, whilst the

installation of lifts and specialised toilets, which are often required by those who use wheelchairs, will involve the most expense. If Member States are left to regulate the financing of the adaptation of public transport to the needs of travellers with a disability there is a possibility that service providers established in the different States will find themselves obliged to meet vastly different costs. Whilst one Member State may require that a high level of accessibility be achieved and that the transport provider cover all the expenses, another Member State may provide subsidies or tax relief to carry out similar required adaptations, whilst yet another Member State may set no requirement regarding accessibility at all. This clearly has the potential to lead to a distortion of competition which could require Community intervention[4].

Although it is unlikely that the revenue generated by the increased use of public transport systems by disabled people will be sufficient to cover the expenditure made on modifications (other than the most basic), one must in addition consider a number of related financial and non-financial benefits. An accessible public transport system will lead to savings through a reduction in the need for residential care, improvements in the physical and mental health of disabled people so reducing demands on health and social services, the provision to disabled people of greater opportunities to take up employment, a reduction in the need for costly specialised transport services and in the demand for other non-transport services (e.g. medical treatment at home). At the non-pecuniary level an accessible public transport system can help foster independence and improve the quality of life of disabled people.

Furthermore, adaptations would not only benefit those with the more severe forms of disabilities mentioned in the preceding section, but also those who, whilst presently able to use the existing services, experience difficulty and discomfort doing so. Many people included in the latter group are elderly and, with the ageing population, it is important for public transportation providers to court this client group. In addition those who experience temporary restrictions related to mobility, such as pregnant women, adults travelling with

[4] The threat to competition will obviously be more relevant to providers of transnational transport, such as airlines and rail providers, than to providers of local transport over a short distance.

small children, and people with certain injuries, would also benefit from accessible public transport.

The achievement of these objectives can be regarded as contributing to the promotion of "a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it" as defined in Article 2 of the Treaty of Rome.

Lastly one must consider that an inaccessible public transport system can pose a risk to the health and safety of disabled travellers. Disabled people who find it absolutely necessary to travel - for example, to work or receive medical treatment - and who do not have access to other means of transport may be forced to fall back on public transport. This can result in physical injuries where, for example, wheelchairs cannot be adequately secured in moving vehicles, or stress and anxiety-related problems caused by concerns about the difficulty of using public transport.

There are therefore a number of reasons why Community intervention in the area of mobility and transport can be justified. The following sections shall examine the directive proposed by the Commission to see how far it meets the needs identified.

2. The Proposal for a Council Directive on Minimum Requirements to Improve the Mobility and Safe Transport to Work of Workers with Reduced Mobility[5].

2.1 History.

Not surprisingly it was the European Parliament, in 1981, which was the first EC institution to call for greater attention to be paid to the mobility needs of people with disabilities. A Resolution passed in March of that year[6] called on local authorities "to review existing programmes and assistance to ensure that they match the priorities in transport for disabled people" and to ensure "access to and use of public transport and the

[5] Commission of the European Communities COM (90) 588 final, 28 February 1991 and Amended Proposal (92/C 15/15) COM (91) 539 final - SYN 327 OJ No. C 15/18 21/1/92.

[6] The Resolution of the European Parliament of 11 March 1981, OJ No. C 77/27 of 6/4/81 on the economic, social and vocational integration of disabled people.

entire urban infrastructure". The Parliament also urged the Commission to intervene by producing "proposals" in this area.

The topic of transport was also addressed shortly thereafter by the Economic and Social Committee in an opinion on the situation and problems of the handicapped delivered in July 1981[7]. The Committee favoured Community intervention to ensure that "minimum standards of accessibility for disabled people ... be required at all major airports and railway stations", and argued furthermore that Article 3(c) of the Treaty of Rome[8] and Article 3(e)[9] "required the Commission to take a more active role in facilitating the free movement of disabled people throughout the Community".

These arguments were heeded to a limited degree in the first action programme to promote the social integration of disabled people[10] in which the Commission stated that "transport, housing (and the) physical environment" were among the areas to be covered by the networks of local activities. In adopting the action programme the Council and Representatives of the Government of the Member States also invited Member States to "develop and implement measures in the housing and mobility of handicapped people and improved access to public buildings, transport and other facilities, so as to promote the fullest possible integration and participation of handicapped people".

Shortly afterwards the Division Action in Favour of Disabled People began to commission a series of reports which were to lay the groundwork for the proposal which was ultimately produced. An initial report, produced in 1982, provided a thorough review of door-to-door transport schemes within the European Community, Sweden and the United States[11], whilst a second report addressed the use of private cars, pedestrian facilities and

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[7] OJ No. C 230/38 of 10/5/81.

[8] "the abolition, as between Member States, of obstacles to freedom of movement for persons...".

[9] "the adoption of a common policy in the sphere of transport".

[10] OJ No. C 347/1 31/12/81

[11] Transport for the Disabled. Door-to-Door Transport Systems. Investigation of the relevant schemes in Member States of the EEC, Sweden and the United States. ERICA Research Ltd., November 1982. V/706/83 - EN.

public transport by people with disabilities[12]. At about the same time two reports on the information needs regarding the mobility of disabled persons[13] and the accessibility of public buildings[14] were produced. This series concluded with what is perhaps the most relevant report for the purposes of this chapter - concerning appropriate European Community initiatives to promote "mobility and accessibility" for disabled people[15]. This summarised the results of previous research, including that which had been carried out under the auspices of other European and international institutions, and attempted to draw some implications for future Community action.

In the meantime the European Parliament had produced a second report and resolution which reaffirmed the right of disabled and elderly people to mobility, and the responsibility of public authorities to meet this need[16].

In addition the Community Charter of Fundamental and Social Rights of Workers, which was ratified by eleven of the twelve Member States in December 1989, stated that all disabled people must be entitled to additional measures to improve their social and professional integration. It was specifically stated that these measures were to concern, amongst others, mobility and means of transport[17]. The Action Programme[18] in which the Commission set out its plans for implementing the Charter also included a commitment to

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[12] Everyday Mobility for Disabled People. Private Cars, pedestrian facilities, adaptations of existing public service vehicles. D. Yelding, ERICA Research Ltd., February 1985. V/1098/86.

[13] Study to Assess the Information Needed Regarding Mobility of Disabled Persons, Dr. Hans Aengenendt, October 1987. V/132/88 - EN.

