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The project partners contributing to this publication were:

- AFRaHM
Avenue Albert Giraud 24
1030 Brussels
Belgium
Tel.: +32-(0)2.247.60.10
- Centre for Equal Opportunities and
Opposition to Racism
Rue Royale 138
1000 Brussels
Belgium
Tel.: +32-(0)2.212.30.00
- Lithuanian Welfare Society for Per-
sons with Mental Disability (VILTIS)
Kačtonø g. 2/14-17
LT-2001 Vilnius
Lithuania
Tel.: +370 52.61.52.23
- CECD Mira Sintra
Avenida 25 de Abril, 190
Mira Sintra, 2735-418 Cacém
Portugal
Tel.: +35 121 918.85.70
- Université de Mons-Hainaut,
Département d'Orthopédagogie
Place du Parc, 18 B
7000 Mons / Belgium
Tel.: +32 65.37.31.77

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Fighting for our Rights-

Using Non-Discrimination Law to Protect People with Disabilities

**Report on the transposition of Council Directive 2000/78/EC
on Establishing a General Framework for Equal Treatment
in Employment and Occupation.**

August 2004

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EXECUTIVE SUMMARY

It is a rather positive fact that, in the process of transposing the Directive, some Member States have gone beyond the minimum standards set out in Community legislation. For example, they have banned discrimination on grounds of disability outside employment, or extended the right to reasonable accommodation to other basic aspects of daily life, such as public transport.

Unfortunately though, this has not been the rule. Although the deadline for transposing the Directive into national law expired on 2 December 2003 for almost all of the member states, a vast majority of them seems to be delayed and adopting poor implementing legislations.

Aware of the fact that the deadline for transposition expired more than half a year ago, an increasing number of governments –including those of the Netherlands, Portugal, Belgium, Slovenia, Spain, Italy, Finland, Lithuania or Sweden- are claiming to have transposed the Framework Directive completely. However, according to the analysis carried out under this project, almost none of them did in fact implement the Directive fully and correctly. The situation is far from satisfactory. In May 2004, some States had not even drafted any implementing legislation, and in the countries where that implementing legislation existed we frequently found regulations that were either too vague (this is mostly the case as regards the right to reasonable accommodation), or too similar to the text of the Directive, with the consequence that the resulting provisions –of countries like Italy or Luxemburg- are so generic that they will be very difficult to apply to particular cases.

From the way they define disability in their laws, we can see that too many countries follow restrictive, medical approaches to the notion. In most cases countries are still rather reticent towards adopting the social model, and this has consequences with regard not only to the definition of disability itself, but also to the way they approach the question of discrimination as a whole. Belgium, for instance, finds too many exceptions to the prohibition of direct discrimination, while the UK does not explicitly mention indirect discrimination at all. Almost every country excludes sheltered employment from the scope of the Directive, and in some cases selection procedures are not adequately covered. Reasonable accommodation, for its part, is usually defined as it is in the text of the Directive, but then again only very few countries provide for national arrangements in order to make this right possible in practice. Further elaboration is also needed on the principle of the reversal of the burden of proof, which only Belgium seems to have taken seriously. A rather critical aspect regarding the state of implementation concerns the regulation of the defense of rights. Only in very few occasions are disability organizations entitled to represent people with disability before a court. People with learning disability are very specially concerned by this lack of compliance with article 9.2 of the Directive.

Finally, it also has to be said that implementations of the provisions regarding the State's obligation to disseminate accessible information or to promote social dialogue are virtually non-existent.

In general terms, our conclusion is that the existing national laws or draft laws, which are supposed to transpose the Framework Directive are not giving enough protection to the persons they claim to protect. But also, they are not covering all persons affected or threatened by disability-based discrimination. In particular, such form of discrimination can also be based on past, future or assumed disabilities. Moreover, people suffer discrimination also because they are related to someone who has disability. We strongly believe that implementing legislations have to include all these groups of individuals under their scope of protection.

1. Introduction

Since the unanimous adoption of the “Employment Equality Directive” by the Council of the European Union in the year 2000, the time has come to assess the progresses made so far at a national level with regard to the transposition of the Directive from a disability rights perspective.

The “Employment Equality Directive” bans discrimination in employment and occupation, as well as vocational training. It covers both direct and indirect discrimination, as well as harassment, on grounds of disability. It includes very important provisions on the right to reasonable accommodation, in order to promote access of persons with all kinds of disabilities to employment and training.

People with intellectual disability are in a very vulnerable position as regards access to employment and protection against discrimination. In order to enable people with intellectual disability to effectively defend themselves against discrimination, the Directive includes measures which are specifically oriented to inform them about their rights. On the other hand, families are as well in need of protection. Anti-discrimination laws on the basis of the Directive should also take into account that people are often discriminated at work on the grounds that they have a child with learning disability.

The ambition of the “Fighting for Our Rights” project is to influence the implementation process of the Framework Directive across Europe, in order to maximize the positive effects of this piece of legislation for people with intellectual disability. To this aim, we would like to promote the establishment of a code of good practice to set up the way in which, under our view, the directive should be implemented. For instance, we advocate for the adoption of a definition of disability-based discrimination, which is inclusive enough to cover also future and past disabilities, as well as all persons who can be discriminated against because they are related to someone who has a disability.

