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EQUALITY LAW IN PRACTICE

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DISCUSSION PAPER

Reasonable accommodation for persons with disabilities: Exploring challenges concerning its practical implementation

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*This designation is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

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Introduction

Jone Elizondo-Urrestarazu

In 2020, Equinet's working group on Equality Law analysed the topic of reasonable accommodation for persons with disabilities and prepared the ensuing Discussion Paper. This Discussion Paper builds upon the work done by Equinet in 2014[1] and the more recent background work done in order to submit, in July 2020, Equinet's third-party intervention in the case of Toplak and Mrak v Slovenia. The case concerns the accessibility of polling stations to persons with disabilities in wheelchairs and raises complaints in terms of article 3 of Protocol No.1 to the ECHR read alone and in conjunction with article 14, article 1 of Protocol No.12 and article 13 as well as under article 1 of Protocol No. 12 and article 13 of the Convention. It is the first time that the Court will decide on the merits of a case regarding the structural problem of physical accessibility to polling stations for persons with disabilities, and the positive duties of States to ensure effective accessibility.[2]

Equinet's submission provided the Court with information about international human rights standards and trends regarding the right to vote for persons with disabilities as well as information about legislation, jurisprudence and practice at the national level in contracting states.

On the basis of this prior work, the Equality Law working group decided on main issues that needed to be explored further in this Discussion Paper. During the preparation of this document, Equinet has also consulted staff members and publications of organisations such as the European Disability Forum (EDF) and the European network of legal experts in gender equality and non-discrimination[3] which have both been active in the area of reasonable accommodation.

This Discussion Paper aims at giving a comparative view of the main identified problematic issues in the field of reasonable accommodation for persons with disabilities to serve as a resource and practical guide to equality bodies and other interested stakeholders.

Legal Framework

While the legislative frameworks vary from one country to another, all Countries whose equality bodies participated by sending the questionnaires have ratified the United Nations Convention on the Rights of Persons with Disabilities (hereafter UNCRPD or CRPD)[4] and its Protocol, as has the European Union. Likewise, all have signed and are bound by the European Convention of Human Rights (ECHR). Finally, the EU legislative framework is explored given its relevance that goes beyond EU Member States, effectively applying also for instance to EEA and EU candidate and potential candidate

[1] Equinet, Equality Bodies Supporting Good Practice on Making reasonable accommodation for people with disabilities by employers and service providers an Equinet good practice guide, 2014

2 The ECtHR previously dealt with a similar situation in Mółka v Poland, albeit the case was declared inadmissible. ECtHR, Mółka v Poland, Application no. 56550/00, 11 April 2006

[3] See in this regard, for instance, Waddington L, Broderick A, Combatting Disability Discrimination and Realising Equality a Comparison of the UN Convention on the Rights of Persons with Disabilities and EU Equality and Non-Discrimination Law, 2018. Waddington L, Broderick A, Poulos, A, Disability law and reasonable accommodation beyond employment, 2016. Ferri D, Lawson A, Reasonable accommodation for disabled people in employment, 2016.

[4] United Nations, Convention on the Rights of Persons with Disabilities (CRPD), 13 December 2006.

countries. Throughout this Discussion Paper reference will be made to all these legislative frameworks where appropriate. Given the common traits, this introduction will aim at giving a general idea about the multilevel European legal framework as regards reasonable accommodation.

United Nations Convention on the Rights of Persons with Disabilities

The CRPD is a UN Convention that seeks to define the human rights of persons with disabilities, including human rights that apply for all and human rights that are specific to persons with disabilities and imposes wide-ranging obligations to state parties. Mentioned above, all EBs that responded to the questionnaire on the basis of which this Discussion Paper was drafted have ratified the CRPD. Moreover, in December 2010, the EU became a party to the CRPD. This was the first international Treaty that the EU has ratified. The direct consequence of this is that the EU is bound, from the moment the Convention entered into force (January 2011), to comply with the requirements set forth by the Convention to the extent of their competences. This "includes an obligation on the EU not to act in a manner which is incompatible with the Convention and an obligation on the Court of Justice of the European Union (CJEU) to interpret EU legislation, including the Employment Equality Directive[5], which prohibits discrimination on the ground of disability, in a manner which is compatible with the CRPD as far as possible".[6] Given that all EU Member States have also ratified the CRPD, this implies that even in a space of shared competences, such as equality and non-discrimination, the CRPD should be respected and applied across the EU.

The first change the Convention provided for was the understanding of the concept of disability, which inevitably conditions the idea of equality for persons with disabilities. Before the Convention, it was common to adopt and focus on the individual or medicalised model of disability. The Convention implied a shift to the socio-contextual model.[7] In fact, in article 1 the Convention establishes that "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." According to WADDINGTON & BRODERICK "the adoption of the CRPD also saw a shift in international human rights law: from the formal model of equality, which fails to take into account differential characteristics in the form of physical, intellectual, psychosocial and sensory impairments, to the substantive model of equality, which factors in the disadvantage encountered by persons with disabilities due to overt and covert forms of discrimination and physical, attitudinal and legal barriers in society."[8]

Article 2 of the CRPD defines reasonable accommodation:

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

[5] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, 27 November 2000.
[6] Waddington L, Broderick A, Combatting Disability…. Ibid, 2018, p. 31.
[7] The CJEU did, in fact, apply this model before the CRPD, such as in CJEU, Sonia Chacón Navas v Eurest Colectividades SA, case C-13/05, 11 July 2006. Nonetheless, after the CRPD was adopted, the Court applied the social model, as shown in CJEU, HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, C-335/11 and C-337/11, 11 April 2013.
[8] Waddington L, Broderick A, Combatting Disability…. Ibid, 2018, p. 8.

Article 5.3 of the CRPD, focusing on Equality and non-discrimination contains further input regarding reasonable accommodation, stating "In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.". Further, point 4 states that "Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.".

In its General comment No. 6 (2018) on equality and non-discrimination the CRPD committee further explored reasonable accommodation stating that:

> (c) "Denial of reasonable accommodation", *according to article 2 of the Convention, constitutes discrimination* if the necessary and appropriate modification and adjustments (that do not impose a "disproportionate or undue burden") are denied and are needed to ensure the equal enjoyment or exercise of a human right or fundamental freedom. Not accepting an accompanying person or refusing to otherwise accommodate a person with a disability are examples of denial of reasonable accommodation;[9]

It further adds that "Any justification of the denial of reasonable accommodation must be based on objective criteria and analysed and communicated in a timely fashion to the person with a disability concerned. The justification test in reasonable accommodation is related to the length of the relationship between the duty bearer and the rights holder.".

In that vein, regarding the obligations under article 5.3 on reasonable accommodation, the Committee states that:

> 23. Reasonable accommodation is an intrinsic part of the immediately applicable duty of non-discrimination in the context of disability.[10] Examples of reasonable accommodations include making existing facilities and information accessible to the individual with a disability; modifying equipment; reorganizing activities; rescheduling work; adjusting curricula learning materials and teaching strategies; adjusting medical procedures; or enabling access to support personnel without disproportionate or undue burden.

The CRPD committee addresses the differences between accessibility and reasonable accommodation (as will this Discussion Paper in depth in chapter 1)[11] to then establish that the duty to provide reasonable accommodation in accordance with articles 2 and 5 of the Convention can be broken down into two constituent parts. The first part imposes a positive legal obligation to provide a reasonable accommodation which is a modification or adjustment that is necessary and appropriate where it is required in a particular case to ensure that a person with a disability can enjoy or exercise her or his rights. The second part of this duty ensures that those required accommodations do not impose a disproportionate or undue burden on the duty bearer.

Furthermore, the Committee explains what should be considered "reasonable", assessing that "it is not a means by which the costs of accommodation or the availability of resources can be assessed — this occurs at a later stage when the "disproportionate or undue burden" assessment is undertaken.

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[9] Committee on the Rights of Persons with Disabilities, General comment No. 6 on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, italics added.

[10] See Committee on Economic, Social and Cultural Rights General comment No. 5 on persons with disabilities, 1994, para. 15.

[11] Ibid, para. 24-25-26.

Rather, the reasonableness of an accommodation is a reference to its relevance, appropriateness and effectiveness for the person with a disability. An accommodation is reasonable, therefore, if it achieves the purpose (or purposes) for which it is being made, and is tailored to meet the requirements of the person with a disability". In doing this the Committee further explains "Disproportionate or undue burden", that should be understood as a single concept that sets the limit of the duty to provide reasonable accommodation. Both terms should be considered synonyms insofar as they refer to the same idea: that the request for reasonable accommodation needs to be bound by a possible excessive or unjustifiable burden on the accommodating party. Finally, the Committee finds that key elements guiding the implementation of the duty to provide reasonable accommodation include:

a) Identifying and removing barriers that have an impact on the enjoyment of human rights for persons with disabilities, in dialogue with the person with a disability concerned;

b) Assessing whether an accommodation is feasible (legally or in practice) — an accommodation that is legally or materially impossible is unfeasible;

c) Assessing whether the accommodation is relevant (i.e., necessary and appropriate) or effective in ensuring the realization of the right in question;

d) Assessing whether the modification imposes a disproportionate or undue burden on the duty bearer; the determination of whether a reasonable accommodation is disproportionate or unduly burdensome requires an assessment of the proportional relationship between the means employed and its aim, which is the enjoyment of the right concerned;

e) Ensuring that the reasonable accommodation is suitable to achieve the essential objective of the promotion of equality and the elimination of discrimination against persons with disabilities. A case-by-case approach based on consultations with the relevant body charged with reasonable accommodation and the person concerned is therefore required. Potential factors to be considered include financial costs, resources available (including public subsidies), the size of the accommodating party (in its entirety), the effect of the modification on the institution or the enterprise, third-party benefits, negative impacts on other persons and reasonable health and safety requirements. Regarding the State party as a whole and the private sector entities, overall assets rather than just the resources of a unit or department within an organizational structure must be considered;

f) Ensuring that the persons with a disability more broadly do not bear the costs;

g) Ensuring that the burden of proof rests with the duty bearer who claims that his or her burden would be disproportionate or undue.

European Convention of Human Rights

Article 14 of the European Convention of Human Rights (ECHR) protects from discrimination in connection to any of the rights protected in the Convention. The European Court of Human Rights (ECtHR) has been especially prolific regarding reasonable accommodation in the field of education, which is not covered by the EU Employment Equality Directive (EED, which will be explained later in this introductory chapter) and therefore complements the legal framework.

In 2016, the ECtHR delivered a significant judgment on the inclusion of students with disabilities in the field of (non-compulsory) education, Çam v. Turkey.[12] In this judgement, the Strasbourg Court analysed a case regarding a person who was refused enrolment at the Music Academy because of her blindness. In the judgement, the ECtHR read the reasonable accommodation requirements in light of article 2 of the CRPD and ruled that there had been discrimination on the basis of disability given the denial of reasonable accommodation. In 2018 and 2019 the Court issued two decisions in which there seemed to be a shift in the Court's interpretation of the scope of the right and obligation to provide reasonable accommodation (Dupin v. France and Stoian v. Romania)[13]. Nonetheless, in G.L. v. Italy (2020)[14] the ECtHR got back in line with the principles set up in Çam v. Turkey. The case of G.L. v. Italy concerns the right of a disabled pupil to specialised assistance in school. First, article 14 and reasonable accommodation is interpreted in line with UNCRPD and link is made to substantive equality and second, it sheds light to how the argument of budget restrictions should be analysed. In this sense, the Government argued that there were no funds available to provide for the reasonable accommodation G.L. would need in order to attend primary school given the only funds available had been allocated to the needs of sufferers of amyotrophic lateral sclerosis (ALS). The ECtHR established that given Italy had adopted an inclusive education approach, the scarcity of the funds allocated to provide for reasonable accommodation to pupils with disabilities caused by budget reductions should have been proportional and equivalent to those cuts to the budget to provide for pupils with no disabilities.

EU law

Mentioned above, the EU is bound by its obligation to apply the UNCRPD, implying that all existing provisions should be read in a way that complies with what has been established in the Treaty. The CRPD committee reviewed the application of the Convention by the EU in 2015[15] and it was expected to do it again in 2021, but the process has been postponed due to the COVID-19 pandemic.

While there are articles in the Treaties regarding equality and non-discrimination of, inter alia, persons with disabilities, no explicit reference is made to reasonable accommodation. However, the EUCFR, in its article 26 calls for the integration of persons with disabilities:

> The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

The main EU-wide legislative document that touches upon reasonable accommodation for persons with disabilities concretely is the Employment Equality Directive.

[12] ECtHR, Çam v. Turkey, No. 51500/08, 26 June 2016. In this same vein please see ECtHR, Enver Şahin V. Turkey, No. 23065/12, 30 January 2018.
[13] ECtHR, Dupin v France, No. 2282/17, 18 December 2018 and ECtHR, Stoian V. Romania, No. 289/14, 25 June 2019.
[14] ECtHR, G.L. v. Italy, No. 59751/15, 10 September 2020.
[15] Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, 2 October 2015. Interesting to note that in its concluding observations, the CRPD Committee recommended that the EU provide Member States with training on reasonable accommodation and accessibility in the context of employment. (para. 65)

Employment Equality Directive

Article 5 of the Employment Equality Directive[16] establishes the need to procure reasonable accommodation measures to guarantee compliance with the principle of equal treatment in access to employment and vocational training. All EU Member States have long transposed this Directive into national law[17]. Given the scope of the Directive, Member States need to comply with the guidance given in the article, interpreted in the light of recitals 16, 20 and 21[18] and the UNCRPD. While the Directive was adopted before the adoption of the UNCRPD and did therefore not take into account the precepts established in this treaty, as explained above, the Directive should be indeed read and interpreted in compliance with the UNCRPD.