[14] Accessibility of Public Buildings for the Disabled, Johan Galjaard, October 1986. V/1958/86 - EN.

[15] Moving to Independence - A report concerning Appropriate European Community Initiatives to Promote Mobility and Accessibility for Disabled People. ERICA Research Ltd., January 1989. V/1320/89 -EN.

[16] Report and Resolution on Transport for handicapped and elderly persons drawn up by the Parliamentary Committee on Transport and adopted by the assembly on 2 July 1987. OJ No. C 281/85 of 16/9/83.

[17] Para. 26.

[18] Communication from the Commission concerning its action programme relating to the implementation of the Community Charter of Basic Social Rights for Workers. COM (89)568 final.

produce a draft directive to improve the travel conditions of workers with motor disabilities. It was stated that it "would be necessary to draw up common objectives and harmonized standards in order to ensure that workers with motor disabilities can move in complete safety."[19]

The Community, though, has not been the only international organisation to express concern at the mobility problems of disabled people, and recommendations and resolutions produced by other bodies also provided valuable assistance in drafting the EC proposal. In 1975 the Committee of Ministers of the Council of Europe adopted a Resolution on "ways of facilitating access to and use of public transport by disabled people". In addition a recommendation on transport for disabled people was included in the Council's rehabilitation programme produced in 1984[20].

The European Conference of Ministers of Transport has also done extensive work in this field, and the resolution which it produced[21] is included in the draft directive.

The Commission was therefore provided with ample and well-researched material to draw upon when formulating its proposal. Before discussing the actual content of the draft which was finally produced, brief consideration shall be given to one of the aforementioned documents: the final report in the series produced for the Commission which attempted to draw some conclusions from the previous research for future Community action.

2.1.1 "Moving to Independence" - A Report concerning Appropriate Community Initiatives to Promote Mobility and Accessibility for Disabled People.

This report was written by Patrick Daunt, the former head of the Division Action in Favour of Disabled People (see chapter three). It therefore had the advantage of being prepared by someone who was not only aware of the mobility problems disabled people face, but who was also familiar with the politics and legal structure of the Community

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[19] Ibid, para. 13.

[20] Model rehabilitation programme for national authorities - A coherent policy for the rehabilitation of disabled people, Second edition, Strasbourg, 1984.

[21] Resolution on Access to Buses, Trains and Coaches. CEMT/CM (90)21 final.

institutions. The report considered the scope of the term "mobility and transport" and found that it covered four areas:

a) Public Transport (including concessions, accessibility of vehicles and infrastructure);

b) Special Services (door-to-door transport systems etc.);

c) Private Vehicles;

d) Movement in the street (pedestrians, wheelchair users).

Excluded was movement within buildings other than those designed for the use of travellers. This classification was supported by the Commission which, for practical reasons, wished to exclude the above mentioned area.

The report also specified the aim behind Community intervention: "to make safe and accessible to the mobility-handicapped both the open environment and all forms of transport, in order to make possible the social and economic integration of disabled people, and to foster the success of active community care policies for them ..."[22].

There were therefore to be two immediate objectives with regard to the open environment and (all forms of) transport: rendering them safe, and making them accessible; with the long term objective of contributing to both the social and economic integration of disabled people. The Community's proposal has in fact much more limited objectives, as will shortly be seen.

Warnings were given as to the pitfalls which had to be avoided if these objectives were to be achieved. Firstly, the instrument had to be able to oblige Member States to act. Otherwise it would be what the report termed "teeth without jaws". For this reason the adoption of a directive, based on either Article 48, Articles 8A and 8B or Article 118A, or a mixture of these Articles was recommended[23].

Secondly the report cautioned against producing a constraining instrument which was so vague and broad that it would not result in the achievement of precise objectives and standards. It termed this "jaws without teeth".

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[22] page 14.

[23] page 16, para. 36.

Instead it stated that the proposal should articulate "common objectives and standards which are neither impossibly demanding for the less well-resourced countries nor devoid of challenge for the more advanced countries"[24]. It recommended that the best way to achieve the set objectives was to produce a framework directive on mobility of disabled people, and establish a list of principal objectives expressed in terms of the satisfaction of need. This would be followed by a series of more precise instruments, including a European Community Code of Good Practice, a proposal for an EC Travel Card for disabled people, proposals for the mutual recognition of parking rights and badges, and for the elimination of discrepancies in the recognition of licenses and adapted cars. A third and final stage would involve the adoption of regulations setting precise objectives and standards. This programme of activity would naturally be complimented by further research and reports on the progress made by Member States.

The Report included a draft of the proposed Code of Good Practice. This emphasised the right of all disabled people to public transport, whilst recognising that, in the short term at least, the adaption of systems to make them accessible to the most severely disabled people was extremely difficult and that specialised systems would have to continue for some time. The draft Code also included concrete measures to be carried out to ensure that all kinds of public transport are accessible to people with specific kinds of disabilities, and covered the harmonisation of the granting of concessions to disabled travellers. In addition the question of specialised "door-to-door" transport for disabled people was addressed. It emphasised that such transport should be an extension of the standard public transport system which would continue to be needed by more severely disabled travellers. In addition private transport was also not neglected, and detailed proposals were produced for the adoption of an EC Travel Card for disabled people.

Having considered the preparatory work carried out with regard to the draft directive on mobility and transport, attention shall now be turned to the Commission's proposal.

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[24] page 15, para. 35.

2.2 The Draft Directive.

Three limitations are immediately obvious when comparing the objectives of the draft directive with those set out in "Moving to Independence" and the other reports produced for the Commission. Firstly the draft directive is directed specifically at workers with a reduced mobility. Previous Community documents consistently referred to the need to promote the mobility and accessibility of all disabled people with restricted mobility, and this limitation was imposed for the first time in the draft directive.

Secondly the draft directive is concerned exclusively with transport to and from work[25]. The argument that all disabled people need to be able to travel freely for all purposes if both economic and social integration are to be achieved is not addressed, and the instrument concentrates on measures to achieve only a restricted form of economic integration.

Finally, the draft directive is only aimed at achieving the "safe transport" of disabled people on the above mentioned journeys. Arguments related to the need to harmonise adaptations so creating a compatible and accessible public transport system throughout the Community are also not referred to in the proposal.