It is important to stress that legislative measures, although not sufficient, are the necessary first step towards a pro-active commitment of all national authorities, and of society as a whole, to combat discrimination in the daily practice.

By prohibiting discrimination on several grounds, such as disability, the Directive’s objective is to protect the fundamental right to equality of opportunity. Every legislator or judge should bear this in mind when they interpret the Directive. Provided that the rights of others are respected, the Directive should be transposed and enforced as to afford the right of people with intellectual disability to equality of opportunity the highest level of protection.

We want common European standards of protection of disabled peoples’ rights, and we need to prevent that these standards are undermined through narrow interpretations of the European Law. Hopefully this paper will contribute to achieve this aim.

Françoise Jan
President
Inclusion Europe

2. Description of the situation in EU and accession countries

The deadline for transposition for the Employment Framework Directive was 2 December 2003, with a further 3 years possible for transposing the disability (and age) related provisions. Indeed, France has notified the Commission that it will use the extra 3 years for the disability provisions, while the UK and Denmark will use one extra year. The rest of the EU Member States should have fully transposed all the Directive's provisions already.

The European Commission is currently in the process of examining the national laws in question to ensure that they fully conform with the Directive's provisions. As a result of its findings, it has already decided to launch infringement proceedings against Germany, Austria, Luxembourg and Greece, because implementing legislation in those countries has not been adopted at national level. Moreover, the Commission has also launched infringement proceedings against Belgium and Finland, because the adopted anti-discrimination laws have not entered into force in all the Belgian regions (namely the German-speaking community) and do not cover some parts of the Finnish territory (namely the Swedish-speaking Åland Islands).

Definition of disability

We can identify different national responses to the disability provisions of the Directive. The vast majority of the 25 EU-Member States have either laws or draft legislations, which are supposed to transpose the Framework Directive.

However, according to the analysis carried out under this project, present anti-discrimination laws are not covering all the persons affected or threatened by disability-based discrimination. In particular, very few national legislations protect people who are discriminated against because they have had a disability in the past, or because they are likely to develop one in the future, or simply because they have a son or a daughter with a disability who needs special attention. In this respect, Irish and Belgian implementing legislations are interesting in that they cover future disabilities. In the Netherlands, persons who are "supposed" or assumed to have a disability or a chronic illness are protected against discrimination (from employers as well as from all those civil servants or private persons involved in facilitating employment). In the UK, the Disability Discrimination Act of 1995 states that "hidden impairments are also covered". Member States, however, tend to describe disability as a present, severe, physical or psychological impediment. In particular, German draft implementation legislation follows a quite restrictive approach. It only protects from discrimination in employment those people who have been classified as "severely disabled", namely those individuals with a disability grade of at least 50 per cent and who have been adequately registered. In contrast, the Maltese Equal Opportunities Act of the year 2000 goes a long way to comply with the obligations under the Directive, covering individuals with a disability and individuals who are believed to have a relationship or association with a person with disability.

Material scope

The *material scope* of the Framework Directive is restricted to the area of employment. However, Member States have no legal impediments to the introduction of more wide-ranging national laws.

Some countries have widely defined the area of Employment, and have included sheltered workshops under the scope of their implementing legislations. Belgian law, for example, has a broad material scope, which covers aspects such as "unpaid work" and "the provision or

availability of goods provided to the public". In addition, the Belgian anti-discrimination laws sometimes go even beyond the area of employment. For instance, "those who give publicity to their intention to commit discrimination" are committing a criminal offence under Belgian law. Implementing legislation in the Netherlands also goes to some extent beyond the field of employment, stating that discrimination ("differentiation") is prohibited, for instance, "in offering public transport services and travel information".

Restrictive interpretations, however, are more abundant. Spanish implementing legislation does not even comply with the material scope of the Directive, because it does not protect against discrimination during the selection procedures. Irish implementing legislation does not mention vocational rehabilitation and retraining, and Bulgarian anti-discrimination law is not employment-specific. Ireland, Belgium, Austria, Lithuania, the Netherlands and other countries have chosen not to include sheltered workshops under the scope of protection of their respective laws.

Direct discrimination, indirect discrimination and harassment

As far as the concept of *discrimination* is concerned, member states' provisions are often identical to the relevant language version of the Directive. However, we can find many national particularities, which are sometimes problematic.

For instance, the British "Disability Discrimination Act" does not cover indirect discrimination explicitly. As a result, discriminatory advertisement cannot be directly challenged (it can merely be brought as evidence into a court in the course of a process for direct discrimination). Furthermore, case law has interpreted the "Disability Discrimination Act" in a way that leaves employers a very wide margin to justify discrimination (too much emphasizing concepts like "health and safety concerns"). Portugal, whose government claims to have already transposed the Directive completely, is still waiting for a definition of indirect discrimination. The Belgian and Lithuanian legislations include exceptions to the prohibition of direct discrimination, which are not mentioned in the Directive. Under Irish law, indirect discrimination only refers to gender. As for *harassment*, the Dutch *Equal Treatment Act for Handicap and Chronic Illness* of 2003 does not even mention it, and in Ireland and Germany it is only the employer who can be made accountable for harassment.