Academia has consistently pointed out that there still exist some inconsistencies between the EED and the UNCRPD[19]. FERRI and LAWSON further pointed out that regarding 'reasonable accommodation' and its implementation across Member States there are a few aspects that have asymmetrically been implemented across Member States. These comprise, for instance, the definition of disability, that not all EU Member States establish that the denial of reasonable accommodation should be regarded as discrimination, what is considered to be a 'disproportional burden' or variations regarding the personal scope of the duty.[20]

On top of that, MEP Katrin Langensiepen presented in September 2020 a Draft Report on the implementation of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in light of the UNCRPD [21]. The report contains a call to EU institutions to, inter alia, establish clear EU guidelines on reasonable accommodation. The European Commission has published in 2020 a good-practice guide in this regard[22], in which it is stated that

> Reasonable accommodation is any change to a job or a work environment that is needed to enable a person with a disability to apply, to perform and to advance in job functions, or undertake training on an equal basis with others. The purpose of reasonable accommodation

[16] 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.

[17]Relevant to note that Italy introduced the corresponding reasonable accommodation provisions into national law in 2013 after a ruling of the European Court of Justice found Italy to be in breach of the directive for failure to fully transpose the provisions of Article 5 EED. ECJ, Commission v Italy, Case C-312/11, 4 July 2013.

[18] Recital 16, 20 and 21
(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.
(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.

[19] See, for instance, Waddington L, Broderick A, Combatting Disability…. Ibid, 2018.

[20] For a comprehensive list of these issues please check Ferri D, Lawson A, Reasonable accommodation… 2016. Ibid

[21] The report has now been adopted by the plenary: Report on the implementation of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in light of the UNCRPD (2020/2086(INI)), 3 February 2021.

[22] EC, How to put reasonable accommodation into practice – guide of promising practices, 8 September 2020.

is to enable persons with disabilities to have access to, participate in, or advance in employment. Employees with disabilities thus could achieve the same work outputs and have equal opportunities as non-disabled employees, by doing things a bit differently.

Additionally, the guide offers guidance regarding kinds of accommodation and a *checklist for assessing the 'reasonableness'* of such accommodations that includes:

- Will it work? Does it address the particular needs of the employee with a disability?
- Is it practical?
- Will it result in unsustainable direct and indirect costs to the employer?
- If costs are incurred, are external resources (money subsidies & expertise) available to support employers?
- Will it disrupt other employees from being able to do their jobs?
- Can it be done without health and safety implications?

The European Parliamentary Research Service published in December 2020 an Assessment on the Implementation of the Employment Equality Directive in light of the UN CRPD[23] in which extensive reference is given to reasonable accommodation. In it, it is stated that "The duty to provide reasonable accommodation for persons with disabilities is considered a key element of the Employment Equality Directive, as it effectively helps persons with disabilities to enter the labour market and to remain in employment."[24]

Horizontal Directive

The so-called Horizontal Directive[25] was proposed in 2008 and is still to be adopted by the EU. This would extend the requirement of EU MS to provide for reasonable accommodation in the fields of social protection, including social security, healthcare and social housing; education, and access to and supply of goods and services, including housing. Likewise, the adoption of this directive would incorporate, in line with the UNCRPD the unjustified denial of reasonable accommodation as discrimination.

The duty to provide reasonable accommodation and the costs it could entail to businesses has been one of the most contested issues regarding the approval of the Directive by the Council. Nonetheless, it has been consistently pointed out that the duty as regarded in the proposal, goes no further than what is already stated in the CRPD and therefore already binding in EU Member States.[26] The proposal

[23] Anglmayer, I, Implementation of the Employment Equality Directive in light of the UN CRPD European Implementation Assessment, December 2020.
[24] Ibid, p. 45.
[25] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426 final
[26] See in this regard the arguments set forth by the European Commission in the Proposal, p. 5.

is still pending,[27] although it has been established as one of the European Commission priority pending proposals files in its 2021 Work plan.[28]

Lack of awareness among duty bearers and general public

Notwithstanding the above-mentioned guidance, to this day there seems to be overall confusion regarding what reasonable accommodation measures entail, its differences (and relationship) with accessibility requirements, what kind of measures are considered 'reasonable' and who is supposed to request or offer the measure (proactive or reactive nature of the measure).

Whilst there exist several resources regarding both the theoretical and practical approach to reasonable accommodation measures, such as the impressive online database (Searchable Online Accommodation Resource -SOAR) designed to let users explore various accommodation options for people with disabilities in work and educational settings compiled by the American Job accommodation network[29] that can be searched by both employers and individuals and contains different reasonable accommodation measures per type of disability that can be taken; both employees and public officials seem to be missing an EU legislation (mainly the EED) and UN CRPD compliance 'seal of approval' regarding the specific measures that need to be taken, the reasonableness test or who should be the one proposing a specific measure.

This Discussion Paper tries to tackle and offer comparative information about both the status quo and the experience of equality bodies in applying these measures regarding the main problematic areas identified among our members.

Chapter 1, drafted by Veronika Bazalová, addresses the difference between reasonable accommodation and accessibility. Chapter 2, drafted by Lindsey Reynolds and Imane El Morabet, dwells into the scope of the duty of reasonable accommodation, and in chapter 3 Konstantinos Bartzeliotis focuses on the procedural aspects regarding who has responsibility for designing a reasonable accommodation measure. This Discussion Paper is complemented by a Compilation of case law gathered on the basis of the submissions of the members of the Working Group.

[27] Please check the Synthesis report of the online roundtable future of equality legislation in Europe held by Equinet on 14 October 2020 to gather insight about ideas from key players regarding how to panellists shared one idea that could help to get the Horizontal Directive and its provisions across the line.

[28] Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2021 A Union of vitality in a world of fragility, COM(2020) 690 final, Brussels, 19 October 2020, p. 22.

[29] Available at https://askjan.org/soar.cfm

1: The difference between reasonable accommodation and accessibility

Veronika Bazalová

This chapter will address the difference between reasonable accommodation (RA) and accessibility. As mentioned in the introduction, distinguishing the two concepts may at times be difficult and ambiguous. The purpose of both provisions is mainly to help persons with disabilities to fully enjoy their rights. However, their legal character differs. Another legal concept that helps persons with disabilities to fully enjoy their rights is the duty to develop products while maintaining universal design.[30] But this is beyond the scope of this publication.[31]

Since reasonable accommodation and accessibility are both covered in the CRPD the chapter starts with a closer look on the concepts in the CRPD. Then it assesses them on the level of the European Union (EU) law. Next, there is a short analysis how they are applied by the Council of Europe (CoE) and the European Court of Human Rights (ECtHR). The chapter concludes with description of the national experience.

Reasonable accommodation and accessibility in the CRPD

In contrast to any other universal international legal document the CRPD contains definition of both reasonable accommodation and accessibility. The provision of reasonable accommodation is contained in the right to be free from discrimination section of the CRPD. Mentioned in the introduction, reasonable accommodation is defined as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."[32] The States Parties should ensure that reasonable accommodation is provided.[33] Denial of reasonable accommodation is a form of discrimination.[34]

Accessibility is a general principle identified in Article 3 (f) of the CRPD.[35] The States Parties should ensure that persons with disabilities have access, on an equal basis with others, to the physical environment, to transportation, to information and communications, and to other facilities and services open to the public.[36] The State Parties should develop the accessibility standards and monitor

[30] According to Article 2 of the CRPD: "'Universal design' means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. 'Universal design' shall not exclude assistive devices for particular groups of persons with disabilities where this is needed."
[31] For further reading see e.g. Persson, H., Åhman, H., Yngling, A. A. and Gulliksen, J. (2014), 'Universal design, inclusive design, accessible design, design for all: different concepts—one goal? On the concept of accessibility— historical, methodological and philosophical aspects', Universal Access in the Information Society, Vol 14, p. 505–526.
[32] Article 2 of the CRPD.
[33] Article 5(3) of the CRPD.
[34] Article 2 of the CRPD (see definition of "discrimination on the basis of disability").
[35] On whether accessibility is a legal principle or self-standing right as well see Broderick, A. (2020), 'Of rights and obligations: the birth of accessibility', The International Journal of Human Rights, Vol. 24, No. 4, p.393-413.
[36] Article 9 of the CRPD.

their implementation. They should ensure that the standards are followed not only by public authorities but also by private entities that offer facilities and services to the public.

The Committee on the Rights of Persons with Disabilities has issued general comments on equality and non-discrimination (General comment No. 6[37]) as well as on accessibility (General comment No. 2[38]). They serve as guidance for the legal interpretation of the CRPD. Both comments talk about the relationship between reasonable accommodation and accessibility. General comment No. 2 from 2014 on accessibility understands accessibility as relating to groups, whereas reasonable accommodation as related to individuals.[39] The duty to provide accessibility is an *ex ante* duty, before receiving an individual request to enter or use a place or service. As stated in General comment No. 2, the obligation to implement accessibility is unconditional. The State Parties are not allowed to use austerity measures as an excuse to avoid ensuring gradual accessibility and the duty bearers cannot claim an undue burden. On the other hand, the General comment No. 2 asserts that a duty to provide reasonable accommodation is an *ex nunc* duty which is enforceable from the moment an individual needs it. Reasonable accommodation can be used to ensure accessibility for an individual with a disability in certain cases. In particular, it may be the case that the accessibility will be assured but for a person with some rare needs the place or service will be still inaccessible. Under such circumstances reasonable accommodation may apply additionally to accessibility requirements.

The General comment No. 6 from 2018 on equality and non-discrimination reiterates the Committee's General comment No. 2 on accessibility.[40] Reasonable accommodation and accessibility are two distinct concepts of equality law. Accessibility relates to groups and is implemented gradually but unconditionally. It is a proactive, systemic duty. On the contrary, reasonable accommodation is individualized, applies from the moment the individual persons require access to non-accessible situations or environments, or wants to exercise their rights (and is therefore a reactive duty) and is limited by proportionality. The duty bearer has to enter into dialogue with an individual with a disability and negotiate the design of the reasonable accommodation measure. It usually benefits only the applicant. Since accessibility is applied gradually and its full realization may take time, according to the Committee's Comment No. 6, in the meantime, reasonable accommodation should be available to an individual requesting access.

Besides the general comments, the Committee on the Rights of Persons with Disabilities may adopt views in an individual disputed matter. In several of its decisions the Committee applied the provisions of reasonable accommodation and accessibility without addressing their difference.[41] In other decisions, the Committee touched upon their relationship. However, never as clearly as in the general comments.

In 2013, the Committee considered the case of *Szilvia Nyusti and Péter Takács v. Hungary* that concerned the issue of inaccessible ATMs for applicants with visual impairment.[42] First, the applicants

[37] Committee on the Rights of Persons with Disabilities, General comment No. 6… Ibid.
[38] Committee on the Rights of Persons with Disabilities. General Comment No. 2 (2014), Article 9: Accessibility, 22 May 2014, CRPD/C/GC/2.
[39] Ibid, 2, para. 25-26.
[40] Committee on the Rights of Persons with Disabilities, General comment No. 6… Ibid, para. 24 and 41-42.
[41] One case concerned the accessibility and provision of the reasonable accommodation in prison, see UN, CRPD, Case No. 8/2012, X. v. Argentina, 18 June 2014. Another case was about accessibility of a house in the context of a private dispute between neighbours, see UNCRPD, Case No. 26/2014, Simon Bacher v. Austria, 6 April 2018.
[42] Committee on the Rights of Persons with Disabilities, Case No. 1/2010, Szilvia Nyusti and Péter Takács v. Hungary, 21 June 2013.

unsuccessfully requested the banking company to provide them with a reasonable accommodation measure. After, they brought the claim before the national courts pointing to a broader context – the overall inaccessibility of the ATMs of the banking company. For this reason, the Committee explicitly declined to examine the duty to provide reasonable accommodation and looked only at breach or compliance with Article 9 (accessibility) of the CRPD. It concluded that there was indeed an Article 9 violation and recommended the State Party to remedy the lack of accessibility for the applicants and to establish minimum standards for the accessibility of banking services provided by private financial institutions.

In 2015, the Committee handled the case of *F. v. Austria*.[43] The applicant, who had a visual impairment, alleged that the public transport company owned by the city failed to equip the newly built tram stops with digital audio systems similarly as were the old tram stops. The applicant claimed violation of Article 5 (discrimination) and Article 9 (accessibility) of the CRPD. To define accessibility, the Committee relied on the general comments and described accessibility as unconditional *ex ante* duty related to groups, whereas it described reasonable accommodation as conditional *ex nunc* duty related to individuals. The Committee found a violation of Article 5 (2) (general prohibition of discrimination) and Article 9 (accessibility) of the CRPD. It reasoned that arrangements other than the digital audio system did not provide the applicant with an immediate access to the real-time information available visually on an equal basis with others.

