Prohibitions on discriminating against persons with disabilities in Austria[1]
Measures of reasonable accommodation for persons with disabilities

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1. General remarks

The implementation measures in the member states, as they concern us here, are based on a transposition requirement laid down in European law. Building further, in particular, on Art. 13 of the EC Treaty, which makes provision for measures to prevent discrimination on a number of grounds, one of them being disability, the so-called Framework Directive, 2000/78/EC[2], makes it a duty to implement measures of *reasonable accommodation for persons with disabilities*, to guarantee that the principle of equal treatment be applied to them too.

At face value, the Directive only applies to employment and occupation[3]. What this means according to its Art. 5 is that employers are to 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. The Directive does, however, allow for exceptions where such measures would impose disproportionate burdens on employers. But such measures are most definitely not disproportionate burdens if they are remedied by "measures" (which here obviously means "legal provisions") existing within the framework of the disability policy of a member state[4]. That is a point to which we shall return in more detail later on.

At all events, the European Union has now broadened the principle of equal treatment, already firmly rooted in many of the Community's legal instruments to take in persons with disabilities too[5]. The fundamental considerations are to be sought more or less in the tenet of equality of all before the law as well as protection against discrimination constituting a general human right[6]. The Community's Charter of Fundamental Social Rights also recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled persons[7]. The Directive's eleventh recital makes the explicit point that discrimination based on disability (along with a number of other grounds) may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment. It is

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[1] This presentation is based primarily on contributions by the presenter to (1) "*Arbeitsrechtliche Diskriminierungsverbote*" edited by Tomandl & Schrammel, 2005, pp. 63 ff., and (2) Rebhahn "*Gleichbehandlungsgesetz Kommentar*", 2005, Annex II "*Diskriminierungsverbote für Menschen mit Behinderung*" pp. 681 ff.

[2] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[3] cf. Dir. 2000/78/EC, Arts. 1 and 3.

[4] op. cit, Art. 5, last sentence

[5] On the following passages, cf. Brodil "*Differenzierung nach Behinderungen*", in Tomandl & Schrammel (eds.) "*Arbeitsrechtliche Diskriminierungsverbote*", 2005, pp. 63 ff.

[6] cf. Dir. 2000/78/EC, recital 4.

[7] cf. Dir. 2000/78/EC, recital 6.

no less categorical in what it says about the important role of the measures provided for in combating discrimination on grounds of disability[8]. In this way, the needs of persons with disabilities ought to be catered for at their place of work. What the Directive is aiming for are *appropriate* measures to adapt the place of work to the disability, for which the European legislator prefers the words "effective and practical measures". These measures might include, for instance, suitable adaptations to premises and equipment.

For the rest, Directive 2000/78/EC follows the fundamental "tried and tested" structures. It makes use of the already familiar concepts of indirect and direct discrimination[9] and also the term "harassment". The system of possible objective justifications also follows the well-known patterns[10]. Moreover, social-security and social-protection schemes are left out of its scope[11]. In addition, it is permissible to exclude the armed forces (as well as the police, prison service and the like)[12] from the requirement not to discriminate on grounds of disability or age[13].

2. Transposition in Austria: the Federal Act on equality of treatment of people with special needs ("BGStG.")

For reasons beyond the scope of the current presentation, the Austrian legislator decided to decree very **comprehensive** protection against discrimination for persons with disabilities. The transposition of Directive 2000/78/EC was thus spread over two fields. For the "general field", a new Federal Act was passed called the "*Bundesbehindertengleichstellungsgesetz*" or "BGStG." (Different English translations of this title are to be found, the commonest being "Federal Act on equality of treatment of people with special needs"; it is referred to throughout this presentation as the "general law".). For the more specific field of employment, amendments were made to the existing legislation on the recruitment of persons with disabilities[14].

The aim of "general law" is the elimination of discrimination against persons with disabilities[15]. It also sets out to ensure that persons with disabilities can participate in the life of society on an equal basis with others and facilitates them being able to determine the course of their own lives.