Reasonable accommodation

The regulation of the right to *reasonable accommodation* differs from country to country. Only in exceptional cases, such as the UK and Ireland, does the law provide with concrete examples of reasonable accommodation. According to Belgian law, an accommodation is judged to be reasonable if it does not create a disproportionate burden on the employer. This way of interpreting the "reasonableness" of the accommodation might not be very accurate. We rather tend to interpret that an accommodation is reasonable when it is effective and appropriate to achieve equality of opportunity. In any case, the regulation of the scope of this right is problematic. Although the Directive clearly states that reasonable accommodation should start already in the recruitment process, not many countries seem to be aware of this. In most of the Member States there is no obligation for the employer to take anticipatory actions to provide reasonable accommodation.

Furthermore we observe a general lack of elaboration as to how this right should be exercised in practice. While the Directive states that reasonable accommodation should be provided unless this would pose a disproportionate burden on the employer, countries tend not to further elaborate on this.

In our view, the law should regulate the right to reasonable accommodation more clearly, because otherwise it gives the Judiciary an exaggerated margin of interpretation. For instance, the national definitions of disproportionate burden (such as Portugal's) usually refer to the costs entailed, the financial resources of the employer's business or the possibility of obtaining public funding. However, public authorities are usually given legal discretion to reimburse employers for the reasonable adjustments made.

We can find national exceptions to the right to reasonable accommodation, which could arguably lead to breaches of the Directive. The Lithuanian quota system, for instance, allows the employer to choose between employing and accommodating either three disabled persons, or one single person with a severe disability. In the light of such a provision it has to be stressed that reasonable accommodation is an individual right, which has nothing to do with positive action. It must be underlined that disability-based discrimination can still occur after the employer has fulfilled the legal quota. Under our view, national laws cannot create exceptions on the obligation to provide reasonable accommodation beyond those explicitly mentioned in the Directive.

The Directive implies that an unjustified failure to provide reasonable accommodation amounts to discrimination. Some member states explicitly regard an unjustified failure to provide reasonable accommodation as discrimination (it is direct discrimination under Swedish law, indirect discrimination under Austrian law and *sui generis* discrimination under Dutch law). Belgian law simply states that failure to provide the accommodation required amounts to discrimination, but then it is too vague when it comes to defining when reasonable accommodation is required. The law in Belgium, and in many other countries, does not define or elaborate on the term "disproportionate burden", leaving it for the judiciary to decide on a case-by-case basis.

On the other hand, there are examples of good practice, too. One of these examples is Slovenia. Although Slovenian law does not seem to contain a general definition of reasonable accommodation, it is rather exhaustive in ensuring that this right is exercised in practice, mainly through state measures. Two public institutions, the Pension and Disability Insurance Institute and the Employment Service, are obliged by law to cover reasonable accommodation to such an extent, that the exception of disproportionate burden on the employer is excluded in practice. Furthermore, a special program to foster employment integration is provided by law. The program contains aspects, which are relevant for persons with learning disability, namely information and motivation strategies, assessment, psychosocial rehabilitation, selecting the professional goal, development of social skills, finding the proper job, or the analysis of working place and environment.

Positive action

With some limitations, *positive action* practices are generally accepted by national legislations. Some States, including Portugal, Germany, France, Lithuania and Spain provide for a quota system to promote the employment of persons with disability. However, in some cases these quotas are not respected in practice.

For example, since the year 1982 the Spanish law establishes a five per cent quota of employees with disability that employers must hire or face sanctions. Nevertheless, the employment rate of disabled people in today's Spain is certainly well below that rate. In Germany, on the other hand, employers who do not fulfill the legal quota are being fined. The money obtained through those fines is then employed to finance workshops for people with disability. The British and the Irish legislations, for their part, seem to be far more restrictive towards positive action.

Enforcement mechanisms and sanctions

As far as the Directive's *enforcement mechanisms* are concerned, Member States have a wide decision margin. In order to ensure that their non-discrimination laws are followed, they can decide to set up judicial, conciliatory or administrative mechanisms.

Most of the Member states have opted for a combination of administrative and judicial measures under Civil Law. For instance, this is the case in Portugal, Germany, Bulgaria and the UK. Austria, Spain and other countries exclude administrative mechanisms and opt for conciliatory ones instead. Very few countries prosecute discriminatory practices under Criminal Law. As far as we know, only Belgium and Slovenia do so. Belgian law sets up judicial and administrative mechanisms, and judicial mechanisms can be both civil and penal. In particular, it is a criminal offence under the Belgian law to “publicly insight discrimination, hatred or violence against a person, a group or community on the basis of one of the covered grounds”, or to “give publicity to the intention to discriminate”. Public servants who commit discrimination in the exercise of their public functions are also subject to criminal liability. In Slovenia, certain discriminatory practices can be misdemeanors under the Penal Code.