In 2016, the Committee handled the case of *Michael Lockrey v. Australia*.[44] Mr. Lockrey was summoned to serve as a juror. The applicant is deaf and requested real-time steno-captioning of formal communications in order to communicate with others. The steno-captioning was not provided. The applicant claimed violation of Articles 5 (discrimination) and 9 (accessibility) of the CRPD. The Committee agreed with the applicant's objections. It said that the State Party's refusal to provide steno-captioning without thoroughly assessing whether that would constitute an undue burden is discriminatory and violates Article 5 (3) (reasonable accommodation). It also concluded that the State Party did not secure the applicant's right to live independently and participate fully in all aspects of life and was therefore in breach of Article 9 (accessibility). Interestingly, the Committee considered that the accessibility provision was breached both alone and in conjunction with the provision on reasonable accommodation. The same conclusion (including reasoning) was adopted in a similar case of jury duty by an applicant that requested interpretation into Australian Sign Language.[45]

The latest case concerning reasonable accommodation and accessibility was the 2018 case of *Fiona Given v. Australia*.[46] The applicant had limited muscle control and used an electric wheelchair. During the elections she wanted to vote by secret ballot. However, due to her disability, she was unable to mark a ballot paper and deposit it in a ballot box without live assistance, which would compromise the secrecy of her vote. She needed access to an electronic voting system that was not granted. The applicant claimed that she had been subjected to a violation of, *inter alia*, Article 5 (3) (reasonable accommodation) and Article 9 (accessibility) of the CRPD. In the reasoning, the Committee reiterated

[43] Committee on the Rights of Persons with Disabilities, Case No. 21/2014, F v. Austria, 21 September 2015.
[44] Committee on the Rights of Persons with Disabilities, Case No. 13/2013, Michael Lockrey v. Australia, 30 May 2016.
[45] Committee on the Rights of Persons with Disabilities, Case No. 11/2013, Gemma Beasley v. Australia, 25 May 2016. In 2018 the Committee also dealt with another case of jury duty and provision of Australian Sign Language. However, the applicant in this case did not claim the violation of Article 9 (accessibility) of the CRPD. The Committee therefore concluded that only Article 5 (3) (reasonable accommodation) was breached. See Committee on the Rights of Persons with Disabilities, Case No. 35/2016, J.H. v. Australia, 20 December 2018.
[46] Committee on the Rights of Persons with Disabilities, Case No. 19/2014, Fiona Given v. Australia, 29 March 2018.

the difference between reasonable accommodation (related to individuals, upon request) and accessibility (related to groups, *ex ante* duty). It then argued that the State Party did not submit any evidence that provision of the electronic voting platform (already available in the State Party) would represent an undue burden. The Committee concluded that this was a denial of the applicant's rights under Article 29 (participation in political and public life), read alone and in conjunction with Articles 5 (2) (general prohibition of discrimination) and 9 (accessibility).

While it is helpful to have guidance from the Committee on the use of reasonable accommodation and accessibility requirements, it is important to note that case law is still developing. It is not entirely clear when the case concerns only reasonable accommodation or solely accessibility and when both would need to be assessed. It shows an inconsistency on this matter which is both a challenge and an opportunity for further progress in the future.

Reasonable accommodation and accessibility in EU law

Mentioned above the European Union is party to the CRPD, since December 2010, when it ratified the Convention. Therefore, the EU's approach to reasonable accommodation and accessibility should reflect the view of the CRPD Committee. Reasonable accommodation is defined in the Employment Equality Directive as "an appropriate measure to enable a person with a disability to participate in; or advance in, employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer".[47] In general, the phrasing of this provision is in line with the CRPD. However, in comparison to the CRPD the directive fails to explicitly define reasonable accommodation as a form of discrimination.[48] The requirement to provide accessibility is not explicitly addressed in the Employment Equality Directive.

The requirement to ensure accessibility was emphasised in the European disability strategy 2010-2020,[49] and had a special focus on the new 2021-2030 strategy as well.[50] Additionally, the European Commission has developed accessibility standards for certain products and services.[51] In 2019, the EU adopted the European Accessibility Act[52]. It is a directive that aims to improve the functioning of the internal market for accessible products and services, by removing barriers created by divergent rules in Member States. The accessibility requirements have to be fulfilled prior to the placement of the product on the market, and are applicable only if they do not pose a disproportionate burden on a duty bearer.[53] Recital 50 explains that the provision of accessibility should not exclude the provision of reasonable accommodation when required by EU or national law.[54] Similarly, the EU Directive, focused on the accessibility of websites and mobile applications of public sector bodies, says that if

[47] Article 5 of the Council Directive 2000/78/EC, Ibid.
[48] Waddington L, Broderick A, Combatting Disability…. Ibid, 2018, p. 70-71.
[49] European Commission (2010), *European Disability Strategy 2010-2020*, COM(2010) 636 final, Brussels, 15 November 2010.
[50] European Commission (2021), *Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030*, COM(2021) 101 final, Brussels, 3 March 2021. Read Equinet's summary here.
[51] List of the actions on accessibility standardisation is available here.
[52] Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services (European Accessibility Act).
[53] Article 4 (1), 7(1) and 14 of the European Accessibility Act.
[54] Recital 50 of the European Accessibility Act.

the set accessibility requirements are not applicable, then the requirements of 'reasonable accommodation' will still apply.[55]

It is worth noting that the so-called Horizontal Directive proposal that would prevent discrimination on the ground of disability outside of employment explicitly addresses accessibility. It says that persons with disabilities should have an effective access provided by anticipation to health care, education, housing and supply of goods and services.[56] The obligation would be limited by the defence that it would impose a disproportionate burden.

It is apparent that EU law has a different stance on accessibility than the CRPD and the CRPD Committee. In the terms of EU law, accessibility is conditional, and the duty bearers may excuse themselves from the obligation arguing a disproportionate burden and instead apply a reasonable accommodation measure. The Court of Justice of the European Union (CJEU) has not yet explicitly addressed the difference between reasonable accommodation and accessibility in its case law, neither has considered this divergence between EU law and the CRPD.

Reasonable accommodation and accessibility in the work of the Council of Europe

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in its text does not address the duty to provide reasonable accommodation to persons with disabilities or accessibility. However, the Council of Europe (CoE) and the ECtHR work with and apply these concepts.

The CoE as an institution that promotes, protects and monitors the implementation of human rights, is following its Disability Strategy 2017-2023. One of the cross-cutting issues that has to be followed in all of the CoE's work is universal design and reasonable accommodation. Accessibility is one of the Strategy's priority areas. Referring to the CRPD, the Strategy acknowledges that in addition to necessary accessibility measures related to groups, individual barriers can further be overcome by individually tailored reasonable accommodation measures. And denial of reasonable accommodation as well as denial of access can constitute discrimination.[57] This approach is in line with the CRPD and is further stressed in other CoE's documents.[58]

The European Court of Human Rights (ECtHR) has profound experience with claims related to the rights of persons with disabilities.[59] The Court considers a refusal of reasonable accommodation to be discrimination under Article 14 of the ECHR.[60] The Court has a similar stance regarding the difference between reasonable accommodation and accessibility as the CRPD Committee, stating (in the context

[55] Recital 38 of the Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies.
[56] Article 4 of the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final, 2 July 2008.
[57] Council of Europe, Human rights: a reality for all, Council of Europe Disability Strategy 2017-2023, 2017, para. 36.
[58] See e.g. Council of Europe, Lawson, A., Accessibility of information, technologies and communication for persons with disabilities: Contribution to the Council of Europe Strategy on the Rights of Persons with Disabilities, 2017, p. 16-18. Council of Europe, Waddington, L. and Broderick, A., Promoting equality and non-discrimination for persons with disabilities, 2017, p. 13-14.
[59] For the overview of the ECtHR case law on disability see ECtHR, Factsheet – Persons with disabilities and the ECHR, 'Persons with disabilities and the European Convention on Human Rights', September 2020.
[60] ECtHR, Çam v. Turkey, Ibid, para. 65-67.

of education): "[I]n the absence of accessibility of the physical environment prior to the integration of children with a disability in mainstream schools, the authorities have an obligation to provide reasonable accommodation from the moment it is requested […] However, this obligation may not impose a disproportionate or undue burden on the authorities […] These adjustments can serve as a temporary solution for an individual when accessibility is lacking."[61]

There are not many ECtHR's cases that would address accessibility in a more extensive way. One claim against inaccessible buildings in the applicants' hometown was made under Article 8 (right to respect for private and family life).[62] In another case the applicant argued violation of Article 6 (right to a fair trial) in relation to an inaccessible court building.[63] However, the ECtHR declared both cases inadmissible and did not deliberate on the merits. In one case the Court found violation of Article 3 (prohibition of inhuman or degrading treatment) because the applicant with disability, *inter alia*, did not have access to toilet without the help of officers in a detention facility.[64]

The *Enver Şahin v. Turkey* (2018) case deserves special attention[65] This case concerns a paraplegic's access to university education. The ECtHR relied on Article 14 of the ECHR (prohibition of discrimination) in conjunction with Article 2 of Protocol No. 1 (right to education) referring to the failure to adopt reasonable accommodation. However, judge Lemmens in his dissenting opinion disagreed with the majority. He claims that the case raised also the issue of accessibility of the education under Article 2 of Protocol No. 1 (right to education)[66] He reiterates the difference of reasonable accommodation and accessibility according to the CRPD Committee and then provides his stance on relationship between the CRPD's approach and the one of the ECHR:

> "It is quite possible that not every position adopted by the Committee on the Rights of Persons with Disabilities concerning the Disability Convention applies, as such, to the European Convention on Human Rights. For instance, I do not think that our Convention can be interpreted as imposing an 'unconditional' obligation to ensure accessibility without considering the fair balance between individual rights and general interests characterising the whole Convention. On that point, the Disability Convention expands the obligations which States accept on becoming Parties to the European Convention on Human Rights."[67]

From the viewpoint of the duty bearer, it seems that the ECHR could be more lenient on the limits of the accessibility. But it has to be born in mind that the above assessment is of one dissenting judge and does not represent the Court's opinion.

The case in which the ECtHR would have to carefully differentiate between the reasonable accommodation and accessibility is yet to come. But it seems that the Court understands accessibility to be a general *ex ante* principle that is not dependant on an individual's request, whereas reasonable accommodation is seen as an *ex post* conditional arrangement after a person requests it.

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[61] ECtHR, Stoian v. Romania, Ibid, para. 102-103.
[62] ECtHR, Zehnalova and Zehnal v. the Czech Republic, No. 38621/97, 14 May 2002.
[63] ECtHR, Farcaş v. Romania, No. 32596/04, 14 September 2010.
[64] ECtHR, Asalya v. Turkey, No. 43875/09, 15 April 2014.
[65] ECtHR, Enver Şahin v. Turkey, No. 23065/12, 2 July 2018.
[66] Specifically in para. 6 of his dissenting opinion he argues: „Access to educational institutions existing at any given time is an integral part of the right set forth in the first sentence of Article 2 of Protocol No. 1 […] The right of access to education imposes an obligation on States to ensure that the buildings in which classes are given are accessible to all, therefore including persons with disabilities.
[67] Ibid, para. 4.

National experience

21 national equality bodies (NEBs) shared national legislation, case law and approach to the concepts of accessibility and reasonable accommodation. In some countries the duty to provide the measures to people with disabilities so that they can work, have access to goods and services or live independently have different names – reasonable accommodation, reasonable adjustment (i.e. Great Britain, Greece, Croatia), effective adjustment (the Netherlands), individual accommodation (Norway), appropriate measures (e.g. Ireland). In order to maintain clarity, the term reasonable accommodation is uniformly applied in the text.

Many countries have (at least partially) adapted their national legislation following the ratification of the CRPD[68] and produced the CRPD related national policy documents (action plans, strategies).

Some countries adopted **two different types of duties** in their equality legislation: one referring to accessibility and one to reasonable accommodation (e.g. Germany, Albania, Netherlands, Georgia). In Belgium, there is only legislation referring to **reasonable accommodation and no specification of accessibility** in the national acts or decrees, understanding that the duty to provide accessibility stems from the CRPD.[69] In some countries **accessibility requirements are stipulated in separate disability acts that are distinct from equality legislation** (e.g. Albania, Georgia, Hungary, Ireland). In other countries the **accessibility duties are specified in legal instruments related to specific fields** such as construction law (e.g. Croatia, Czech Republic, Greece[70], Slovakia) or transportation law (e.g. Great Britain, Slovakia). Such legislation may be an implementation of the EU directives on accessibility.[71]

Only few NEBs reported that the difference between accessibility and reasonable accommodation was addressed in their respective countries. Some of them noted that the notion of reasonable accommodation and accessibility is like the one of the CRPD and the CRPD Committee. Those countries are Finland, Hungary, Greece and Cyprus.