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[8] cf. Dir. 2000/78/EC, recitals 16 and 20.

[9] cf. Art. 2.

[10] cf. Art. 2 (2) i and ii.

[11] cf. Art. 3 (3).

[12] cf. Dir. 2000/78/EC, recital 18.

[13] cf. Art. 3 (4).

[14] See Austrian Federal Law Gazette (BGBl.) I 82/2005. First and foremost, law affected by these amendments was the one governing the equal treatment of persons with disabilities (*Bundes-Behindertengleichstellungsgesetz*, "BGStG"). At the same time a number of other statutes were amended: (1) the *Behinderteneinstellungsgesetz* (law on disabled recruitment), (2) the *Bundesbehindertengesetz* (federal law on disabilities), (3) the *Bundessozialamtsgesetz* (federal law on the provision of social services), (4) the *Gleichbehandlungsgesetz* (law on equal treatment) (5) the *Bundesgesetz über die Gleichbehandlungskommission* (federal law on the equal-treatment commission), (6) the *Gleichbehandlungsanwaltschaft* (equal-treatment advocacy) and (7) the *Bundes-Gleichbehandlungsgesetz* (federal law on equal treatment).

[15] cf. Objective as laid down in Section 1.

Austria's "general law" goes beyond the scope provided for in the European context and affords broad protection against discrimination for persons with disabilities[16]. The legislator's primary intention is to promote the equality of persons with disabilities in all areas of life[17].

Apart from a number of special situations not covered by this presentation, the "general law" deals primarily with both matters covered by legal relationships (including how these come into being and what they are based on) and claiming or enforcing benefits outside of legal relationships, insofar as this involves access to and the provision of goods and services that are available to the general public and provided there are direct federal regulatory powers[18]. This general law does not cover discrimination in the world of work, since that remains the purview of the more specialised law on disabled recruitment (the "BEinstG.", presented below)[19].

The definition of disability corresponds to the one already used in Section 3 of an earlier law on disabled recruitment ("BehEinstG"), which has also been amended and brought up-to-date. Its central provisions include prohibitions on direct and indirect forms of discrimination (corresponding to Section 4 of the general law), which also concerns itself with technical access or obstacles to technical access for persons with disabilities (*"absence of obstacles in structured areas of life*"). However, the definition of discrimination in relation to persons with disabilities is limited by **proportionality**. Art. 6 (1) of the general law ("BGStG.") states that indirect discrimination for the purposes of Art. 5 (2) would not exist if the rectification of conditions causing a disadvantage, in particular the removal of obstacles, were itself to be against the law or if it were to entail disproportionate burdens.

The same general law also provides for legal consequences mirroring "general" equal treatment in the event of non-compliance with the prohibition on discrimination[20]. It is the arbitration commission (*Schlichtungsstelle*) that is competent for enforcing claims under this law[21]. That institution is also outside of the scope of this presentation.

However, it is already clear today that the Austrian legislator has espoused the habit of copying the essentials of the German text of the Directive verbatim, without enunciating any clarifying provisions dealing with points of detail. It is a noteworthy general characteristic of the text of the Directive that it is extraordinarily vague (which is obviously ascribable to the difficulty in arriving at a single view amongst 15 or 25 member states). The effect of transforming such a text lock-stock-and-barrel into domestic law is that resolving difficult demarcation questions is thrust upon those with a first-hand interest in the national law. So let me now try to shed some light on this far-from-clear situation by elucidating a number of aspects.

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16 cf. Dir. 2000/78/EC, recital 18.

17 cf. Dir. 2000/78/EC, recital 18 and Art. 7 (1) of the Austrian federal constitution.

18 cf. "BGStG.", Section 2 (2)

19 For more details, see section 3 below.

20 cf. "BGStG.", Sections 9 ff .

21 cf. collision rules in BGStG., Section 11, for multiple-discrimination cases.

3. Changes in the recruitment of persons with disabilities brought about by the specific Federal Act governing disabled recruitment ("BEinstG.")