In accordance to the Slovenian law, non-governmental organisations shall have the right to take part in judicial and administrative proceedings initiated by victims of discrimination (as a result of a violation of the anti-discrimination law). This is a relevant provision, since only in very few countries are disability organizations entitled to represent people with disability before a national court.

Too many countries, among them Ireland, Spain, the Netherlands and Lithuania, have not laid down any rule on *sanctions* applicable to infringements of the national provisions adopted pursuant to the Directive.

With the exception of the United Kingdom, and according to our knowledge, no cases of complaints of persons with intellectual disability regarding discrimination in employment have been brought before national courts in the member States. From the UK, ten cases have been brought to our attention, including cases of harassment, denial of reasonable accommodation during disciplinary hearings, denial of reasonable accommodation during professional examinations, denial of reasonable accommodation in respect of recruitment process and direct discrimination in respect of recruitment process. According to the Disability Rights Commission most of these cases either have good prospects of success or have been already settled.

Reversal of the burden of the proof

The Directive also imposes Member States to introduce the procedural requirement of the *reversal of the burden of the proof* in cases of direct or indirect discrimination in employment. In the civil procedure, the Directive allows the claimant to bring preliminary evidence to the judge. This preliminary evidence or facts (such as statistic analysis or situation tests), under certain conditions, will constitute a proof of the existence of direct as well as indirect discrimination, meaning that it will be for the employer to prove that s/he did not discriminate.

Although implementing legislations (with some exceptions like the Irish or the Lithuanian cases) tend to mention the reversal of the burden of the proof with regard to direct and indirect discrimination in employment, only a minority of governments have introduced any measures in order to ensure that this principle is applied in practice. The Belgian law is an example of good practice in this respect, for it provides with elaborated examples of the kind of facts, which can be brought before a court in order to reverse the burden of the proof. Thus, it

mentions statistical data and situation tests as examples of facts, which the person who feels discriminated against may bring to court in order to reverse the burden of the proof. According to the Belgian law, a governmental decree will determine the characteristics of such situation tests.

Dissemination of information and promotion of social dialogue

At this point it is important to insist on the States' obligation to ensure that all the relevant provisions regarding non-discrimination in employment "are brought to the attention of the persons concerned by all appropriate means".

In Slovenia, Spain and Belgium public authorities are legally obliged to *disseminate information*, but these countries are the exception rather than the rule. In Slovenia, information is disseminated through the Council for Persons with disabilities, which is the official body charged with the implementation of the directive. Also in Belgium there is an official body charged with the implementation of the Directive, namely the Centre for Equal Opportunity, and similar bodies exist in other member States (the Disability Ombudsman in Sweden, the Disability Rights Commission in the UK, the Dutch Equal Treatment Commission or the Lithuanian Equal Opportunities Ombudsman). Bulgaria, Greece, Spain, Austria, Germany or Italy all belong to the group of States that have not set up such official body. The usefulness of these bodies is not limited to the dissemination of information or monitoring activities.

The Centers for Equal Opportunities can also play a very important role in promoting *social dialogue*. This obligation under Article 13 of the Directive embraces almost all the complementary actions that the State can possibly undertake in cooperation with the social partners in order to spread out good practices throughout society. However, according to our analysis, dialogue between the government and disability organizations regarding the new non-discrimination legislation has not taken place very often.

3. Analysis of the situation

In the absence of case law by the European Court of Justice, it has not yet been officially established how the Directive must be interpreted. From the way the European Court of Justice has approached the issues of gender discrimination in the past, we can infer by analogy that for this Directive the Court will as well adopt a generous approach, except for positive action, which will most probably be interpreted in a restrictive manner. In any case, what we can do is work already on the interpretation of those problematic concepts, or open clauses in the Directive, which could be interpreted in multiple ways. It is important to limit the negative effects of State discretion in transposing the Directive, and the best way to do it, under our view, is to highlight that the Directive has to be interpreted as what it is: a human rights instrument.

Being the Directive a framework, general law, it has to be transposed and implemented by legislations, which are more precise than the Directive itself. In this respect, we can point out that the Italian implementation legislation (Decreto Legislativo 9 July 2003: Attuazione della Direttiva 200/78/EC) is too much based on the language of the Directive. Luxemburg and Greece also seem to have simply imported the text of the Directive into national law. The problem with this kind of provisions is that they are so generally phrased that it is not clear how national employers, workers and courts will respond to them.

Definition of disability

Although the Framework Directive clearly endorses the social model of disability, it provides no *definition* of disability. The Directive leaves this problem to be resolved by Member States. This means that countries have a relatively free hand in determining what definition of disability, if any, to include in implementation legislation. It is important to understand that, by defining disability, Member States are in fact determining who should be protected from discrimination on the grounds of disability. As a result, there is a risk that Member States bypass their obligations under the Directive by simply defining disability down. There is a variety of possible approaches to the notion of disability, ranging from a strictly medical conception to a social model of disability. A restrictive definition of disability would undermine many people's right to equality of opportunity. Therefore, under our view, such a definition would be contrary to the spirit of the Directive.