In Finland according to the preparatory works to the Non-Discrimination Act reasonable accommodation must be conceptually distinguished from the *general and permanent* accessibility measures provided in other pieces of legislation.[72]

In 2019 the Hungarian Equal Treatment Authority handled the case of denied reasonable accommodation to a person with reduced mobility while undergoing radioactive iodine therapy (see Annex for details).[73] The complainant needed personal assistance by a nurse . The hospital denied such assistance due to possible harm on the nurse's health caused by radioactivity. The equality body concluded that the hospital failed to examine whether the treatment could be carried out in a hospital setting and did not seek expert advice. The equality body found in its decision that the hospital's failure

[68] European Union Agency for Fundamental Rights (FRA), Implementing the United Nations Convention on the Rights of Persons with Disabilities (CRPD): An overview of legal reforms in EU Member States, May 2015, p. 7-8 (reasonable accommodation) and p. 9-10 (accessibility).
[69] In some countries (e.g. Czech Republic) ratified international conventions are integral part of the national law. Therefore, the accessibility enacted in the CRPD is *stricto sensu* defined in national law as well.
[70] In Greece, the accessibility duty in equality law context is vague. The specific accessibility requirements are laid down only in relation to specific fields (such as construction regulations).
[71] For more information on accessibility obligations in European countries see European Commission (2016), Waddington, L., Broderick, A. and Poulos, A., Disability law and reasonable accommodation…. Ibid, p. 75-80.
[72] Finland, Government (2014), 'Hallituksen esitys eduskunnalle yhdenvertaisuuslaiksi ja eräiksi siihen liittyviksi laeiksi', HE 19/2014 vp, p. 79.
[73] Hungary, Equal Treatment Authority, Decision No. EBH/HJF/10/54/2019.

to provide reasonable accommodation constituted direct discrimination on the ground of disability and explained that accessibility is not the same as reasonable accommodation. Providing accessibility is a *general obligation* while reasonable accommodation has to be tailored to the needs of the particular person with disability and it The hospital then turned to the court that upheld the equality body[74]

The Greek equality body assessed the case of a teacher with a mobility impairment that was assigned by the Ministry of Education to a primary school placed in an old building without an elevator (see Annex for details).[75] The teacher had to use the children's restroom on the ground floor and could not access the teachers' office on the first floor. The equality body concluded that the duty to provide reasonable accommodation is *complementary* to the duty to comply with accessibility requirements. This implies that the Ministry has to take into account the disabilities of the education staff and not to allocate them in inaccessible buildings.

As a good practice example, the equality body in Cyprus periodically issues reports on accessibility of beaches, theatres, stadiums, public transportation and audio-visual media services. Recently, the equality body requested that information on COVID-19 pandemic be accessible. When an opportunity arises, the equality body sends letters to the duty bearers proactively, arguing in favour of the provision of reasonable accommodation to job applicants, employees or students.

In some countries there is an approach to reasonable accommodation and accessibility that differs from the one of the CRPD. The diversion is in one or several following aspects of the accessibility/reasonable accommodation: ex ante / ex post duty, (no) need for an individual assessment, unconditional/conditional duty.

In Great Britain reasonable accommodation is in some contexts such as employment and housing understood to be a reactive duty which is triggered when an individual requests it, whereas accessibility measures are understood to be proactive and of universal application. However, in the areas of services, public functions and education the provision of reasonable accommodation is proactive or anticipatory.[76]

The Swedish Discrimination Act defines six forms of discrimination, one of them being 'inadequate accessibility'.[77] It is compulsory to take measures towards ensuring accessibility, where the prohibition is applicable and such measures are reasonable. Determining what measures are reasonable is to be done on the basis of accessibility requirements in laws and other statutes, and with consideration to certain other factors. However, those requirements vary. In some cases, such as regarding certain physical obstacles, there are provisions that call for addressing the inaccessibility itself, regardless of

[74] Hungary, Budapest-Capital Regional Court, Decision No. 105.K.701.061/2020/6.
[75] Greece, Greek Ombudsman, file No. 239916/2018.
[76] For the details see Waddington, L. and Broderick, A., Promoting equality and non-discrimination for persons with disabilities, March 2017, p. 22-23. Waddington, L. and Lawson, A., Disability and non-discrimination law in the European Union: An analysis of disability discrimination law within and beyond the employment field, July 2009, p. 53-54.
[77] Inadequate accessibility, which is a form of discrimination, is defined as follows: that a person with disability is disadvantaged through a failure to take measures for accessibility to enable the person to come into a situation comparable with that of persons without this disability where such measures are reasonable on the basis of accessibility requirements in laws and other statutes, and with consideration to:

- the financial and practical conditions,
- the duration and nature of the relationship or contact between the operator and the individual, and
- other circumstances of relevance.

what information is available regarding the hindering of individuals.[78] In other cases, a law might call for an individual investigation into what can be done about a problem.[79]

In the Netherlands the law stipulates that the duty bearers have to gradually ensure general accessibility for people with disabilities, unless such action constitutes a disproportionate burden. The same applies for reasonable accommodation.[80] Similarly, in Norway the accessibility duty (which has been translated to the law as 'universal design')[81] is not imposed if it represents a disproportionate burden to a duty bearer. Assessing proportionality, one should take into account the effect for the person with disability, whether the undertaking is of public nature, costs, resources, safety considerations and cultural heritage considerations. Reasonable accommodation has to be provided only if it does not impose a disproportionate burden as well. However, the conditions to evaluate whether a measure imposes a disproportionate burden are limited to the effect for the person with disability, costs and resources.[82] This is explored further in chapter 2.

Conclusion

Clear guidance on the difference between reasonable accommodation and accessibility is provided in the CRPD legal framework – reasonable accommodation is a conditional ex post duty related to an individual, whereas accessibility is a systemic unconditional ex ante duty. These concepts are employed by the EU law and the CoE as well, although differently in some aspects in comparison to the CRPD.

Reasonable accommodation measures have the positive aspect of being potentially more diverse and manifold, due to their nature of responding to individual situations. For example, for a person with disability changing the working hours, leaving out night shift or moving them to a site where there's less noise or more light may be considered a reasonable accommodation measure. On the other hand, providing some of these and similar arrangements before a request seems nearly impossible given the potentially different needs of and solutions for each person with disabilities. The question remains whether these could nonetheless be considered accessibility measures where the duty bearer has a general policy targeting all persons with disabilities that stipulates and ensures that they could benefit from such measures (thus being an ex ante measure).

Overall, there is a lack of national case law and experience with differentiating reasonable accommodation and accessibility. It may indicate three things. First, the concepts are new and the issues are yet to arise. Second, the cases are settled before reaching the courts. Or third, the problem to conceptually distinguish reasonable accommodation and accessibility is merely theoretical and does not pose real obstacles in practice. Due to lack of case law people with disabilities may be wary

[78] Such is the case with the regulations of the Swedish National Board of Housing, Building and Planning, specifically regarding what it defines as easily eliminated obstacles.
[79] Such is the case with the Swedish Education Act which, among other things, regulates pupils' rights to support measures.
[80] Netherlands, The Act on equal treatment on grounds of disability or chronic illness (Wet gelijke behandeling op grond van handicap of chronische ziekte), 3 April 2003, Article 2a (1) (accessibility) and Article 2 (1) (reasonable accommodation).
[81] Generally speaking, 'Universal design' is considered linked but different from accessibility. Universal design relates to how to produce and design things that are accessible to begin with for everyone and not only linked to disability, will accessibility has a clear and direct link to disability. Nonetheless the Norwegian lawmaker has understood UD to be all-encompassing as reflected in the legislation.
[82] Norway, Equality and Anti-Discrimination Act (likestillings- og diskrimineringsloven), 1 January 2018, Section 17 (accessibility) and Section 22 (reasonable accommodation).

to claim accessibility before the courts fearing the loss and related financial costs. And there may be also a lack of awareness among people with disabilities about their rights.

Nevertheless, it is apparent that the concepts of reasonable accommodation and accessibility are complementary and can strengthen each other towards better equality. Once the environment is more accessible there will not be such need to provide reasonable accommodation in individual cases. In turn, more individuals requesting reasonable accommodation will result in duty bearers choosing accessibility to begin with, thereby benefitting persons with disabilities further.

2: Scope of the duty of reasonable accommodation

Imane El Morabet and Lindsey Reynolds

This chapter will firstly give a brief overview of the duty to provide reasonable accommodation in EU law and under the CRPD.

Thereafter it will consider how this duty is implemented in Member States and the extent to which national legal systems offer a more detailed definition, either in statute or in guidance, of the meaning of what is considered to be 'reasonable'.

We will then address whether, and to what extent there is a lack of clear guidance on this point, and if so, the extent to which any lacunae are problematic.

We then offer a thematic overview of the national cases, considering the range of issues the national courts have been asked to consider. Finally, we provide closer analysis of the approach the national courts have taken to determining what is reasonable, seeking to identify factors which the courts have taken into account and found to be persuasive. In taking these two approaches, we analyse the same set of cases from a different angle. There will therefore be an inevitable degree of overlap and readers may wish to focus on either the section titled 'Thematic overview of national case law' or the section titled 'Case law on reasonableness' depending on the nature of their interest in the topic.

The duty of reasonable accommodation in EU law and under the CRPD

This chapter aims at answering the vital question of how far can a reasonable accommodation measure go and to what standard does it have to be provided.

Mentioned before in this Discussion Paper, Article 2 of the CRPD defines reasonable accommodation as: '*necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms*'.

Article 5 of the Employment Equality Directive describes the obligation in the field of employment as follows: '*In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training for such a person unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate*'.

This entails a context-sensitive analysis based on: (1) the individual needs of the disabled person, (2) the effectiveness of adjustments in removing the disadvantage for the particular disabled person, (3) the practicality of carrying them out by a duty bearer (e.g. an employer, a provider of goods and

services, education bodies), (4) the proportionality of the adjustments. This may include the financial and/ or organizational cost of the adaptation, its frequency of use and expected lifespan, (5) the need to create substantive equality for the person with a disability, meaning the enjoyment and exercise of human rights and fundamental freedoms on an equal basis with others.

In *Jungelin v Sweden*[83], the CRPD Committee held that States Parties enjoy a certain **margin of discretion** in the formulation of reasonable accommodation duties. In particular, regarding their decisions about when a burden should be regarded as 'undue' or 'disproportionate'.[84]

This margin of discretion has also been confirmed by the ECtHR in the case of *Enver Sahin v. Turkey*[85], about the barriers facing a paraplegic person seeking access to university buildings: "*it is not the Court's task to define the "reasonable accommodation" – which can take on different material and non-material forms – to be implemented in the educational sphere in response to the educational needs of persons with disabilities; the national authorities are much better placed than it to do so*. *It is, however, important that those authorities take great care with the choices they make in this sphere, in view of the impact of those choices on persons with disabilities, whose particular vulnerability cannot be ignored*."[86]

At EU-level, the recitals of EU directive 2000/78[87] provide some clarity on what reasonable accommodation in the employment sphere entails and what the consequences of this obligation could be in practice:

> *(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*.
>
> *(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.*

The criteria in recital 21, such as the financial and other costs of the requested accommodation, the scale and financial resources of the duty bearer and the possibility of obtaining public funding or any other assistance are also used in domains other than employment at national level to assess the reasonableness of the requested accommodation. This is discussed further below.

[83] Committee on the Rights of Persons with Disabilities, Communication No. 5/2011, *Jungelin v Sweden*.
[84] Ferri D, Lawson A, Reasonable accommodation… 2016, p. 10.
[85] ECtHR *Enver Sahin v. Turkey*, Ibid.
[86] ECtHR *Enver Sahin v. Turkey,* Ibid, § 61 also confirmed in *Çam v. Turkey,* Ibid § 66.
[87] Recital nr. 17, 20 and 21 of the Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Implementation of the duty in Member States

When we look at the information on national legal systems provided by NEB's, it appears that that the scope of this duty can be wide, meaning that accommodation could include anything, such as material and auxiliary aids, organizational adjustments, adjustments to provisions, criterion and practices to physical spaces and buildings… as long as they meet the legal definition of reasonable accommodation and result in inclusion of the person with disability.

In some states, the obligation is **limited to the employment sphere** in terms of the Directive, such as Austria, Germany, Lithuania and Slovakia. Other Member States have gone **beyond** the requirements of the Directive and have a reasonable accommodation duty in other spheres of public life such as education, access to goods and services or public functions, see examples in Albania, Belgium, Bulgaria, Croatia, Czech Republic, Finland, Hungary, Ireland, Great Britain, Greece, Malta, Netherlands, Norway, Poland, Slovenia and Sweden.

In general terms, we can make a distinction between States that **provide a degree of statutory definition or guidance** which elaborates on the requirements of the duty of reasonable accommodation such as Albania, Czech Republic, Great Britain, Belgium, Finland, Greece, Ireland, Norway, Netherlands, Cyprus and Georgia (some examples of this are discussed in the section titled Defining reasonableness in statute or guidance below) and states that **do not,** such as Slovenia, Croatia, Austria. However, this picture is complicated by the overlap with accessibility legislation and other means of implementation of the CRPD.

Most states provide a form of defence to respondents to a request for reasonable accommodation[88] where they can demonstrate it would impose an **undue or disproportionate burden**.[89]

The majority of states reported having **a reactive duty to make adjustments**, relying on a claimant making a request. However, in other states including Finland, Lithuania, Norway and in Great Britain, at least some aspects of the duty in some contexts are anticipatory, meaning that respondents have to proactively consider the needs of disabled people in some circumstances. There is scope for overlap with accessibility duties in this regard. This is discussed further in other chapters.

In Finland, the Non-Discrimination Ombudsman considers that the obligation to make reasonable accommodation imposed by the Non Discrimination Act together with its preliminary work indicates an overly restrictive interpretation of the obligation compared to the duty imposed by the CRPD and thus some adjustments should be made to the Non Discrimination Act.

Defining reasonableness in statute or guidance

We will now examine more closely the factors identified in examples provided by NEBs of statute or guidance which elaborate on the definition of reasonableness.