A closer examination reveals a number of other glaring exclusions. These shall however be commented upon once a more detailed consideration of the content of the proposal has been made.

The draft directive relies on Article 118A for its legal basis, and it is quite clear that the proposal is concerned with the restrictive area of health and safety of workers. The explanatory memorandum accompanying the draft directive specifies that the proposal is to compliment existing initiatives adopted under the Framework Directive on the introduction of measures to encourage improvements in the safety and health of workers at work[26] and states that unsuitable transport poses a risk to workers with a reduced mobility which is

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[25] The Commission is of the opinion that this also covers longer trips made for business purposes within the Community. The opinions attributed to the Commission here and elsewhere are based on an interview with A. Becker of the Division Actions in Favour of Disabled People carried out in June 1993. This interview also provided the information referred to in section four of this chapter.

[26] (89/39/EEC) OJ No. L 183, 29/6/1989, p.1.

particular to them because of the nature of their handicap. It is further emphasised, both in this memorandum and in the preamble to the draft directive, that, as befits a directive, as much choice as possible is to be left to Member States in deciding how to achieve the specified objectives, and a large degree of flexibility is allowed for. This also illustrates that the aim of the present proposal is not to achieve a harmonisation of the provision of transport to disabled people, or even disabled workers.

The actual draft directive is divided into two parts. The first part, containing nine articles, sets the general objectives and lays down a timetable for implementation, whilst the second section consists of an annex setting out in more detail the minimum requirements to be achieved.

Article one specifies the purpose of the directive, which is defined as facilitating "the safe transport of workers with reduced mobility to and from their place of work"[27].

An earlier version of the directive[28] had defined the objective in terms of "access to employment" generally, which potentially covers a broader area than the final version as it could be taken to apply to unemployed workers seeking employment. The final version however seems to make such an interpretation more difficult. It is nevertheless an improvement on the February 1991 proposal which defined the objective in terms of assisting disabled people to gain "access to the place of employment".

Article 2 defines two of the key terms used in the draft directive. Firstly a "worker with reduced mobility" is defined as "any worker who has special difficulty in using public transport for his occupational activities owing to a serious handicap of a physical or mental origin"[29]. The explanatory memorandum attached to the draft elaborates that the article covers "every worker with reduced mobility whatever his handicap". In fact the reference

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[27] Amended proposal for a Council Directive on minimum requirements to improve the mobility and the safe transport to work of workers with reduced mobility (92/C 15/14) COM (91)539 final - SYN 327. OJ No. C 15/18 21/1/92.

[28] Proposal for a Council Directive on minimum requirements to improve the mobility and safe transport to work of workers with reduced mobility. Presented by Mrs. Papandreou with the agreement of Mr. Van Miert. Revised Version III. OJ 1039 - point 13 -12/12/1990.

[29] Article 2a.

to "difficulty in using public transport" in the article seems to impose a restriction, so that presumably if it could be shown that a worker with reduced mobility had no difficulty in using public transport (but did have difficulty in using private transport) s/he would not be covered. The Commission is clearly assuming that every worker with reduced mobility does experience problems using public transport, and this may indeed be the case, or alternatively, that such workers do not need any special measures to be taken in their favour; nevertheless the restriction seems to add little to the directive.

The explanatory memorandum also notes that, as a result of the draft directive's legal basis, its focus is exclusively on workers, and categories of people such as the unemployed, students, pensioners, school children and those working in sheltered employment are excluded. This contrasts with the Opinion of the Economic and Social Committee on the proposal[30], which argued that the draft directive was broad enough to cover not only those in active employment, but all those with a physical, mental or sensory handicap which makes work-related travel difficult. The Committee therefore argued that the term "workers with reduced mobility" did embrace those groups mentioned above, as well as workers on a minimum guaranteed income and self-employed persons with a reduced mobility. It is however difficult to reconcile this definition with both the wording of Article 2a and the competences conferred on the Commission by Article 118A. The Commission however believes that the benefits of the draft directive cannot be confined to disabled workers and that other disabled citizens will profit as the measures adopted to implement the directive have a "spill-over" effect. This will clearly result in the case where steps are taken to improve the accessibility of public transport, which is given priority in the preamble to the proposal, although the benefits will be less, or non-existent, where Member States concentrate on improving specialised transport or employer-provided transport. It is the Commission's belief however that Member States will have to improve public transport systems if the directive is to be implemented since the other two forms of transport will be inadequate to meet the needs of all affected workers. If this is the case then it is certain that

[30] Opinion of the Economic and Social Committee on the Proposal for a Council Directive on minimum requirements to improve the mobility and the safe transport to work of workers with reduced mobility COM(90) 588 final - SYN 327. 29 May 1991.

other disabled travellers will also benefit, and the worker-related restriction will indeed become less important. The fact nevertheless remains that the draft directive only requires that a very limited number of disabled people, travelling for one purpose only, have access to safe transport, and Member States will be perfectly justified in confining their efforts to this group. Therefore, although the research carried out for the Commission always assumed that a broad spectrum of the disabled population would be covered, it is uncertain if this will in fact result from the present proposal.

Secondly, the term "means of transport" is defined in Article 2b. This is stated to cover public transport, transport provided by the employer, and special transport services for disabled people. The explanatory memorandum notes that in view of the high cost of specialised transport and the principle of integration which underlies the Commission's policy on disabled people, priority should be given to the most severely disabled travellers on such services. The Economic and Social Committee wished to extend "public transport" to include air, water and underground means of transport, since it is not clear from the proposal that these are in fact covered[31]. This is indeed an area where the draft directive is ambiguous and if left unclarified it could potentially lead to legal challenges in the future.

Article 3 of the draft directive imposes obligations on Member States which are necessary to meet the objective set in Article 1. Member States are to take:

"a) the requisite measures to ensure that means of transport are provided and are accessible, allowing for the interchangeability of means of transport, or

b) all measures to facilitate the transport of workers with reduced mobility, on condition that these have an effect equivalent to the measures mentioned in a)."