About half of the Member States have decided to mirror the Directive and not to include a general *definition* of disability in their implementing legislations. The problem with this kind of approach is that it gives judges to some extent the power to define the term on a case-by-case basis.

The term to be defined should not be "disability", but rather "disability-based discrimination". The aim of anti-discrimination laws is not to define persons, but to define an unlawful conduct and to protect the potential victims of that conduct. Disability-based discrimination may affect people who have not a disability. For example, a person can suffer discrimination at work because s/he has a disabled child.

Thus, under our view anti-discrimination legislation should include a definition of the term "disability-based discrimination". Member States should protect against disability-based discrimination, at least the following persons:

- Those who currently have a disability (whether severe or not).
- Those who have had a disability in the past.
- Those who may develop a disability in the future (as Belgian and Irish legislations do). For example, certain congenital characteristics are likely to cause disability in the future.
- Those who have a hidden impairment (as British law does)
- Those who are associated with a person with a disability through a family or other relationship (as Maltese law does)
- Those who are assumed to fall into one of the above-mentioned categories.

Material scope

As far as the *material scope* is concerned, some countries set higher standards than those required by the Directive. Belgium and the Netherlands, for example, have drafted implementing legislations that protect persons with disability against discrimination beyond the area of employment. The fact that the minimum standards required by the Directive have been enlarged by a small number of implementing legislations shows that the Directive can be regarded as a first step towards the prohibition of disability-based discrimination in all areas of life.

The Dutch approach has also the peculiarity of being symmetrical. This means that the law protects also non-disabled people from discrimination on the grounds that they don't have a disability. This can be used to limit the extension of positive action practices, which are nevertheless permitted under Dutch law.

Direct and indirect discrimination

In Article 2, paragraph 2, the Directive defines *direct and indirect discrimination*. It also mentions two exceptions to the general prohibition of indirect discrimination.

Article 2, paragraph 2 states that “indirect discrimination shall be taken to occur when an apparently neutral provision, criterion or practice would put persons having a particular (...) disability at a particular disadvantage compared with other persons, unless:

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

ii) the employer (...) is obliged under national legislation to provide (reasonable accommodation) in order to eliminate disadvantages entailed by such provision, criterion or practice”.

It is important to stress that the exceptions of Article 2, paragraph 2 are referred only to indirect discrimination. However, in implementing the Directive some Member States (including Belgium and Lithuania) have applied those exceptions also to direct discrimination. Under our view, this is a clear breach of Article 2.

On the other hand, the exceptions should be approached from a human rights perspective. This means that the “legitimate aim” that would justify indirect discrimination in a particular case has to be consistent with human rights. The same applies to the concepts laid down in art. 2, paragraph 5: “public security”, “the protection of health”, or “public order” are not clauses left open for national interpretation, but exceptions that are applicable only when the effect of that application would be more consistent with human rights.

In particular, “health and safety concerns” have been invoked by several judges in order to justify discrimination. In this regard, it is important to stress that the Directive does not mention the word “concerns” when it refers to “the protection of health”. Under our view, the Directive imposes the existence of an objective link between the employment of a disabled person and the risk to health. The employer’s health and safety concerns alone are not enough to constitute an exemption under Article 2, Paragraph 5 of the Directive. Furthermore the exception of the protection of health has to be read together with the provision on reasonable accommodation (Article 5). The risks to health, which the employment of a disabled person could pose are often cancelled as soon as the employer complies with the obligation to provide reasonable accommodation to the employee. In other words, the risks to health might be caused not by the worker’s disability, but rather by the employer’s failure to comply with Article 5.

Reasonable accommodation

Article 5 of the Framework Directive creates the obligation for employers to make a *reasonable accommodation* with regard to persons with disability. The right to reasonable accommodation seeks to break the difference between individual abilities and social impediments: because our social environments were not designed to fit us all, they need to be properly adjusted.

Article 5 is very generic and perhaps too brief, considering the many difficulties involved in establishing and assessing reasonable accommodation. In this respect, preamble paragraph 20 of the Directive can be read as a useful tool for the interpretation of Article 5, especially as regards the notion of disproportionate burden. With some exceptions (such as Bulgaria), the vast majority of the Member States mention this right in their implementing legislations. Na-

tional descriptions of reasonable accommodation tend to match article 5 of the Directive, and in some cases (Greece, Luxemburg and Italy) both texts are identical. However, very few countries provide for legal arrangements in order to make reasonable accommodation possible in practice, and regulations are too vague.

The right to reasonable accommodation is of the essence of the right to equality of opportunity as regards people with disability. However, it is a relatively new concept in the European Union. Prior to the adoption of the Directive, only the UK, Ireland and Sweden recognized the obligation to make reasonable accommodation in their national law concerning disability rights. Being a new legal concept, it is desirable that implementing legislations are detailed enough when regulating the exercise of this right, and include specific examples.

Most of the Member States regulate reasonable accommodation as a negative duty. This means that unjustified failure to accommodate amounts to discrimination, but individuals do not have the right to claim it.