[88] This means that the duty bearer must investigate whether the requested accommodation is reasonable and if not, must argue why the accommodation is unreasonable because it represents a disproportionate (financial) burden for the duty bearer.

[89] This is the case in, for instance in Austria, Belgium, Croatia, Czech Republic, Germany, Ireland Hungary, Ireland, Lithuania, The Netherlands, Norway, Poland, Serbia, Slovakia and Slovenia. In Ireland, in respect of the provision of goods and services, reasonable accommodation is only required to be provided if it does not give rise to more than 'a nominal cost' to the provider.

Most of the provisions analysed aim to strike a balance between factors from the perspective of the disabled person, factors which might affect the respondent and factors which are external or affect third parties.

When considering reasonable accommodation from the perspective of the claimant, the **following factors from statute or guidance could support a finding that a measure is reasonable**:

- ✓ the impact on the quality of life of the disabled person (e.g. Belgium),
- ✓ the expected frequency and duration of use/ expected duration of the relationship, e.g. between employer and employee, (e.g. Belgium/ Sweden),
- ✓ the benefit to the person (e.g. Czech Republic, Slovakia),
- ✓ the needs of the disabled person (e.g. Finland),
- ✓ whether the steps would be effective in preventing substantial disadvantage (e.g. Great Britain)
- ✓ whether, without the measure, it would be impossible or unduly difficult for the person to avail him or herself of the service (e.g. Ireland),
- ✓ effectiveness (e.g. the Netherlands/ Hungary),
- ✓ the effect of the accommodation in terms of dismantling barriers (e.g. Norway),
- ✓ the socio-economic position of the person with disabilities (e.g. Cyprus).

These factors have to be balanced **against the requirements of respondent**, very often making express reference to the financial impact and resources (e.g. Belgium, Czech Republic, Cyprus, Finland, Great Britain, Ireland, Malta, Norway, Poland and Sweden). Additional factors within statute and guidance also include the organizational impact (e.g. Belgium) and the practicability (e.g. Great Britain). Some states expressly take into account the availability of grants and other financial assistance (e.g. Belgium, Czech Republic, Cyprus, Finland, Great Britain, Greece, Ireland, Malta). In Great Britain it is specified that in changing policies, criteria or practices, a service provider does not have to change the basic nature of the service it offers.

Finally, some examples of statute or guidance take into account **external factors** such as compliance with legal standards (e.g. Belgium/ Great Britain) and impact on the environment and other users (e.g. Belgium). In Ireland, in relation to the provision of goods and services, it is specified that where a person has a disability that, in the circumstances, could cause harm to the person or to others, treating the person differently to the extent reasonably necessary to prevent such harm does not constitute discrimination. In Slovakia and Czech Republic account is given to the possibility of achieving the purpose of the measure by another, alternative means.

Is there a lack of clarity on the definition of what is reasonable, and if so, is it problematic?

Most equality bodies reported an absence of clear guidance and insufficiency of case law to guide understanding of the meaning of reasonableness in this context. However, no research reports or data on this point were made available from the respondents.

Anecdotally, some expressed the view that this lacuna could be problematic for reasons including:

- The Labour Inspectorate tends to avoid interpretation of concepts it considers vague such as “reasonable”. Legal practitioners who represent the parties very often are unaware of the

provision itself which lays down the reasonable accommodation duty of the employer and the duty is seen as a complement to accessibility. (Greece)

- Without any judicial case law, we are in the dark and our recommendations are less reliable. (Czech Republic)
- The Norwegian term – suitable individual accommodation – may impose a barrier for the claimants considering the employer always has to make an individual assessment and decision. Many employers do not have enough knowledge or information about their reasonable accommodation duty. However it is acknowledged that there is a positive side as well, because when accommodation is made, it should be suited to the individual. (Norway)
- In Slovakia there is no legal definition of reasonable accommodation, despite the recommendations of the UN Committee for the Rights of Persons with Disabilities in its concluding observations[90], calling for the amendment of the Anti-Discrimination Act to include an explicit definition of reasonable accommodation. (Slovakia)

However, others were more positive reporting:

- It is not necessarily problematic as it is inherent to a reasonable accommodation to look at this on a case-by-case basis. It would be impossible to have a fixed framework, as every person and disability is different. There are some standards which can be applied. (Belgium)
- The lack of clear definition is considered to be an asset as it is flexible enough to cover a wide range of needs. (Austria)

Thematic overview of national case law

To have a clear view of how far the reasonable accommodation obligation goes and what kind of reasonable accommodation measures can be provided, in this section we analyse different national cases of NEB's. The approach of the courts to determining these questions and the factors weighed up is analysed in more depth in the section titled 'Case law on reasonableness'.

Employment

The following adjustments were considered ***reasonable*** in the sphere of employment:

- ✓ **Adjusting a provision criterion or practice**[91] (PCP) that is the application of conduct policy to health and safety breaches which requires that any health and safety policy breach be treated as gross misconduct, has been accepted as a reasonable accommodation. The PCP put the claimant at a substantial disadvantage in comparison with non-disabled employees that did not experience difficulties with memory and concentration.[92]

- ✓ **Changing a work post at the same rate pay** for an employee who became disabled through a back injury has also been found to be reasonable, even though this may lead to discontent amongst other employees.[93]

[90] Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Slovakia, 21 April 2016, CRPD/C/SVK/CO/1.
[91] This is a rule, a practice, a requirement or a condition that apply to all workers in the same way.
[92] Great Britain, Employment Tribunal England and Wales, 20 December 2019, Plowright v Sky In Home Services, 1810176/18.
[93] Great Britain, Employment Appeal Tribunal 26 August 2016, G4S Cash Solutions v Powell Appeal No. UKEAT/0243/15/RN.

- ✓ The possibility of complaints from other colleagues has also been rejected as an argument to justify refusing **an adapted work schedule, an adapted chair, a room to rest and modifying a workplace** for a teacher suffering from multiple sclerosis.[94] In this case, the tribunal argued that the duty of reasonable accommodation goes beyond physical adaptations and also includes a **change in mentality**, meaning that the colleagues and other staff members must make an effort to adjust to the situation of the disabled person.[95]

- ✓ **An adapted work rhythm through the system of progressive resumption of work and training to cope with the consequences of the disability at work** were also found to be reasonable for an employee who was absent for almost two years because of cancer and wanted to return to work.[96]

- ✓ **Working from home** can be a reasonable accommodation measure especially if the positive effect on the disabled employee and the small costs for the employer are proven.[97]

- ✓ The duty to make reasonable adjustments is an 'efforts agreement.' This means that an employer must always examine whether reasonable accommodation is possible. Refusing a candidate due to having a hearing-impairment, **without giving her the opportunity to participate further in the recruitment process** and without examining if reasonable accommodation can be provided, can be considered a breach of the employer's duty to provide reasonable accommodation and therefore a discrimination based on disability.[98]

- ✓ **Adapting the work schedule** is also an interesting tool to keep employees with disability longer at work. For example, **exempting a nurse from the afternoon and night shifts**[99], because she has diabetes is a reasonable accommodation measure.

- ✓ **Redeployment to another branch**[100] **or other departments**[101] could also be solutions to integrate disabled employees at the workplace.

The following adjustments were considered ***unreasonable*** because of the disproportionate impact on the employer and/or other employees:

- × The adjustment of a PCP that triggered a "written improvement warning" after a long period of absence from work, so that **disability related absences would be excluded** from the number of sick days an employee was allowed, was not found to be reasonable.[102]

- × A bus driver who had suffered a stroke was refused the accommodation of part-time working **with a certain schedule, and with a calm work-environment,** due to the difficulties in

[94] Belgium, Employment Tribunal Charlerloi, 10 January 2020.
[95] *Ibid*.
[96] Belgium, Labour Court Brussels, 20 February 2018, 2016/AB/959.
[97] Norway, Equality and Anti-Discrimination Tribunal of Norway, 18 October 2007, Case 21/2007, B vs. A Company.
[98] Lithuania, Office of the Equal Opportunities Ombudsperson, case Nr. (20)SN-44)SP-48
[99] Greece, Greek Ombudsman, 2018, case number 241861/2018.
[100] Czech Republic, Public Defender of Rights File No.: 7571/2017/VOP.
[101] Greece, Greek Ombudsman 2018 Case number: 252092/2018.
[102] Great Britain, England and Wales Court of Appeal, 15 May 2014, Griffiths v Secretary of State for Work and Pensions, [2015] EWCA Civ 1265.

achieving this and the impact it would have on other employees. The Court concluded that these accommodations were not reasonable in this particular case, taking into account that an adequate work-environment for this particular employee would have been impossible, or at least very difficult, for the employer to achieve. In the Court's opinion, such accommodations would have had a considerably negative impact on the other bus drivers' working conditions. [103]

- One case concerned an employee who was employed as a road sweeper. Following surgery she was no longer able to work in a manual role. The Council looked to see if she could be redeployed in an administrative / non-manual capacity. She applied for over 100 jobs internally but was unsuccessful. She felt this was because they "could not see past her having been a road sweeper." She was dismissed. The question before the House of Lords was about the permissible limits of the reasonable adjustment duty. The House of Lords accepted that if an employee is not able to do his/her present job due to his/her disability, **redeployment to a different post** can be a reasonable accommodation. [104]

- Similar reasoning was applied in another case[105] where the employer did not have an appropriate job vacancy and could not reassign a healthcare worker, who wasn't able to perform her work over 70% due to a decreased physical disability, to another job suitable for her. **Creating a new position** is considered unreasonable in this case because of the involved financial costs for the employer. Similarly, in addressing the creation of a new position, the Supreme Court confirmed that an employer must be able to show, objectively, that they have given full consideration as to whether the redistribution of tasks would allow the employee to continue in his or her role, but stated this did not go as far as to require the creation of an entirely different job.[106]

- **Sign language interpretation** can be a much needed accommodation for deaf job-seekers , but can be refused by employers if they can argue that the costs are too high and the accommodation would not benefit other employees, which was the case of a university that wanted to recruit an Associate Professor.[107] The applicant in question would need approximately 300 hours of educational interpretation and 150 hours of regular interpretation per year to do the job, which the university found to be too expensive.

- Finally, a deaf person who applied for an eight-month temporary contract as a receptionist at the Interpreter's Central (Tolkcentralen) was not hired due to his disability. Answering voice phone calls would have been one of his main tasks. His discrimination claim was found to be unfounded because the requested adjustments, such as **organizing the work so that he would not have to answer voice phone calls, hiring support staff to help him, or acquiring and utilizing technical tools to help him**, were qualified as a disproportionate burden for the

[103] Sweden, Labour Court, 2013, Veolia Transport Sverige AB, Case 78/13.
[104] Great Britain, House of Lords 1 July 2004, Archibald v Fife Council [2004] UKHL 32.
[105] Slovakia, the Regional Court, 27 August 2019, 8 CO/232/2018
[106] Ireland, Irish Supreme Court, 2019, Nano Nagle School v Marie Daly [2019] IESC 63
[107] Sweden, Labour Court, Södertörn University, Case A 146/16, Judgement 51/17.

employer because of the related costs, organizational difficulties, impact on other employees and the (limited) length of the employment.[108]

Education

- In the field of education, **not sanctioning or reprimanding pupils** that have behaviour problems linked to a disability can be an example of reasonable accommodation: in a case of a nine year old child who had been excluded from school on a few occasions following behaviour that was linked to his Asperger's diagnosis, such exclusion was found to be discriminatory, because, due to the disability of the pupil, his distress tended to build up and the interventions made by the school did not de-escalate matters, which led to him lashing out and ultimately being excluded. The school was required to apologise to the family and **to provide training for staff and to review guidance**.[109]

- **Providing the support of a teaching assistant and a professional communication mediator** is also one of the forms of reasonable accommodation in accordance with the individual needs of the student.[110]

- **Providing free school transport**[111] for pupils with disability, making **the school building accessible**[112] for pupils in wheelchairs and **providing adequate preparations before the child's first year of school, an adequate process of familiarizing the pupil with the school and a support team of staff members with sufficient competence/experience**[113] for a pupil with high-functioning autism are measures that could guarantee proper access to the education system. This is also the position in Belgium regarding providing sufficient **sign language interpretation**[114] for deaf pupils.

- **Dietary adaptations**[115] for students with disability are also seen as a reasonable accommodation. In the case of a student at secondary school in the Czech Republic that is intolerant to gluten, the refusal to provide appropriate dietary meals for the student or the lack of equivalent alternative such as the possibility to bring her own food in the premises of the cafeteria and eat it together with other students, are found discriminatory.

- Where **an exemption on the assessment** of spelling and grammar elements of language subjects is granted due to dyslexia, the Supreme Court in Ireland confirmed that including an explanatory note on the exam results certificate stating that certain parts of an exam had not been assessed was considered reasonable.[116]

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[108] Sweden, Labour Court, 22 January 2020, Stockholms läns landsting, AD 2020 Nr 3.
[109] Great Britain, First Tier Tribunal for Scotland Health and Education Chamber in McGibbon v Glasgow City Council, 2018.
[110] Rules about teaching assistants and professional communication intermediaries, Croatia: Official gazette No 102/18, 59/19 and 22/20).
[111] Finland, Supreme Administrative Court, 28 May 2020, KHO:2020:60.
[112] Sweden, Göta Court of Appeal 15 May 2018, Vara Municipality, Case T 1773-17.
[113] Sweden, Malmö District Court, 18 November 2018, Runstyckets Förskola AB, Case T 11646-17.
[114] Belgium, Tribunal of First Instance Ghent, 15 July 2009, case AR 09/1122/A
[115] Czech Republic, Public Defender of Rights, File No.: 6059/2015/VOP
[116] Ireland, Irish Supreme Court, 2017, Kim Cahill v. The Minister for Education [2017] IESC 29.