The article also refers to the annex to the proposal, which sets out minimum requirements which must be met by the means of transport. The annex is relatively short, and does not stretch to the detail or precision of the text contained in "Moving to Independence". It is divided into four sections, covering access to transport, accessibility of

[31] The Commission believes that these forms of transport are covered.

means of transport, facilities which must be made available and signs. It is specified that a sufficient number and frequency of services, and appropriate transport schedules must be provided. It should be remembered of course that such services need only be provided to enable disabled workers to travel to work, and the annex does not refer to the frequency or quality of transport not used for such travel. Section two (accessibility) specifies that the entrance/exit to and from the vehicle should be provided in one of three possible ways: through a built-in technical device (such as lowered floors or lifting platform); by technical aids external to the vehicle (such as ramps at the bus stop or station); or through personal assistance. The Economic and Social Committee favoured the use of the first option which, although more expensive, promotes the independence of disabled workers. It also stated that all of these alternatives could be used within a single system. Section three (facilities to be made available) specifies that the interior of vehicles covered should provide a sufficient number of reserved seats in appropriate positions, suitable corridors, appropriate toilet and washing facilities and signs to give notice of stops. No specific details as to how these requirements might be met are given. Section four requires that harmonised signs which can be interpreted by workers with reduced mobility be provided. Again, no details as to how this be done are given. Once again it is obvious from the annex that the aim, with the exception of the measures related to signs, is not harmonisation of the provision of public transport to disabled workers. Member States may choose which of the three forms of transport specified in Article 2 are to be made safe for the transportation of the target group, or provide equivalent measures, and the explanatory memorandum emphasises that the proposal does not require that all means of public transport be made accessible - but only those used by the specified group for the specified journeys. It is clear that a Member State which only wishes to make the most modest adaptations to the provision of public transport for disabled people could do so and still comply with the directive. This could be done, for example, by ensuring that specialist transport is provided where necessary. The public transport system and infrastructure may remain relatively unaffected, and the minimum effect on the social and economic integration of disabled people would result. The proposal could, on the other hand, spur a Member State on to further initiatives to establish an

accessible and integrated public transport system, but, in its present form, it could not oblige this.

Article 4 specifies that Member States shall take measures to promote training schemes to help workers with reduced mobility travel in safety; to provide the requisite training for staff of public transport companies to enable them to assist workers with reduced mobility travel in safety; and to provide information and advice for affected workers and the public in respect of the needs of workers with reduced mobility. Initially such information and advice was only to be provided to workers with a mobility disability, and the extension may have been the result of the Economic and Social Committee's request that the Commission require Member States to implement campaigns to ensure that the general public are informed about the problems caused by reduced mobility and measures adopted by Member States to counter them.

Article 5 of the draft directive obliges Member States to ensure that disabled people who need to be accompanied by another person or some other form of assistance whilst travelling do not incur additional expenses as a result. The Economic and Social Committee argued that the article should go further, and specifically state that the accompanying person should travel free of charge. This is indeed the simplest way of meeting the requirements set out in the Article, and some transport providers already allow this[32]. Member States are however free to adopt more complicated systems under the draft directive - for example, requiring disabled people to claim back money spent on the accompanying passenger's ticket from a central authority - which could impose additional administrative burdens on disabled workers.

Article 6 sets out requirements relating to the reporting of progress made under the directive and Article 7 states that the draft directive contains only minimum safety standards, and Member States remain free to introduce more stringent requirements. This is a standard article included in directives based on Article 118A.

Article 8 sets out the timetable for implementation. A double deadline is specified. The objectives referred to in Article 3 (achievement of minimum requirements set out in

[32] For example, no charge is made on Deutsche Bundesbahn or on internal Lufthansa flights for a person accompanying a disabled traveller in need of assistance.

annex) and Article 4 (training and information) are to be achieved through law, regulation and administrative provisions by 31 December 1999[33], and those referred to in Article 5 by 31 December 1993[34]. In both cases the Member States were to have introduced the aforementioned provisions by 31 December 1992. Delays in the adoption of the proposal have rendered these deadlines largely irrelevant. It is however interesting that the explanatory memorandum notes that these deadlines seem reasonable given that public transport is normally renewed every ten years and there is a trend to take account of the needs of disabled travellers when ordering replacement vehicles. These figures do not really add up. Even if the directive had been adopted at the end of 1991, as originally intended, it would have allowed for a period of implementation of only 8 years, meaning that, on the Commission's figures, at least 20 per cent of vehicles would not in the normal course of events have been replaced. Secondly, the ten year replacement period can be questioned. Different forms of transport are replaced at different intervals - so that whilst the average working life of a bus in the Community may be ten years, that period will not apply to train rolling stock, trams or ferries which have longer working lives. Furthermore, even where ten years is the average working life, this period will be longer in some Member States such as the United Kingdom where buses which are frequently over 15 or even 20 years old are still being used by smaller operators. This is not to say that a longer period for implementation should be allowed, and indeed the Economic and Social Committee argued that the set periods were too lax, but that the Commission's justification for setting the deadlines cannot be sustained.

Having examined the draft directive in some detail, a brief review of its limitations in comparison with the objectives set out in the Commission's report shall be made. Having done that it shall be considered how far the choice of Article 118A as the legal basis required these limitations, and how they can be dealt with.

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[33] Article 8a.

[34] Article 8b.

2.3 A Review of the Limitations contained in the Draft Directive.

The three major limitations - that the directive is concerned only with workers, only with journeys to work, and only with guaranteeing safe transport - have already been stressed. The draft directive also makes no specific reference to private transport and only scant reference to the associated infrastructure, so leaving out vital areas which need to be tackled when promoting the transport of those with mobility disabilities. In addition, because of the focus on safety, the proposal leaves Member States free to choose between public transport, transport provided by the employer, and specialised transport. The directive[35] itself makes no reference to which means is to be preferred, although an accessible public transport system will clearly do much more to further the aim of integration than the second, and particularly the third option.

The reasons for these restrictions and limitations have much to do with the choice of Article 118A as a legal basis. For this reason this article shall now be examined and its use in this particular case discussed. Following this the Commission's proposals to overcome these limitations by the introduction of additional measures shall be discussed.

3. Article 118A.

Article 118A was added to the Treaty of Rome by the Single European Act[36]. It is one of the few articles contained in the present Treaty that unambiguously gives the Community the competence, on the basis of a qualified majority vote, to introduce directives in the social field. For this reason the Commission was determined to make the maximum use of the powers provided by the Article from an early stage. The second framework directive for example, within which the present proposal fits, was based on Article 118A as have been a number of other significant directives and proposals.