Instead, the Directive approaches reasonable accommodation as a positive right. Therefore, individuals should be entitled to claim this right under national law. Moreover, it is important that the national laws establish cooperation mechanisms between the individual claiming the accommodation and the employer. The State should provide advice to disabled employees in this regard, especially to employees with learning disability. When claiming this right, it would be useful to apply the principle of the reversal of the burden of the proof, although the Directive does not require it for reasonable accommodation.

The “reasonableness” of the accommodation refers to its potential to provide equal opportunity in a reliable and efficient way. An individual might always be in need of reasonable accommodation. Reasonable accommodation is not a form of positive action. It is important to remember that reasonable accommodation is an individual right to an individual adjustment; it is something different to the general adjustments that might be otherwise required by law. A legislation, which allows the employer to choose not to provide reasonable accommodation to a particular employee for reasons other than those mentioned in Article 5 is in breach of the Directive. These exceptions are:

- 1) The employer was not aware of the need to provide reasonable accommodation.
- 2) An effective accommodation is not available.
- 3) Reasonable accommodation would pose a disproportionate burden on the employer (account taken of the financial and other costs entailed, the scale and financial resources of the organization and the possibility of obtaining public funding or any other assistance).

Needless to say, reasonable accommodation applies also to persons with learning disability. Indeed some of the measures which could amount to reasonable accommodation, included as examples in Preamble paragraph 20 (such as “the adaptation of patterns of working time, the distribution of tasks or the provision of training”) could be referred to persons with intellectual disability.

Enforcement mechanisms and sanctions

Member States are obliged to lay down appropriate *sanctions* applicable to infringements of the national provisions adopted in order to transpose the Directive. In our view, conciliatory, administrative and judicial (civil and criminal) enforcement mechanisms should complement each other. Sanctions should be compensatory on an individual basis for damages such as past loss, future losses, injury to feelings, personal injury and interest.

As regards the effectiveness of the sanctions, we can draw up an analogy with the European Court of Justice ruling of 2 August 1993 (the Marshall case), where the Court explains what it considers an effective sanction with regard to gender discrimination. It states that “effective sanctions are all the measures necessary to ensure that the EC Treaty’s provisions are fully effective, in accordance with the objectives pursued by the Directive”, while leaving it to the Member States the choice of the form and methods used to achieve that objective. However, the Court states that sanctions shall not be *a priori* limited.

According to this, an effective sanction in our case would be that measure, which ensures that the right to equality of opportunity of people with intellectual disability is respected.

Dissemination of information and promotion of social dialogue

With regard to the provision on *dissemination of information*, we believe that there is still much to be done by Member States in order to comply with Article 12 of the Directive, which imposes the obligation on the State “to ensure that all the relevant issues concerning the Directive are known by all the people concerned”.

In our view, “people concerned” means, on the one hand, all those who are protected against disability-based discrimination, and on the other hand, the employers. People with disability and their families need to be aware of their rights as much as employers need to be aware of their obligations. This is the only way to really promote dialogue and mutual understanding.

Secondly, information shall be brought “by all appropriate means”. This sentence is extremely relevant for the interests of those persons whose disability is a learning disability. Accessibility of the information is for them a key issue. When complying with the obligation to disseminate information, Member States must take into account the special needs of the people with intellectual disability, which necessarily imply the availability of accessible material in Easy-to-Read format or equivalent. The vast majority of the member States and accession countries are not complying with article 12. This is a major failure, which has very negative effects for people with intellectual disability. By not providing the information necessary for people with learning disability to become aware of their rights, and also by impeding their associations to represent them before the courts, States are seriously undermining the exercise –and therefore the meaning- of the rights contained in the Directive.

Considering all this, it is probably not a coincidence, the fact that there have been so few cases of judicial complaints of persons with intellectual disability regarding discrimination in employment. And it might be interesting to point out the fact that the only country in having reported a significant number of such cases –namely the United Kingdom- has done relatively well in complying with Articles 9 and 12 of the Directive: according to British law, relevant associations are entitled to represent persons with intellectual disability before the courts, and on the issue of information the Disability Discrimination Act states that the disseminated information has to be in a format that all disabled people can read.

4. Conclusions and Recommendations

The purpose of the Framework Employment Directive is to protect and enhance the fundamental right to equality of opportunity. The Directive shall be interpreted, transposed and implemented in a way, which is not only compatible with its purpose, but in a way that promotes to the maximum extent the real enjoyment of equality of opportunity among the population groups covered by its scope.

When transposing a Framework Directive into national law, Member States may take into account their own legal traditions, and use different approaches to secure implementation. However, the Directives set goals, which Member States are obliged to achieve in any case. We hope that the following recommendations will be helpful for public authorities at the national and the European levels when interpreting the disability provisions of the Framework Employment Directive. They propose measures, which we believe are necessary in order to ensure that the Directive's provisions are also used to the advantage of people with intellectual disability and their families.

Defining disability-based discrimination

First of all, it goes without saying that Member States are obliged to ensure that the protection granted by the Directive reaches all the persons concerned.

One way of bypassing this obligation is to introduce national definitions of disability, which are so restrictive that many victims of disability-based discrimination are left outside. The chances of people with intellectual disability are determined by how they are defined.