- ✗ Swedish courts have concluded that the refusal of the request from a dislexic pupil to **use a digital reading tool** during reading tests would not be reasonable, as the purpose of the test would not be reached.[117]

Goods and services

- ✓ When it comes to (public) transportation, people with a disability are entitled **to fully accessible public transportation** so they can benefit from their freedom of movement without any restrictions due to their disability. When it comes to wheelchair users, bus companies must ensure that they have **access to the bus**[118] which can not only be classified as a reasonable accommodation but is also an accessibility requirement.[119]

- ✓ In Ireland it was held that an **airline's refusal to allow a passenger to use a harness** in the business cabin of the plane, resulting in having to sit in the economy cabin without the access he required to a reclining chair was a failure to provide reasonable accommodation. The airline's defense that the use of the harness would pose a safety risk was not accepted, as no evidence was presented to support this. It was further taken into account that the harness had been used in the business cabin multiple times previously and that the airline had failed to implement or justify the findings of an engineer's report into its use or follow up on queries with the manufacturer of the airline seats as to its safe use.[120]

- ✓ **Payment of costs of an assistant in a healthcare program** in Slovenia[121] and **remote opening of the entrance door of a building** in the Czech Republic[122] where a person with disability lives are other examples of reasonable accommodation. As regards the latter example, the argument of the Housing association (HA) that once they would be willing to help the woman, they would be obliged to provide the remote opening to everybody else in the building and concerns about the security in the building were rejected.

- ✓ **Admission of assistance dogs to an animal park**[123] has also been found to be obligatory and a reasonable accommodation for clients with a disability.

- ✓ The refusal of an **airline company to make reasonable accommodation for a customer who needed extra space** in an airplane due to a leg disability was found discriminatory in first instance in Finland. The company had informed the customer that the only way to arrange the space needed would be by booking and buying two extra seats. The appeals court overruled the decision and stated that the obligation to provide reasonable accommodation does not impose an obligation to accommodate in the form of price reductions. As there was no other way for the airline company to accommodate the service than in relation to the price, the company had not discriminated against the disabled customer. An appeal has been made by

[117] Sweden, Scania and Blekinge Court of Appeal, 2020, Malmö Municipality, FT 3697-19 and Svea Court of Appeal 2020, Huddinge Municipality, FT 8377-19. Göta Court of Appeal, 2020, Örebro Municipality, FT 3960-19.
[118] UK, Supreme Court, Paulley v FirstGroup PLC [2017] UKSC 4. For a similar line of reasoning, see Gävle District Court, T 240-16.
[119] See first chapter.
[120] Ireland, Workplace Relations Commission, 2020, A Customer v An Airline ADJ-00021710
[121] Slovenia, Advocate of the Principle of Equality, 26 April 2018, Case no. 0700-32/2017/85.
[122] Czech Republic, Public Defender of Rights, 2020, File No.: 3737/2019/VOP.
[123] Belgium, Tribunal of First Instance Liège, 10 December 2018 and Court of Appeal Liège, Belgium 16 July 2020.

the Non-Discrimination Ombudsman to the Supreme Administrative Court, where the case is currently pending. [124]

- ✗ The refusal of a mortgage company to allow a woman **to change to an interest-only mortgage**[125], because she was not able to work due to a depression, was not found to be discriminatory. After losing her job, she claimed on an insurance policy to cover her mortgage repayments. Her claim was initially on the basis that she was unemployed and later that she was depressed and could not work. When her insurance cover ran out, she was unable to meet the monthly repayments. Some months later the mortgage company began proceedings to repossess her home. The woman applied to the mortgage company to transfer her repayment mortgage to one which was interest-only. This would have reduced her monthly payment sufficiently for her housing benefit to cover it. She argued that the mortgage company had failed to make reasonable adjustments on the grounds of her depression. This claim was rejected by the Court of Appeal of England and Wales.[126]

- ✗ Lastly providing **a reserved parking spot** for a man with severe and multiple physical disabilities has not been considered to be reasonable due to the existing alternatives namely two spots suitable for parking on the man's estate, in the garden surrounding his house.[127]

Case law on Reasonableness

The section 'Defining reasonableness in statute or guidance' focused on the definition of reasonableness in statute and guidance. However, in practice, determination of this elusive concept will primarily be on a case by case basis considering the facts and circumstances. Building up a body of case law will therefore be a helpful guide for future cases. This section looks in more depth at how the national courts and decisions of NEBs have weighed up competing factors and reached a view on what is reasonable.

Benefit

- ✓ In a Czech case,[128] there was considerable focus on the benefit to an employee of the Prison Service who requested **redeployment** to a prison closer to his home due to difficulties he experienced in sitting for prolonged periods. Overall, he was successful in arguing that refusal of the redeployment was discriminatory. Factors in his favour were that the transfer would be of great benefit to the employee, the second prison had a suitable vacancy, it was financially viable, and there was no other viable local option for him. The only factor which was preventing the transfer was the refusal of the second prison.

- ✓ Similarly, the Norwegian anti-discrimination tribunal[129] considered that a **home working arrangement** had a positive effect on a Chief Physician with a disability. The cost to the

[124] Finland, The National Non-Discrimination and Equality Tribunal (decision 102/2016), 20.4.2017; Helsinki Administrative Court (decision 04815/17/1205) 20.12.2019. The Supreme Administrative Court: currently pending.
[125] Great Britain, England and Wales Court of Appeal, Jacqueline Vera Green v Southern Pacific Mortgage Ltd and Equality & Human Rights Commission, 2019
[126] See case in National Case Law Compendium.
[127] Czech Republic, Public Defender of Rights, 2018, File No.: 1370/2017/VOP.
[128] Czech Republic, Public Defender of Rights, 21 January 2019, 7571/2017/VOP.
[129] Norway, the Norwegian Anti-Discrimination Tribunal, 13 August 2020, Case 19/203 A vs. B/University Hospital.

employer of a laptop was minimal and so the Tribunal held that the hospital had failed to offer reasonable accommodation.

Rendering the measure devoid of effectiveness

- ✓ In Slovenia, funding for regenerative rehabilitation was reformed so that the disabled person would receive **funding to attend** but their personal assistant was not funded. This meant that the service could be offered to more people, however the Advocate of the Principle of Equality of the Republic of Slovenia[130] held that in doing so the right to the service offered by the association was devoid of effectiveness.

Self-resolution

In another case from the Czech Republic[131] a man with multiple physical disabilities requested that the municipality provided a **designated parking space** in front of his house. However, the fact that the man resolved the issue by himself by parking in his own garden area resulted in a finding that the denial of such measure was not discriminatory.

Financial considerations

- × The central role of affordability was particularly clear in a case from Germany.[132] A deaf student unsuccessfully argued that she required an **interpreter for her Masters course**, which would cost the University 15,000 euros per semester, as opposed to the far cheaper option of provision of student interpreters, which was offered by the University. Even though the written interpreter would arguably have been more effective for the student and would have aided her full participation in the course, she was unsuccessful on the grounds of disproportionate financial burden.

- × Similarly, the Swedish Labour Court[133] held that it would not be reasonable to expect a University to fund 300 hours of **educational interpretation and 150 hours of regular interpretation** per year for an applicant who is deaf.

- × In a related case from Slovakia[134] due to the claimant's health condition and the impact of her work as a healthcare worker, she requested that the employer **transfer her to a different department** and assign her a different type of work, which the employer refused. The Regional Court did not find a violation of the Anti-Discrimination Act as the claimant, in light of her gradual deterioration of her health condition, was not qualified and able to perform her job, which required physical movement and fitness. The Regional Court pointed out that if the respondent were to comply with the claimant's request to transfer her to the reception, he would have to create and increase the number of employees in this position, which would involve financial costs. Having regard to the circumstances of the case, also the fact that the respondent was a state-subsidized organization, it was not possible to create a new position.

[130] Slovenia, The Advocate of the Principle of Equality, 2017, 0700-32/2017/85. Please consult Case-Law Compendium for further details.
[131] Czech Republic, Public Defender of Rights, 28 March 2018, 1370/2017/VOP.
[132] Germany, Administrative Court Halle, judgment of 20. November 2018 6 A 139/17 HAL
[133] Sweden, Södertörn University, Case A 146/16, Judgement 51/17.
[134] Slovakia, the Regional Court, 27 August 2019, 8 CO/232/2018.

Logistical barriers/impact on others

- ✓ A case before the Greek Ombudsman[135] concerned a nurse who requested an **exemption from afternoon and night shifts** due to her need to have fixed times for meals and injections. Based on the information given by the hospital, the Greek Ombudsman observed that the on-call days were approximately 91 per year (365/4), therefore exempting the complainant from afternoon shifts 6 times per year would result in a need for replacement once every 15 on-call days. On this ground, the Greek Ombudsman concluded that granting the requested measure would not impose a disproportionate burden to the hospital and, therefore, the requested measure was reasonable. In contrast, a similar request to work morning hours only was held not to be reasonable in a small hospital with only four midwives available.[136]

- × A request for **part-time working** with a particular schedule, in a suitably calm environment for a bus driver who had experienced a stroke was found by the Swedish Labour Court not to be reasonable due to the difficulties in achieving this and the impact it would have on other employees.[137]

- × In a case before the Court of Appeal of England and Wales [138]the Court considered a disabled employee's request that her **disability related absences be excluded from the calculation of her permitted sickness absence days**. The Court of Appeal noted that the argument that the absence was exceptional, because it was the period when the illness was diagnosed and the treatment plan adopted had not been fully considered. However, overall, the Employment Tribunal was entitled to take the view that this was not a material reason for ignoring a lengthy absence. The Court was influenced by the fact that the absence was eight times longer than the permitted annual absence before the consideration point is reached.

- ✓ In a case before the Labour Court in Brussels, Belgium[139] the Court concluded that a **request for progressive resumption of work** after disability related absence was reasonable. The Court highlighted what could additionally have been done by the employer, such as requesting input from an occupational health doctor to look at adapted working methods and adaptations to the post.

- ✓ The Supreme Administrative Court of Finland[140] considered a case about **school transport** for a disabled pupil. The pupil's family had moved to another school admission area, but the pupil's guardians and doctors considered the old school to be better suited for the pupil. The pupil was allowed to continue in the old school, but his parents were required to fund his transport. The Court stated that given that the journey from the pupil's home to his new primary school is approximately the same as the journey to his old primary school and that the cost of transporting him and his brother to his new school would be around € 5,600 school year, the transportation costs cannot be considered unreasonable. A similar case involved a

[135] Greece, Greek Ombudsman, Case number: 241861/2018.
[136]Greece, Greek Ombudsman case number: 248376/2018
[137] Sweden, Labour Court, 23 October 2013, Veolia Transport Sverige AB, Case 78/13.
[138] Great Britain, Court of Appeal (Civil Division), 10 December 2015, Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ) Please check the Case law compilation for more information.
[139] Belgium, Labour Court Brussels, 20 February 2018, 2016/AB/959.
[140] Finland, The Supreme Administrative Court, 28 May 2020, KHO:2020:60.

disabled pupil on a remote Scottish island.[141] The local authority refused to provide accessible transport for him to travel to school with his friends. After a case was raised before the Education Tribunal, the case settled, and the local bus routes were adjusted to free up an accessible bus to transport the pupil to school.

The importance of individualised assessment

- ✓ The Office of the Equal Opportunities Ombudsperson in Lithuania,[142] considered a case concerning a bank which refused to progress an application from a **hearing-impaired job applicant**. The Ombudsperson concluded that there was a violation and emphasized: *"It should be noted that it is the individualized assessment of a person's ability to perform a specific job that is an essential criterion in deciding whether an employer will be able to perform the job functions assigned to him or her. …it must be stated that the Bank has not provided evidence that the Applicant and his possibilities to perform the functions assigned to the Position has been individually assessed. Thus, the Bank did not prove that the employer (the Bank) had taken measures to ensure that the Applicant would have equal opportunities to participate in a job interview, regardless of the disability. It should be noted that from the written explanations provided by the Bank and the content of the job description, it is obvious that the job functions of the Bank's Operations Specialist are mostly related to internal processes, i.e., working with the computer."*

Sufficiency of anticipatory steps

There is a clear overlap between reasonable accommodation and accessibility. Some of the cases presented reflect that meeting accessibility standards may be only part of the picture and may not always be sufficient. Accessibility standards could be strengthened to avoid discrimination by, for example, ensuring reasonable accommodation to Provisions, Criterion or Practices to build towards ensuring that the accessibility measures are effective in practice. For example, Gävle District Court in Sweden[143] found a **breach of accessibility regulations where a bus driver** did not know how to operate the lift and in addition, he had not arranged a taxi for the passenger, in contravention of the operator's policy. The Court found that his offer to lift the passenger was not reasonable as it could be demeaning and dangerous.