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[35] As opposed to the preamble where a preference for public transport is stated.

[36] Article 21.

Article 118A has however attracted controversy. The objective of the Article is defined as "encouraging improvements ... as regards the health and safety of workers" and this is to be carried out "especially in the working environment". It is this latter concept, which may be regarded as a restriction imposed on the use of the article, which has been the subject of debate. The European Parliament has argued in favour of a broad interpretation of the term:

"the concept of the 'working environment' referred to in article 118A is wider than that of the 'workplace'; the safety and health of workers covers the individual as a whole, i.e. his or her physical and mental state and the prevention of injury (industrial accidents, occupational diseases etc)"[37],

and continued:

"the word 'especially' which appears in the first paragraph of article 118A means that the measures provided for in the article must relate particularly, but not solely, to the working environment".

The Article specifies that the objective of Community intervention in the field of health and safety is to establish "minimum requirements for gradual implementation" which will help Member States achieve "harmonization of conditions in this area, while maintaining the improvements made". It is quite clear therefore that harmonisation is allowed for under Article 118A, albeit in an ambiguously defined and limited area.

The Parliament has subsequently reiterated its opinion that Article 118A should be interpreted broadly and allows for a wide scope of action[38]. This view is shared by the Economic and Social Committee[39], and the Commission now seems to be taking a similar

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[37] Salisch Report - Document A 2-0226/88 of 21 October 1988.

[38] Resolution adopted by the European Parliament OJ No. C 12/181 of 16 January 1989. European Parliament Resolution of 15 March 1989 on the social dimension of the internal market, Social Europe, 1/90, p.111-113. Second Salisch Report (Document A 3-0241/90 of 2 October 1990), p.33.

[39] Beretta Report on the Social Aspects of the Internal Market, 19 November 1987, p.2, Document CES 1069/87.

approach[40]. A more restrictive interpretation has however been adopted by certain members of the Council[41], and this is reflected in the lack of progress the draft directive has made before this body. The difficulties that are presently being experienced with regard to adopting the proposal are representative of the differences that exist amongst the Community institutions over the interpretation of Article 118A. The Parliament and the Economic and Social Committee, which must be consulted before any proposal based on Article 118A is adopted, have called for the extension and broad interpretation of the draft directive, whilst (certain members of) the Council regard it as too radical, and have thus far refused to pass it.

Having briefly examined the scope of Article 118A, the extent to which this Article is responsible for the limitations in the draft directive which were mentioned in the previous section will be considered. Following this, the significance for the interpretation of Article 118A of the proposal, should it be adopted in its present form, will be discussed. The question of further Community action will then be considered.

3.1 The Limitations contained in the Draft Directive and Article 118A.

A number of important restrictions within the draft directive are a clear result of the decision to base it on Article 118A. The Article dictated that the client group be limited to "workers" and that the target be securing the "health and safety" of these individuals, rather than some broader aim of economic and social integration. This is reflected in the fact that Member States are free to choose between the three means of transport when securing the safe transport to work of those with mobility disabilities.

A number of other limitations and exclusions are more difficult to explain by reference to Article 118A. Private transport was not referred to directly in the proposal, inspite of the importance which it is generally agreed is attached to this form of transport.

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[40] Members of the European Parliament, after meeting with representatives of the Commission in March 1992, believed that the Commission had adopted an interpretation broadly similar to their own and dropped their threat to bring an Article 175 complaint.

[41] The Legal Division of the Council has however approved of the use of Article 118A as a legal basis for the proposal.

This is not the result of any limitations contained in Article 118A. In fact the exclusion was a conscious decision of the Commission which wished to give priority to public transport as far as possible. Article 3b however, which refers to measures having an equivalent effect, does give Member States the option of improving the access and use of private transport by disabled workers as a means of implementing the directive. The legal basis also does not provide an explanation for the relative neglect of the infrastructure, which is only referred to in the annex.

Furthermore, whilst Article 118A clearly gives the competence to introduce harmonizing measures, which were argued to be necessary in order to ensure the compatibility of means of transport within the Community, no attempt was made to achieve this on a broad scale - although it is an area where an EC initiative would clearly be beneficial. The Commission's argument is that it wishes to give a certain degree of flexibility to Member States in this first directive and that it would be inappropriate to introduce harmonising measures at present. The intention in the long run however is to introduce such measures.

The decision to exclude both an EC Travel Card for Disabled People and a Code of Good Practice can also not be explained by reference to Article 118A, since these measures could have been directed at disabled workers. Whilst the Code of Good Practice seems to have been totally overlooked, there is the intention to introduce instruments concerning identity cards, including travel cards, in the future.

Whilst the most important restrictions contained in the draft directive - related to workers and health and safety - are a clear consequence of the choice of Article 118A as a legal basis, a number of other weaknesses and exclusions cannot be justified on this ground. However in certain cases the intention exists to correct the deficiencies in the future. Nevertheless, it cannot be said that in formulating the proposal the Commission adopted a restrictive interpretation of the scope of the Article. For this reason the significance for future Article 118A initiatives of the adoption of the draft directive in its present form will be briefly considered.

3.2 Implications of the Adoption of the Draft Directive for the Interpretation of Article 118A.

The adoption of a directive concerned with the transport to work of workers would be an expansion in the area where Community intervention on the basis of Article 118A has thus far occurred. It would demonstrate either that directives based on the Article need not be concerned exclusively with "the working environment" or that this term is to be given a very wide interpretation. As such it would contribute to the academic debate over the term "working environment", which has been addressed by both Bercusson[42] and Vogel-Polsky. These writers have suggested three possible definitions for the term:

1. That it is limited to the protection of work in the strictest sense.

2. That it includes working conditions which have or which could have an effect on the health and safety of workers, including the duration of working time, its organisation and its content.

3. That it covers the "working environment" in the widest sense, as well as accidents at work, industrial diseases and the protection of health at the workplace.

The present proposal, if adopted, would lean heavily in favour of the last definition. This no doubt partly explains the demands from the Parliament and Economic and Social Committee that the proposal cover a broader area, and the refusal of the Council to adopt the draft. The acceptance by the Council of the proposal in its present form may lead to an increase in the number of measures produced by the Commission on the basis of Article 118A and, more importantly, to those covering a broader area. The struggle between the Community institutions over the present proposal therefore probably reflects far more than differing opinions as to how the safe transport to work of disabled workers is to be achieved.