In our view it is crucial that, when defining the term, national authorities endorse the social model of disability, and thus implicitly recognize that impairments are being imposed on disabled people by social organization.

Furthermore, we strongly believe that the definition should cover past and future disability, and that the people related to persons with intellectual disability, such as families, should also be protected against discrimination. Ideally, the definition should describe "disability-based discrimination" and the duties related to reasonable accommodation rather than the term "disability" or "disabled person".

Effective protection against discrimination

The exceptions to the general prohibition of discrimination included in Article 2 of the Directive are meant to be interpreted in a restrictive manner and from a human rights perspective.

The Directive states that indirect discrimination is banned unless "that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary". From that perspective, a "legitimate aim" necessarily implies *in accordance with human rights*, and that the means are "appropriate and necessary", cannot be that they are merely "cheaper" or "more convenient for the job", but also *that they are consistent with human rights*. The same applies, under our view, to concepts such as "health" or "public order". These are not clauses left open for national interpretation, but exceptions that are applicable only when the effect of that application would be more consistent with human rights.

Reasonable accommodation

People with intellectual disability need reasonable accommodation in order to enjoy human rights. Because the structures of our societies were not designed to fit us all, they now need to be corrected in order to include those who have for so long been left outside the mainstream of social activities.

Therefore, the “reasonableness” of the accommodation cannot be interpreted as referring to its limited cost or convenience to the employer, but rather to its efficiency to enable the right to equal opportunity. The failure to comply with this obligation is a form of discrimination.

It cannot be denied that the right to reasonable accommodation applies also to persons with intellectual disability. Indeed some of the measures, which could amount to a reasonable accommodation included as examples in the Preamble of the Directive (such as “the adaptation of patterns of working time, the distribution of tasks or the provision of training”) could apply specifically to persons with intellectual disability.

Reasonable accommodation shall be provided by the employer in cases where it is required by a qualified worker in order to be able to perform the essential duties of the job. According to the Directive, the employer who is aware of this need can only deny reasonable accommodation in cases where it would pose a disproportionate burden on him/her, taking into account the costs entailed, the financial resources of the organization and the possibility of obtaining public funding or any other assistance.

Effective remedies

Member States are obliged under the Directive to offer remedies to the victims of discrimination. Remedies have to be effective, proportionate and dissuasive, and should be available to all persons that feel discriminated against, even after the working-relationship has ended.

We believe that sanctions, administrative and judicial, should complement each other. They should be compensatory on an individual basis for damages such as past loss, future losses, injury to feelings, personal injury, aggravated damages, exemplary damages and interest.

Effective sanctions with regard to intellectual disability-based discrimination shall be, under our view, all the measures necessary to protect the right to equal opportunity of persons with learning disability, in accordance with the objectives pursued by the Directive. Even though Member States may choose the form and methods used to achieve that objective, State action has to be effective. For instance, under our view a national provision fixing an upper limit to the amount of compensations would be contrary to the Directive.

Protection against retaliation

Whether direct or indirect discrimination, harassment or failure to provide reasonable accommodation, all forms of discrimination are often easy to hide and very difficult to prove. In addition to that, people who witness discriminatory practices tend to belong to the same working environment as the victim’s and therefore fear retaliation from the employer. In this respect, protection against retaliation as a reaction to a complaint aimed at enforcing compliance with the principle of equal treatment should cover not only the claimant, but also the witnesses.

Reversal of the burden of the proof

In the civil procedure, the Directive allows the persons who consider themselves discriminated against to bring to Court facts, from which it may be presumed that there has been discrimination. These facts can therefore reverse the burden of the proof, which means that it shall be for the employer to prove that there has been no breach of the principle of equal treatment.

It would be useful for people with intellectual disability and their advocates if national law would specify that the facts that can be brought to court in order to reverse the burden of the proof can be based, for example, on statistic analysis or on situation tests.

Moreover, it would also be very helpful if Member States would apply the reversal of the burden of the proof also to discrimination cases resulting from a denial of reasonable accommodation.

Disseminating information and promoting social dialogue

With regard to the provision on dissemination of information, we believe that Article 12 of the Directive imposes the obligation on the State to ensure that all the relevant issues concerning the Directive are known by all the people concerned, including employers.

That the information shall be brought “by all appropriate means”, necessarily implies the availability of accessible material, in Easy-to-Read format or equivalent.

Under our view, the vast majority of the Member States are not complying with article 12. This is a major failure, which has very negative effects for people with intellectual disability. By not providing the information necessary for people with learning disability to become aware of their rights, and also by impeding their associations to represent them before the courts, States are seriously undermining the exercise –and therefore the meaning- of the rights contained in the Directive.

As far as social dialogue is concerned, Article 13 goes clearly beyond unilateral consultation. It embraces almost all the complementary actions that the State can possibly undertake in cooperation with the social partners in order to spread out good practices throughout society. This provision is the legal basis upon which to build up a culture of social inclusion.

Once again, Inclusion Europe advocates for an expansive approach as regards the scope of the Directive. By focusing on one of the essential dimensions of daily life, such as employment and occupation, the Directive sets out minimum standards in order to fight discrimination in general, and to exclude discriminatory practices against people with intellectual disability from all areas of life.