However, also in Sweden, the Stockholm District Court[144] found there was no discrimination when a **hearing loop was out of order**. The fact that the company had installed a loop, trained staff and tested that the loop was functional the night before it failed persuaded the Court there was nothing further that could have been asked of the company.

In a case from Great Britain, a bus company had a policy that **wheelchair users could use an accessible space on a first come first served basis**. When a woman with a child in a pram refused to move, Mr

[141] Great Britain, Western Isles Education Authority decision 05 October 2018
[142] Lithuania, Office of the Equal Opportunities Ombudsperson, 2020, (20)SN-44)SP-48.
[143] Sweden, Gävle District Court, 2018, Region Gävleborg, T 240-16.
[144] Sweden, Stockholm District Court, 2019, 7 A Sevena AB, T 5181-18.

Paulley was unable to board the bus. The Supreme Court[145] took a practical approach and considered what would work in practice, how firm a notice should be and what could reasonably be expected of the driver. The Court allowed the appeal but only to the extent that FirstGroup's policy requiring a driver to simply request a non-wheelchair user to vacate the space without taking any further steps was unjustified. Where a driver who has made such a request concludes that a refusal is unreasonable, he or she should consider some further step to persuade the non-wheelchair user to vacate the space, depending on the circumstances.

Conclusion

This chapter has provided an overview of the requirements of the reasonable accommodation duty in EU law and under the CRPD. Thereafter we have analysed some trends in how the duty is implemented at national level and provided a thematic summary of the sorts of accommodation which has been considered to be reasonable in employment, education and goods and services. These included, in the particular circumstances of the case; provision of specialist furniture and equipment, adaptations to policies involving salary scale, work patterns and location, education support measures such as digital recording tools, school transport, a remote-control door and access for assistance dogs. Others, in the circumstances of the case, were found not to be reasonable and included provision of sign-language interpretation at work, use of a digital reading tool in a reading exam, provision of a disabled parking space in a private garden and extra space on a flight.

Many of the respondent equality bodies indicated that there was a lack of clarity on the parameters of what is considered to be reasonable, but differing views were offered as to the extent to which this is problematic in practice. In some states there is more detail provided in statute or guidance, which includes balancing factors in favour of the claimant, the respondent and the wider world. Similarly, in case law, the Courts and decision makers have been influenced by factors such as: benefit, effectiveness, self-resolution, logistical barriers, individualised assessment and of course financial issues. These resources can act as a useful guide, but the fact remains that each case has to be considered on its merits, taking into account a range of relevant factors. Overall, the important outcome is that reasonable accommodation compensates for the disadvantages experience by people with disabilities as a result of the non-adapted environment, in order to ensure the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

[145] Great Britain, the Supreme Court, 18 January 2017, Paulley v FirstGroup PLC [2017] UKSC 4.

Chapter 3: Responsibility for designing the reasonable accommodation measure (persons with disability vs. duty bearer) & procedural aspects

Konstantinos Bartzeliotis

As evidenced in the previous sections of this Discussion Paper, neither Directive 2000/78/EC nor the CRPD contain provisions as to whom belongs the responsibility to trigger and design a reasonable accomodation measure. Nor does it seem that the matter has been disputed before the CJEU or the CRPD Committee. National authorities on the ground can seek for an authoritative guidance in the General Comment No. 6 on equality and non-discrimination of the CRPD Committee, issued in 2018, where it is stated that:

> *As an ex nunc duty, reasonable accommodation must be provided from the moment that a person with a disability requires access to non-accessible situations or environments, or wants to exercise his or her rights. Reasonable accommodation is often but not necessarily requested by the person who requires access, or by relevant representatives of a person or a group of people. Reasonable accommodation must be negotiated with the applicant(s). In certain circumstances, the reasonable accommodation provided becomes a collective or public good. In other cases, the reasonable accommodations provided only benefit the applicant(s). The duty to provide reasonable accommodation is an individualized reactive duty that is applicable from the moment a request for accommodation is received. Reasonable accommodation requires the duty bearer to enter into dialogue with the individual with a disability. It is important to note that the duty to provide reasonable accommodation is not limited to situations in which the person with a disability has asked for an accommodation or in which it could be proved that the alleged duty bearer was actually aware that the person in question had a disability. It should also apply in situations where a potential duty bearer should have realized that the person in question had a disability that might require accommodations to address barriers to exercising rights*[146].

The key elements of these recommendations can be identified as follows:

- Reasonable accommodation is often but not necessarily requested by the person who requires access
- Reasonable accommodation requires the duty bearer to enter into dialogue with the individual with a disability,

[146] Available here, pages 7-8 (last accessed at 9 November 2020).

- Reasonable accommodation also applies in situations where a potential duty bearer should have realized that the person in question had a disability that might require accommodations to address barriers to exercising rights (constructive knowledge).

Although there may not be a single answer as to what extent these guidelines reflect imperatives which were already established in national jurisdictions or they set new standards, their implementation can certainly take a great variety of forms depending on the facts and the context in each case. Parameters which can also affect their impact include enforcement mechanisms' availability when dialogue between the parties is not successful, the inherent particularities of psychosocial disabilities, under what circumstances is proof of disability required and privacy considerations. The aim of this chapter is to outline this dynamic process in a variety of fields by referring indicatively to relevant practices or national case-law.

Responsibility

All equality bodies reported **that it is mainly the persons with disabilities** (or someone acting on their behalf) **who are expected to take the initiative** to manifest their need for a specific reasonable accommodation, however, this expectation **does not rule out any responsibility of the duty bearer to take initiative when needed**. For example, in Finland, the duty of the authority to provide reasonable accommodation is not treated as conditional on the disabled person expressly requesting reasonable accommodation from the authority or other communication from the disabled person concerned[147], whereas in Great Britain service providers, those exercising public functions and education authorities are also expected to proactively anticipate the needs of disabled users[148].

Responses from equality bodies focused on both the area of education and the area of employment. Their responses are analysed in the sections below.

Education

Regarding the field of education, the Swedish Education Act calls for **an investigation by a school into what can be done** about the challenges that a certain pupil might be facing, in certain situations. Such an investigation can potentially bring into light not only that the pupil has a disability but also what accommodating measures are needed. This duty and to what extent it has been fulfilled is to be taken into account when determining whether the pupil has been discriminated (in the form of inadequate accessibility) or not. Such proactive duty of school authorities exists also in Norway and the Netherlands, where it has been ruled that **a school may still have the obligation to investigate what accommodation is necessary despite the fact that a pupil or his parents have not explicitly asked for specific measures**, if it is clear beyond doubt that a pupil needs accommodation[149].

Employment

In Great Britain**,** there is **no onus on the disabled worker to suggest what adjustments should be made** (although it is good practice for employers to ask). The Employment code of practice states that

[147] Finland, National Non-Discrimination and Equality Tribunal, 14 December 2015, YVTltk 21/2015, a case concerning granting unemployment benefit for a disabled person for the duration of their studies.
[148] UK Equality Act 2010, part 3.
[149] The Netherlands, Netherlands Institute for Human Rights, 27 June 2016, 2016-59, para. 4.5 (a standard that was not fulfilled in that case).

an employer must do all they can reasonably be expected to do to find out if a worker has a disability, having regard to privacy. What is reasonable depends on the circumstances and will be objectively assessed. Employers must come to their own conclusions about whether an employee is disabled or not and should not blindly adopt an Occupational Health report[150].

In the Netherlands, discrimination can occur when a potential employer concludes not to hire a person with a disability already known to him/her due to poor performance in the **selection standards** (e.g. the results of a selecting test) if those were applied uniformly (for people with disabilities and without disabilities) without having **considered/researched whether reasonable accommodation was necessary** in the specific case[151].

In Norway, it is stated that the **employer is under duty, when should or ought to know** that an employee has a disability that might affect work performance or ability to exercise his or her tasks, to seek information about the diagnosis and contact expertise and suggest accommodation measures in cooperation with the employee[152].

In Croatia, a municipality asked for guidance about how to achieve reasonable accommodation for **an applicant who had intellectual disability and was illiterate in a job recruitment procedure for cleaners which entailed written and oral tests** according to the administrative regulation. This request allowed the equality body to clarify i) that the legal provision which lays down the reasonable accommodation duty is *lex specialis* as regards the regulations concerning recruitment procedures and, therefore, must take precedence over the latter, ii) that adjustments should be made not only regarding the form but also the content of the testing and iii) that reasonable accommodation does not put people with disabilities in a privileged position in the selection process, but provides them with equal conditions and equal opportunities for employment compared to people without disabilities[153].

Dialogue and enforcement

It is accepted that **the duty bearer has a right to choose from various effective measures**, however it is a prerequisite that this is done **in consultation** with the person who is to make use of the measure and that the person's point of view is taken into account (e.g. Norway). Accordingly, it is established that the **employer has a duty to take steps to at least examine the feasibility** of the requested accommodation and it can be expected of her/him to demonstrate the measures undertaken (Belgium[154]). On the other hand, in situations where there is a **dispute between the employer and the employee about what measures are needed**, if the employer takes measures that seem reasonable, further information might need to be provided by the employee (Sweden).

[150] Great Britain, Employment Appeal Tribunal, 4 March 2016, Gallop v Newport City Council UKEAT 0118_15_0403.
[151] The Netherlands, Netherlands Institute for Human Rights, 2 January 2014, 2014-1, (para. 3.15-3.16).
[152] Norway, Equality and Anti-Discrimination Tribunal of Norway, 18 October 2007, Case 21/2007, B vs. A Company. In that case, an employer was found to have discriminated against an employee with attention deficit/hyperactivity disorder (ADHD) because, although he/she was aware of the diagnosis, did not make any attempts for adjustments.
[153] Delivered on September 28th2020, Croatia, Office of the Ombudsman, 28 September 2020, POSI-1.9.4.-1090/20-12-02.
[154] Belgium, Decision of the Employment Court of Liege of 12th October 2017. The Court found that a driving school had failed to demonstrate they had investigated the possibility to purchase an adapted car requested by a job applicant considered to be morbidly obese and, consequently, they failed to demonstrate the undue burden.

In fulfilling their responsibilities for designing reasonable accomodation, the parties involved may firstly **rely on recommendations issued by competent authorities** (Croatia[155], Ireland[156], the Netherlands, Norway[157], Sweden[158]). They may also avail themselves of **mediation or counseling services**, which are alternatively or cumulatively offered by equality bodies (Albania, Austria[159], Belgium, Croatia, Cyprus, Finland, Greece, the Netherlands[160], Norway[161], Slovakia, Slovenia), non govermental so-called anti-discrimination bureaus (Sweden), or other competent authorities (GB[162], Germany[163]).

Within the employment context, a relevant instrument is the **Occupational Health Services Convention (No. 161)**, adopted by the International Labour Organization in 1985, which provides for the competence of such services, inter alia, to **advise the employers, the workers and their representatives on the adaptation of work to the capabilities of workers in the light of their state of physical and mental health** (article 1 (ii)) [164].Equivalent provisions have been reported to be in force at national level, (Austria, Belgium, [165], Czech Republic, GB[166], Germany, Greece[167], Lithuania, the Netherlands[168], Norway, Slovakia[169], Slovenia, Sweden), however, it is rather unclear to what extent the potential of these regulations has been exhausted. As to the **inspection of the compliance with the duty to provide reasonable accomodation**, it has been reported to be assigned in varying degrees

[155] Institute for Expertise Professional Rehabilitation and Employment of Persons with Disabilities.
[156] In Ireland, the parties may refer to general guidance issued by competent authorities, but please note that since reasonable accommodation is always an individually tailored solution, it is not possible to provide a definitive list of what accommodations are required for particular disabilities or workplaces "Reasonable Accommodations – Obstacles and Opportunities to the Employment of Persons with a Disability" published by the National Disability Authority. Information and guidance is also provided by the Irish Human Rights and Equality Commission p. 96.
[157] E.g. guidelines from the directorate of education regarding individual accommodation in education. The Equality and Anti-Discrimination Ombud provides information regarding individual accommodation on its web page, and provide information and guidance, free of charge, to individuals, employers and organisation regarding individual accommodation.
[158] E.g. The Swedish National Agency for Education has issued general guidelines on how to investigate the need for measures of accommodation for individual pupils who are facing difficulties in school. The guidelines are intended to compliment the Swedish Education Act, which calls for such investigations but is not as detailed as the guidelines.
[159] Under Austrian law, it is mandatory to follow conciliation proceedings prior to make a claim before a court. The Austrian Disability Ombudsman can accompany claimants as a "trustee" in these proceedings, providing support and counselling.
[160] In the Netherlands, each municipality is supposed to ensure access of its constituents to a non-discrimination body who can provide support in case of conflict: https://wetten.overheid.nl/BWBR0026168/ (last accessed on 9 November 2020), The Netherlands, Municipal Anti-Discrimination Services Act, 25 June 2009.
[161] In Norway, guidance can also be given by the Labour Inspection Authority, whereas the labour and Welfare Authority (NAV) can assist in a negotiation between the applicant and the duty bearer.
[162] Advisory Conciliation and Arbitration Service („ACAS").
[163] Integration offices and integration specialist services (§ 182, 192 SGB IX).
[164]Full text of the Convention available here.
[165] Law on health care ("Official Gazzette" No 121/03, 48/05 and 85/06), article 19.
[166] https://www.nhsggc.org.uk/working-with-us/hr-connect/occupational-health/about-us/
[167] Act for the Protection of Health of the workers (Law 3850/2010), article 17 (2).
[168] The Netherlands Parliamentary Documents II, 2001/02, 28169, no. 3 (Explanatory Memorandum. Also, the Netherlands, Court of Amsterdam, 14 Augustus 2020, ECLI:NL:RBAMS:2020:3993 .
[169] Act No. 5/2004 Coll. on Employment Services and on Amendments to Certain Acts, as amended.

and forms to labour inspectorates or occupational safety and health authorities (Belgium, Czech Republic, Finland[170], Greece, Slovakia[171], Slovenia[172]).