The topic of the mobility and transport of disabled people shall now be returned to and the Commission's plans for future developments in this field shall be considered.

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[42] Fundamental Social and Economic Rights in the European Community, Report presented to a conference in Strasbourg on "Human Rights and the European Community", 20-21 November 1989, Florence, EUI, 1989.

4. The Commission's Proposals for future developments in the field of Mobility and Transport for People with Disabilities.

In the light of the Commission's proposals for the future many of the criticisms of the present directive are less serious than they at first appear. The Commission seems to have accepted Patrick Daunt's proposal in "Moving to Independence" that a framework directive, followed by a series of other more specific measures, be adopted. It is the Commission's intention to follow up the present general initiative with a set of more specific directives which will firstly not be confined to workers with a disability, and secondly aim at harmonising the provision of public transport within the Community. The intention is to begin with a technical directive on buses and coaches and to then progress with a number of other similar directives setting precise common standards to be met by providers of transport services. This will enable disabled people to move freely between different forms of public transport and the different Member States, and to travel in the knowledge that all providers have to meet the same standards with respect to accessibility. Work is already progressing on this first proposal which will be the result of cooperation between the Directorate Generals concerning the internal market, transport and social affairs. These directives will be based on Article 100A and therefore need not be confined to disabled workers.

The Commission also intends to introduce proposals covering identity cards for disabled people. At present the conditions for issuing such cards and the benefits which accrue as a result of their possession vary widely amongst the various Member States. For this reason progress in this field has been slow and the Commission was reluctant to take steps to establish a travel card within the present proposal before carrying out additional research and consultation. It is not felt that it would be possible to introduce one EC identity card for all purposes immediately, so the Commission instead intends to concentrate on establishing harmonised conditions for the issuing and recognition of cards in specific areas. The first field to be tackled will be parking permits for disabled drivers. This may in fact not prove as difficult as might be imagined since there already exists agreement at the Conference of European Ministers of Transport on this topic.

The Council has related progress in the technical directives field to that of the draft directive by requiring that the Commission submit an action programme setting out a timetable for the introduction of the technical directives, and including estimates as to some of the costs which will be incurred as a result of these initiatives. The Council will reconsider the draft directive once it has received this action programme which the Commission hopes to present at the November 1993 meeting of the Council of Ministers.

It can be seen that the series of measures which the Commission plans to introduce go a long way to meeting the criticisms which were levelled at the draft directive earlier in this chapter. The benefits of these measures will be specifically extended to non-workers and harmonisation will be the objective. Any restrictions related to the health and safety and travelling for particular reasons should hopefully be eliminated. The Commission also intends to pay further attention to private transport for disabled people and the granting of identity cards which were referred to earlier as neglected areas. A successful series of measures in this field should therefore make a significant contribution to the economic and social integration of disabled people within the Community. It should however be noted that these are ambitious plans and there are many hurdles to overcome before they can be realised. The initial step of adopting the limited draft directive has not yet been achieved, and indeed, it has met with much opposition from some Member States. One could argue that if even this limited proposal cannot be adopted - and it has now been before the Council for nearly two years - that there is little hope for the more ambitious proposals which would require an even greater commitment at the national level. It has yet to be seen if these plans are anything more than wishful thinking on the part of the Commission, and one should bear the Commission's previous failures in mind.

Consideration will now be given to an alternative approach to that which may be adopted by the Community institutions to promote the mobility of people with disabilities.

5. An Alternative Approach to the Mobility and Transport of People with Disabilities.

The Americans with Disabilities Act covers not only employment (see chapter four), but also a wide range of other areas of life including transportation. The Act is clearly not restricted to improvements directed only at disabled workers, nor is it satisfied with guaranteeing safe transport for disabled travellers generally; rather, in keeping with the tone of the Act, the concern is with discrimination.

All forms of transport are covered and are treated in generally the same manner. With regard to purchasing or leasing new vehicles, whether those be buses, rail vehicles etc., it amounts to discrimination under the Act to acquire such a vehicle unless it is "readily accessible to and useable by individuals with disabilities, including individuals who use wheelchairs". This requirement also applies to the refurbishing of vehicles. It also amounts to discrimination to construct or alter a facility used in the provision of public transport unless it meets the above accessibility and useability standards. Structural changes to facilities on local rail networks are to be made within 3 years in general but, in cases of extraordinary expense, this time period can be extended to up to 30 years. A period of 20 years is set for alterations to stations on the intercity rail network. A further concession is granted to providers of rail transportation by requiring that only one accessible rail car per train need be provided. The requirement to provide accessible public transport cannot however be avoided, and arguments that adaptations or new acquisitions will be excessively expensive can at the most only lead to a delay in introducing the necessary changes.

Specialised "door-to-door" transport - or "paratransit" - is also covered. It amounts to discrimination for a public entity which provides public transportation to fail to provide such services to people who, by virtue of their disability, require them. These services must be comparable to those provided to non-disabled travellers and, to the extent practicable, provide a comparable response time. Such services must allow the disabled traveller to be accompanied by one other individual.

The associated infrastructure including, for example, the provision of reserved parking spaces, is also not neglected, and there are strict requirements covering the removal of obstacles and the creation of an accessible environment.

The concern in the Americans with Disabilities Act is discrimination. It aims to guarantee the provision of forms of public transport which are accessible to people with mobility disabilities, and to thus promote the social and economic integration of such people to the fullest extent possible. This concern is also reflected in the provision of specialised transport. The Commission, for political and legal reasons, has shied away from such a broad approach, and the draft directive, if adopted, will only have a very limited impact in comparison with the Americans with Disabilities Act. The additional instruments are also unlikely to encompass such a broad approach.

Consideration shall now be given to additional Treaty articles which may have provided a greater scope for action than Article 118A, and therefore allowed the introduction of a measure which resembles the American legislation more closely.