ANNEX

COUNCIL DIRECTIVE 2000/78/EC**of 27 November 2000****establishing a general framework for equal treatment in employment and occupation**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 13 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the Opinion of the European Parliament ⁽²⁾,

Having regard to the Opinion of the Economic and Social Committee ⁽³⁾,

Having regard to the Opinion of the Committee of the Regions ⁽⁴⁾,

Whereas:

- (1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
- (2) The principle of equal treatment between women and men is well established by an important body of Community law, in particular in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions ⁽⁵⁾.
- (3) In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.
- (4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human

Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

- (5) It is important to respect such fundamental rights and freedoms. This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one's interests.
- (6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.
- (7) The EC Treaty includes among its objectives the promotion of coordination between employment policies of the Member States. To this end, a new employment chapter was incorporated in the EC Treaty as a means of developing a coordinated European strategy for employment to promote a skilled, trained and adaptable workforce.
- (8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.
- (9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.
- (10) On 29 June 2000 the Council adopted Directive 2000/43/EC ⁽⁶⁾ implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. That Directive already provides protection against such discrimination in the field of employment and occupation.
- (11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social

⁽¹⁾ OJ C 177 E, 27.6.2000, p. 42.

⁽²⁾ Opinion delivered on 12 October 2000 (not yet published in the Official Journal).

⁽³⁾ OJ C 204, 18.7.2000, p. 82.

⁽⁴⁾ OJ C 226, 8.8.2000, p. 1.

⁽⁵⁾ OJ L 39, 14.2.1976, p. 40.

⁽⁶⁾ OJ L 180, 19.7.2000, p. 22.

- protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.
- (12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.
- (13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.
- (14) This Directive shall be without prejudice to national provisions laying down retirement ages.
- (15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.
- (16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.
- (17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.
- (18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.
- (19) Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation.
- (20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.
- (21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.
- (22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.
- (23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.
- (24) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.
- (25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.
- (26) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation, and such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons.

- (27) In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community ⁽¹⁾, the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities ⁽²⁾, affirmed the importance of giving specific attention *inter alia* to recruitment, retention, training and lifelong learning with regard to disabled persons.
- (28) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.
- (29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.
- (30) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.
- (31) The rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.
- (32) Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case. The procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate.
- (33) Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations to address different forms of discrimination at the workplace and to combat them.
- (34) The need to promote peace and reconciliation between the major communities in Northern Ireland necessitates the incorporation of particular provisions into this Directive.
- (35) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

- (36) Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as regards the provisions concerning collective agreements, provided they take any necessary steps to ensure that they are at all times able to guarantee the results required by this Directive.
- (37) In accordance with the principle of subsidiarity set out in Article 5 of the EC Treaty, the objective of this Directive, namely the creation within the Community of a level playing-field as regards equality in employment and occupation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the action, be better achieved at Community level. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

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

Article 2

Concept of discrimination

1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
 - (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
 - (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
 - (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

⁽¹⁾ OJ L 225, 12.8.1986, p. 43.

⁽²⁾ OJ C 186, 2.7.1999, p. 3.

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

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Article 3

Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

2. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

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

Article 4

Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Article 5

Reasonable accommodation for disabled persons

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

Article 6

Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate

aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Article 7

Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Article 8

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II

REMEDIES AND ENFORCEMENT

Article 9

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 10

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 11

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

*Article 12***Dissemination of information**

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force in this field, are brought to the attention of the persons concerned by all appropriate means, for example at the workplace, throughout their territory.

*Article 13***Social dialogue**

1. Member States shall, in accordance with their national traditions and practice, take adequate measures to promote dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct and through research or exchange of experiences and good practices.

2. Where consistent with their national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to conclude at the appropriate level agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and by the relevant national implementing measures.

*Article 14***Dialogue with non-governmental organisations**

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on any of the grounds referred to in Article 1 with a view to promoting the principle of equal treatment.

CHAPTER III

PARTICULAR PROVISIONS*Article 15***Northern Ireland**

1. In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation.

2. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in

schools in Northern Ireland in so far as this is expressly authorised by national legislation.

CHAPTER IV

FINAL PROVISIONS*Article 16***Compliance**

Member States shall take the necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.

*Article 17***Sanctions**

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

*Article 18***Implementation**

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 2 December 2003 at the latest or may entrust the social partners, at their joint request, with the implementation of this Directive as regards provisions concerning collective agreements. In such cases, Member States shall ensure that, no later than 2 December 2003, the social partners introduce the necessary measures by agreement, the Member States concerned being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

In order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. Any Member State which chooses to use this additional period shall report annually to the Commission on the steps it is taking to tackle age and disability discrimination and on the progress it is making towards implementation. The Commission shall report annually to the Council.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 19

Report

1. Member States shall communicate to the Commission, by 2 December 2005 at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

2. The Commission's report shall take into account, as appropriate, the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, *inter alia*, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this

report shall include, if necessary, proposals to revise and update this Directive.

Article 20

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 21

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 27 November 2000.

For the Council

The President

É. GUIGOU