Psychosocial disabilities

More specific is the case of psycho-social disabilities, which on the one hand are of an invisible nature, and on the other hand, there is often reluctance from those concerned to disclose their disability due to the stigma such disabilities entail[173]. Apparently, these factors together make these persons particularly vulnerable to the reproach for lack of cooperation, as it is shown by a research in Great Britain[174].

This kind of vulnerability is evidenced in a case concerning the refusal of a municipality **in Norway to provide personal assistance to a woman with reduced functional ability** in the form of dyslexia, structuring and concentration problems, where it was held that the municipality's duty to provide reasonable accommodation does not go further than trying 'as best they can' to establish an appropriate/necessary cooperation with the person who shall receive the individual accommodation[175]. Also in the employment context, in relation to the **dismissal of a person diagnosed with ADHD** due to undocumented absence from work, episodes of threats and uncontrolled anger towards colleagues, The Equality and Anti-Discrimination Tribunal of Norway found no breach of the reasonable accommodation duty of the employer on the ground that there was a **lack of cooperation on the part of the complainan**t, manifesting in his denial to follow psychological assistance from a municipal health service team and to take medicines[176].

To remedy the puzzle, **experts have stressed that employers should not focus on obtaining a diagnosis but instead they should ensure that they are sufficiently aware of conditions to enable them to address weaknesses and support employees**[177]. Such attitude however presupposes that employers do have knowledge of the critical facts, either actual or constructive (see below under the headings "constructive knowledge" and "privacy considerations").

[170] In Finland, labour inspectorates conduct workplace inspections (usually in the form of a written document hearing) and give statements.
[171] In Slovakia, the main role of national labour inspectorate is to inspect and control the correct observance of all rules on the employment of persons with disabilities established by Act No. 311/2000 Coll. Labour Code, as amended. When necessary, the labour inspectorate is entitled to call upon the equality body to participate in the inspection. In such case, the equality body might enter the premises of the employer, request necessary documentation or conduct interviews.
[172] The labor inspectorate has the competence to conduct inspection procedures. It can also order the duty bearer to remove the irregularities.
[173] See for example M. Bell and L. Waddington ,*The employment equality directive and supporting people with psychosocial disabilities in the workplace*' (2016), European network of legal experts in gender equality and non-discrimination, p.12
[174]Ibid, p.13.
[175] Norway, Equality and Anti-Discrimination Tribunal of Norway, 29 October 2020, Case 19/65, A vs. B Municipality.
[176] Norway, Equality and Anti-Discrimination Tribunal of Norway, 9 September 2013, Case 11/2013, A vs. B Company.
[177] See the research paper '*Neurodiversity at work*' by the Advisory Conciliation and Arbitration Service of the UK (2016) p. 46.

Constructive knowledge: where a potential duty bearer should have realized that the person in question had a disability that might require accommodations

It is an obvious prerequisite for the duty to provide reasonable accommodation to arise that the duty bearer has knowledge of the material facts. As it was already shown, this knowledge need not be factual, (i.e. when the duty bearer receives an explicit request or is otherwise aware of such clear information), but it can also be constructive. This concept has been described as **"When the facts at his command beckoned him to look and inquire further, and he refrained from doing so, equity fixed him with constructive notice of what he would have ascertained if he had pursued the further investigations which a person with reasonable care and skill would have felt proper to make in the circumstances."** [178]

Therefore, it may be a matter of dispute whether the duty bearer actually commands those facts which could have beckoned him or her to look and inquire further. Two such cases were reported from Ireland:

a) In a period of 14 months, an employee had taken sick leave frequently, citing stomach difficulties as the reason for his absence. At a meeting to discuss his employment in light of his sick leave record, he disclosed to his employer that he was in fact suffering from depression. The employer was held not to have been on notice of the individual's disability as it had not been disclosed and therefore the duty to provide reasonable accommodation had not been triggered.[179]

b) In the context of the provision of goods and services, when the respondent is not provided with any details of its customers' particular needs or information that would lead it to believe that the customer has particular needs, it has been held that it is not the responsibility of the service provider to probe further if it is not obvious from the information already available[180].

Akin may be also the issue whose knowledge is material. According to the Equality Act 2010 Code of Practise of Great Britain, **the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment in cases where an employer's agent or employee** (such as an occupational health adviser, a HR officer or a recruitment agent) **knows**, in that capacity, **of a worker's or applicant's or potential applicant's disability**. On the contrary, information will not be 'imputed' or attributed to the employer if it is gained by a person providing services to employees independently of the employer, even if the employer has arranged for those services to be provided.[181]

Evidence

Either as a common practice or in compliance with a legal obligation, **persons who request reasonable accommodation usually are expected to establish their claim by providing medical evidence** (Albania, Belgium, Cyprus, Czech Republic, Georgia, Lithuania, Slovakia). **Specific situations in which**

[178] See for example the case of Ireland, Labour Court, 24 January 2018, Swan O'Sullivan Accountants & Registered Auditors v Seamus Counihan [2018] EDA1810.
[179] Ireland, the Equality Tribunal, 6 February 2012, An Employee v A Logistics Company DEC-E2012-11.
[180] Ireland, the Equality Tribunal, 5 February 2010, Carroll v Middleton Cabs DEC-S2010-010, para 5.9
[181] Equality Act 2010 Code of Practise paras 6.21 – 6.22.

proof of disability is reported as a threshold for reasonable accomodation include evaluation in school (Cyprus), dietary requests at school canteens and reserved parking (Czech Republic), or in certain cases requests to skip certain in person meetings mandatory for a course at university (the Netherlands).[182]

In the employment context, medical documentation is reported as a requirement particularly in cases where the disability is not obvious (Czech Republic), when the employer seeks to challenge that someone meets the definition of the disability in order to avoid the duty (Great Britain), in examinations for recruitment of civil servants (Cyprus) and in relation to vocational rehabilitation (Slovenia). The same documentation **is also reported as the initial guide for the duty bearer in identifying the accommodating measure to be taken** (Greece, Lithuania, Slovakia). On the contrary, specific identity cards granted to persons with recognized severe disabilities specifying the degree but not the type of disability may **not be a suitable evidence** for this purpose (Germany[183]).

Privacy considerations

The duty bearer only has a right to request documentation that is relevant when assessing the need for individual accommodation and a requirement for documentation shall not go beyond what is necessary to assess the need (Norway). Employers need also to ensure that where information about disabled people may come through different channels (e.g. occupational health adviser, a HR officer or a recruitment agent), there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act[184].

When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially (Great Britain[185]); from the equality law perspective, a breach of this duty can amount to disability discrimination and harassment[186].

It is important to notice, however, that privacy and reasonable accommodation claims may conflict with each other, hence a compromise between the two may be unavoidable. For example, that was the case of an employee who was taking sick leave frequently, citing stomach difficulties as the reason for his absence and not disclosing that he was suffering from depression for 14 months; it was held that "*if such matters affect a person's participation in the workplace and the person wishes to avail of the protection that any policy or law may afford a person in such circumstances then there is an onus to disclose honestly and fully any such matters to an employer.* ***It is unreasonable to assume that an employer ought to provide appropriate measures without any knowledge of a disability.***"[187]

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[182] The Netherlands, Netherlands Institute for Human Rights, 21 July 2015, 2015-85.
[183] The identity card is granted to persons with recognized severe disabilities so that they can prove their disability to the employer (Section 152 (4) SGB IX). According to the Book IX of the Social Code, People with a recognized severe disability or people who are on a recognized equal footing with severely disabled people are entitled to certain reasonable accommodations, which are made dependent on the existence of a severe disability (e.g. 5 days more vacation per year).
[184] Equality Act 2010Code of Practise, para 6.21.
[185] Equality Act 2010, para 5.15.
[186] See e.g. in Great Britain, The Employment Tribunal, 16 October 2018, Carr v Weston Homes, 3201540/2017, where a British tribunal awarded £14,000 for disability discrimination and harassment to an employee with type 1 diabetes who was left feeling "intimidated, under the spotlight and concerned for her job" when her employer made very intense inquiries about her disability.
[187] Ireland, The Equality Tribunal, 6 February 2012, An Employee v A Logistics Company DEC-E2012-11, para 4.4.

Conclusion

The enjoyment of the right for reasonable accommodation for persons with disabilities results from the successful pursuit of a certain procedure which is mainly regulated at national level and whose complexity may vary. In its simplest form, it consists only of an explicit request addressed from a person with an obvious disability to the duty bearer, whereas this procedure can be more elaborated in different ways, in order to suit better the needs of the right holder in particular circumstances. To this end, the CRPD Committee's recommendations can serve as a compass for the parties involved and the national adjudicating bodies, however there may be cases where other constraints have to be taken into account, such as the need for certainty and the protection of privacy.

Equinet Member Equality Bodies

ALBANIA
Commissioner for the Protection from Discrimination
www.kmd.al

AUSTRIA
Austrian Disability Ombudsman
www.behindertenanwalt.gv.at

AUSTRIA
Ombud for Equal Treatment
www.gleichbehandlungsanwaltschaft.gv.at

BELGIUM
Institute for the Equality of Women and Men
www.igvm-iefh.belgium.be

BELGIUM
Unia (Interfederal Centre for Equal Opportunities)
www.unia.be

BOSNIA AND HERZEGOVINA
Institution of Human Rights Ombudsman of Bosnia and Herzegovina
www.ombudsmen.gov.ba

BULGARIA
Commission for Protection against Discrimination
www.kzd-nondiscrimination.com

CROATIA
Office of the Ombudsman
www.ombudsman.hr

CROATIA
Ombudsperson for Gender Equality
www.prs.hr

CROATIA
Ombudswoman for Persons with Disabilities
www.posi.hr

CYPRUS
Commissioner for Administration and Human Rights (Ombudsman)
www.ombudsman.gov.cy

CZECH REPUBLIC
Public Defender of Rights
www.ochrance.cz

DENMARK
Danish Institute for Human Rights
www.humanrights.dk

ESTONIA
Gender Equality and Equal Treatment Commissioner
www.volinik.ee

FINLAND
Non-Discrimination Ombudsman
www.syrjinta.fi

FINLAND
Ombudsman for Equality
www.tasa-arvo.fi

FRANCE
Defender of Rights
www.defenseurdesdroits.fr

GEORGIA
Public Defender of Georgia (Ombudsman)
www.ombudsman.ge

GERMANY
Federal Anti-Discrimination Agency
www.antidiskriminierungsstelle.de

GREECE
Greek Ombudsman
www.synigoros.gr

HUNGARY
Office of the Commissioner for Fundamental Rights
www.ajbh.hu

IRELAND
Irish Human Rights and Equality Commission
www.ihrec.ie

ITALY
National Office against Racial Discrimination - UNAR
www.unar.it

KOSOVO*
Ombudsperson Institution
www.oik-rks.org

LATVIA
Office of the Ombudsman
www.tiesibsargs.lv

LITHUANIA
Office of the Equal Opportunities Ombudsperson
www.lygybe.lt

LUXEMBURG
Centre for Equal Treatment
www.cet.lu

MALTA
Commission for the Rights of Persons with Disability
www.crpd.org.mt

MALTA
National Commission for the Promotion of Equality
www.equality.gov.mt

MOLDOVA
Council on Preventing and Eliminating Discrimination and Ensuring Equality
www.egalitate.md

MONTENEGRO
Protector of Human Rights and Freedoms (Ombudsman)
www.ombudsman.co.me

NETHERLANDS
Netherlands Institute for Human Rights
www.mensenrechten.nl

NORTH MACEDONIA
Commission for the Protection against Discrimination
www.kzd.mk

NORWAY
Equality and Anti-Discrimination Ombud
www.ldo.no

POLAND
Commissioner for Human Rights
www.rpo.gov.pl

PORTUGAL
Commission for Citizenship and Gender Equality
www.cig.gov.pt

PORTUGAL
Commission for Equality in Labour and Employment
www.cite.gov.pt

PORTUGAL
High Commission for Migration
www.acm.gov.pt

ROMANIA
National Council for Combating Discrimination
www.cncd.org.ro

SERBIA
Commissioner for Protection of Equality
www.ravnopravnost.gov.rs

SLOVAKIA
Slovak National Centre for Human Rights
www.snslp.sk

SLOVENIA
Advocate of the Principle of Equality
www.zagovornik.si

SPAIN
Council for the Elimination of Ethnic or Racial Discrimination
www.igualdadynodiscriminacion.msssi.es

SPAIN
Institute of Women
www.inmujer.es

SWEDEN
Equality Ombudsman
www.do.se

UNITED KINGDOM - GREAT BRITAIN
Equality and Human Rights Commission
www.equalityhumanrights.com

UNITED KINGDOM - NORTHERN IRELAND
Equality Commission for Northern Ireland
www.equalityni.org

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