6. Alternative Legal Bases for the Adoption of a Directive on Mobility and Access for Disabled People.

A number of other articles contained within the present Treaty have been discussed as providing a possible legal basis for initiatives in this field. The report "Moving to Independence" argued that three articles were of relevance[43]. Firstly it was argued that Article 48, covering the free movement of persons, could be relied upon. Particular reference was made to the "abolition of discrimination" and the "right to move freely within the territory of member states for the purposes of employment". In fact this seems a highly improbable legal base for an initiative such as the one being discussed. The "discrimination" referred to in the article relates to that based on nationality, and probably cannot be extended to cover disadvantaged groups such as disabled people or ethnic minorities who are, or who wish to become, workers (see chapter four). Furthermore this Article has thus far only been relied upon to require the removal of administrative barriers and not physical barriers such as inaccessible transport systems. This may of course be a reflection of the fact that such barriers only present themselves to disabled people. In addition this article and chapter of

[43] Page 16, para.36.

the Treaty are concerned with migrant workers, i.e. workers who move from one Member State to another, and cannot be used to oblige Member States to remove internal barriers to mobility affecting nationals. However it is in this more restricted national arena where most disabled workers experience barriers. This Article would also have the same disadvantage of only applying to disabled workers.

Secondly the report suggested that Articles 8A and 8B relating to the establishment of the internal market, with particular reference to the ensuring of "balanced progress in all sectors concerned", be relied upon. This seems to be the approach that will be adopted by the Commission in the future since the intention is to base the technical directives on Article 100A. This latter Article was added to the Treaty by the Single European Act[44] as a result of dissatisfaction with the progress that was being made towards achieving the "common market" based on the more restrictive Article 100. Article 100A allows for the adoption of all the measures provided for in Article 189 (unlike Article 100 which is confined to directives) by qualified majority voting (whilst Article 100 requires unanimity). The objective of the Article is the progressive establishment of the internal market as specified in Article 8A. The internal market is defined in the latter article as "an area without internal frontiers in which the free movement of goods, persons, services and capital is insured". Paragraph two of Article 100A however specifically exempts certain measures from the reach of the article, including the free movement of persons and those relating to the rights and interests of employed persons. The technical directives could be justified on the grounds that they are necessary to achieve the free movement of transport services and capital.

The third proposal contained within "Moving to Independence" was that which was in fact ultimately adopted: Article 118A.

The 1981 Opinion of the Economic and Social Committee suggested an alternative legal base for measures to promote the mobility of disabled people. The Committee favoured reliance on Article 3(c), covering the abolition of obstacles to freedom of movement for persons, and Article 3(e), which relates to the adoption of a common transport policy. However, these article only allow for Community initiatives which are "as provided [for]

[44] Article 18 SEA.

in this Treaty". It has already been commented that Article 48ff probably do not provide a suitable basis and Article 3(c) cannot add to the competences established therein. The application of the provisions on transport also seem unlikely given that these are concerned primarily with international transport and the provision of transport services by non-residents. The objective of the common transport policy is economic and thus far no consideration has been given to the social dimension which mobility for disabled people involves.

A final alternative as a legal base is Article 101. Arguments relating to this article were covered in detail in Chapter four and it is not necessary to repeat them here. Needless to say at least one Member State would have to introduce legislation or administrative measures requiring transport providers to supply an integrated or accessible service to disabled travellers, and this would have to involve considerable expense to the provider thus distorting competition in the common market. It would also have to be shown that the suppliers of public transport were in fact competing with each other, and this, apart from the provision of transnational transport, may well be difficult to establish.

It seems as if the Commission, in opting for Article 118A for its initial proposal, was making the 'best of a bad deal'. The article has indeed required the Commission to seriously limit the scope of its proposal but, faced with little or no alternative, this was the price which had to be paid. However, although many of the restrictions contained in the draft directive can be traced directly to the limits set by Article 118A, this is not so in all cases. What is clear though is that with the best will in the world a proposal as broad and encompassing as that contained in the US legislation cannot be produced and adopted by the Community institutions. The Commission's intention to produce further initiatives may however go some way to making up for the inadequacies of the initial proposal.

Conclusion.

This final chapter has involved an analysis of the one area of substantive policy related to the economic integration of disabled people which has been the subject of a legislative proposal by the Commission. It was argued that mobility and transport have a vital role to play in promoting economic integration and indeed that they are a prerequisite

for such integration. The present provision of transport, whether that be private, public or specialised transport is generally inadequate and, as a result, numerous people with mobility disabilities are being unnecessarily handicapped. The potential benefits of Community involvement were then considered. It was claimed that such intervention could ensure that different national provisions do not lead to the development of incompatible systems which could become a barrier to free movement, prevent potential distortions of competition, promote health and safety and generally lead to many financial and non-financial benefits for mobility disabled people and society as a whole. An analysis of the Commission's actual draft proposal, however, found that it fails to live up to most of these expectations. As a result of the choice of Article 118A as a legal basis the proposal is confined to guaranteeing the safety of workers with a mobility disability travelling to and from work. The draft therefore fails to incorporate many of the suggestions made in a series of reports produced prior to its formulation for the Commission. These limitations may not prove to be all that serious in the long-run though, since the Commission is planning to introduce a series of further instruments, including technical directives, which will harmonise the provision of various forms of public transport, and measures to introduce common identity cards which will give access to benefits. The technical directives will be based on Article 100A and will therefore not be restricted to workers on journeys for specific purposes. These are the long-term plans of the Commission and until the draft directive is approved there seems little possibility that further genuine advances can be made. This draft directive, in keeping with what was argued to be the Community's approach in chapter three, is directed exclusively at workers. It is notable however that the technical directives will target a broader group. With these directives not yet written it is too early to say whether this broad approach heralds the way for future disability policy within the European Community. It is however to be hoped that, with the extension in competences to be expected from the ratification of the "Maastricht" Agreements, and ultimately through further negotiations, the Commission will attempt to introduce policy instruments to promote social and economic integration which, unlike the present proposal, are specifically targeted at all disabled people.

SECTION IV

CONCLUSION

The concept of disability which was developed in the first chapter of this thesis lays the foundation for many of the arguments which were subsequently made. That model identified two sources from which the problems related to disability stem - functional limitation caused by impairment and discrimination - with the emphasis being placed heavily on the latter. A comparative approach revealed the similarities and differences with regard to the nature of discrimination encountered by disabled people and other groups which experience discrimination. Most notable amongst the differences was the reduction of functional abilities which can be caused by the trait in question, and the consequent need to adapt the environment to the individual concerned. Therefore, with regard to some disabled people, a failure to make a necessary or appropriate adaptation can lead to a special form of indirect discrimination known as "unequal burdens". It was argued that only a concept of equality based on results, rather than opportunity, could aspire to counter these disadvantages, and this concept, as modified in the second chapter, has underlaid the discussion of policy made elsewhere in the thesis.

It was recognised that for some people with impairments the elimination of discrimination will not be sufficient to provide equality since the second element contained within the model of disability, namely functional limitation, will prevent them from competing with their counterparts who do not experience such a physical or mental restriction. In order for such individuals to compete in the labour market a degree of positive action in their favour is necessary. A justification for that action was found in the principles of distributive justice with the basic argument that the state should intervene to ensure that resources, including desirable jobs, are redistributed in favour of the less advantaged members of society. It was accepted though that pure equality of results could not be the objective within a liberal system, and that a distribution based on Rawls' principles of social justice, which allows for inequalities in the distribution of social and economic advantage if these are to the benefit of the least advantaged, was appropriate. In fact the subsequent examination of substantive policy did not favour positive action at the Community level in any of the specific areas addressed, but it is recognised that such initiatives are necessary within a complete policy to promote the full economic integration of all people with disabilities.

An examination of Community initiatives in the area of social and economic integration of disabled people revealed the gradual developments which have occurred in this field over the last 20 years. Although the Commission began with a series of action programmes based on local level networks and the exchange of information it is now beginning to develop more ambitious initiatives. It has been recognised that for these policy guidelines to have a global impact they must take the form of legally binding instruments; however with the limited choice of suitable legal bases in the present Treaty it will be necessary to direct many of the instruments at disabled workers only. Thus, in the immediate future, it is probable that the policy we shall see emanating from the Community will be predominantly aimed at the promotion of the economic integration of disabled people, although broader initiatives where the present or amended Treaty allows for this are also to be expected from time to time.

The remainder of the thesis considered areas of possible substantive intervention at the Community level. Most important of these was an instrument aimed at countering employment discrimination directed at disabled people. Formulating legislation in this field is an extremely complex process and the fullest consideration needs to be given to relevant experiences within national jurisdictions. Notable in this respect is the American experience based on the Rehabilitation Act of 1973 and the broader and more recent Americans with Disabilities Act. An examination of this legislation, and the associated case law, reveals four major challenges which any EC instrument must meet if it is to be successful. Firstly, the definition of the beneficiaries must be detailed and explicit so as to reduce the scope for uncertainty; secondly the definition of discrimination must be broad enough to encompass two concepts - traditional (direct and indirect) and "unequal burdens" discrimination; thirdly, the legislation must represent a compromise between the interests of employers and disabled people; and lastly, because of the idiosyncratic nature of disability and employment the instrument must make extensive use of individualised analysis. The factors related to clarity are even more important at the Community level, where the initiative will take the form of a directive which must be interpreted and transformed into domestic law, than at national level. A maximum level of certainty is unlikely to be achieved immediately and an initial period of uncertainty, whereby courts and administrative agencies elaborate the relevant

concepts and terms, must be accepted. Inspite of the necessity of such an instrument at the Community level it is unlikely that the immediate future shall see its introduction. Whilst it is possible to argue that certain existing articles within the Treaty do provide the necessary competence it seems improbable that they will in fact be used in this way, especially given that this would involve a major reinterpretation of the articles in question. Furthermore, it is unlikely that an anti-discrimination measure could be incorporated into the Community's legal order through the accession to international agreements. The most hopeful prospect for the adoption of such an instrument lies with the future extension of competences of the Community institutions, not least of all through the Social Protocol attached to the "Maastricht" Agreements.

A number of other areas were considered for potential incorporation in a Community policy. Amongst these the only one which was categorically rejected related to the establishment of an EC quota system. Such a system would be extremely complicated to formulate and administer and its adoption would almost certainly breach the principle of subsidiarity. Nevertheless Community policy must take into consideration and compliment national quota systems. This is important because there must be a division of competences between the Community and Member States, with neither side claiming exclusive jurisdiction, and to ensure that national policies, such as quota systems, do not conflict with EC measures by, for example, distorting competition.

An analysis of two other areas found that Community action was justified. With regard to the first of these, vocational training, many deficiencies exist at the national level. An EC measure would promote necessary improvements and contribute to the formation of a global policy. Reflecting arguments made earlier, the directive should be based on the anti-discrimination principle and have as its objective improvements in the quantity and quality of vocational training available to disabled people. A vital component of this would be the encouragement of training in an integrated environment. In order to allow for the wide variation in the structure of national vocational training policy the directive would have to be flexible and provide a broad scope for different forms of implementation. A potential legal basis for such an instrument is Article 128 which may contain an implied power to produce legislation to achieve the aim of a 'common vocational training policy'. A firmer

basis will however be provided by the new Article 127 contained within the "Maastricht" Agreements.

The final area considered related to transport. This is in fact the one area of substantive policy related to the economic integration of disabled people which has been the subject of a legislative proposal in the form of a draft directive. Access to suitable transport is a prerequisite for both social and economic integration, and the present provision of transport for disabled people within the Community is inadequate. Community intervention can be justified on a number of grounds: to prevent the development of incompatible systems which could become a barrier to free movement; to prevent potential distortions of competition; to promote health and safety; and to achieve numerous financial and non-financial benefits. However, the draft directive, largely (but not exclusively) as a result of the choice of Article 118A as a legal basis, fails to meet many of these needs, and is confined to guaranteeing the safety of workers travelling to and from work. The Commission though is planning to produce further directives which will, amongst other things, harmonise the provision of public transport for disabled travellers and introduce common identity cards. These will not be confined to disabled workers and will be based on Article 100A. It is probable however that the proposition of measures targeted at such a broad group is, under the present Treaty, the exception rather than the rule.

This thesis has attempted to do many things - to develop a new model of disability; to expose the role discrimination plays in disadvantaging people with impairments; to critically examine Community initiatives in the disability field; and to propose policy initiatives at the Community level, and at times identify suitable legal bases for these measures. Many of these problems have never before been addressed in the legal academic literature, and this work can as such be regarded as ambitious. It is the hope that this thesis will make a contribution to redressing this neglect and promoting discussion in an area of vital social and economic importance.

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