3.1. General remarks

As far as the **world of work** is concerned, the amended legislation has made no fundamental change to the law pertaining to persons with disabilities[22]. In other words, we are left with the same provisions governing the so-called "favoured disabled", i.e. persons with a disability in excess of 50% (cf. section IX of the German Code of Social Law). The specific recruitment law now contains special provisions for such employees (protection against dismissal, duty to recruit or the imposition of compensatory levies in the event of non-compliance, etc.).

In the process of transposition, the more-limited prohibitions on discrimination laid down in European law are being replaced by the further-reaching wording of Sections 7 ff. of the Austrian Federal Act on disabled recruitment. As it has existed up until now, Section 7 merely contains a prohibition on reducing a disabled employee's salary on account of their disablement. Alongside that, Section 6 (1) of the same pre-existing law already provided for a modicum of protection against discrimination, insofar as consideration was to be given to persons with disabilities as regards the nature of their occupation or their place of work. In parallel with the other innovations, Section 6 (1a) is to create a **general requirement for the elimination** of obstacles – a point to which I shall return more specifically later on.

3.2. The definition of disability

Let us move next to look at the legal definition of disability. The Austrian provisions consider disability to be "the effects of a not merely temporary impairment of a bodily, mental or psychological function or an impairment of the functions of the senses of a nature making participation in the world of work more difficult. 'Not merely temporary' is taken to mean a period of time likely to be in excess of six months."

The Directive does not lay down a definition of disability, which leaves national legislators a relatively large amount of latitude. The Austrian definition is at all events (still) based on a substantive approach along systematic lines analogous to those of a health insurance, but has now been broadened to include impairments to the senses[23]. It is thus in the framework of a *material view* of the concept of disability that an appraisal is to be made as to whether or not the person concerned faces greater difficulty in participating in the world of work.

It seems to me that the way in which disability is ascertained is of overriding importance, since the connecting factor for establishing legal consequences is the existence of *some sort of minimum form of disability*. By the very nature of things, it is easy to ascertain the disability of a person suffering paraplegia. But is left-handedness or hyper-perspiration to be considered a disability? At the same time, the ascertainment of "disability" would appear to be significant for the type and scale of measures for reasonable accommodation.

This sort of understanding of disability is based on ideas put forward by the European Commission itself[24]. Similar approaches are to be found in the definitions of the World

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[22] Law on disabled recruitment (BEinstG), BGBl. 22/1970 and later BGBl. I 71/2003.

[23] cf. anti-discrimination law (no. 836 in BlgNR EBzRV XXII. GP, p. 12).

[24] cf. (1) Helios II – European guide of good practice: towards equal opportunities for disabled people;

Health Organisation, WHO[25]. In terms of content, there are also similarities with the provisions of Section 2 (1) of section IX of the German Code of Social Law[26].

The whole issue of ascertainment in combination with the existence of a disability is extremely complex. The excessive vagueness and questions as to where to draw the line between disabilities and diseases are at the forefront here. The disability itself and coping with it in the social context are essentially predetermined by the triad "impairment – activity – participation"[27]. *Impairment* refers the loss of or change in the structure of the body or in a physical or psychological function. The term *activity* stands for the nature and extent of (the limitation on) proper functioning in a specific individual compared with what is regarded as being normal for a human being. *Participation*, finally, is the nature and extent of the involvement of an individual in various areas of life. So it follows from this that impairment to health must lead on to functional impairment, resulting in deficits in the ability to participate in one or several areas of life[28].

We could take as an example a person who has difficulty walking (for instance on account of a stiff knee joint). Impairment is present. The functional disorder (activity) lies in a restricted ability to go up stairs. If this restriction is a permanent one, then generally participation will be impaired too, so that the assumption must be that there is a disability[29]. In other cases, although there may be a functional disorder, no disability would exist, since in the specific context there would be no restriction on *participation*. The concept of disability must thus be taken as categorisation into types. In individual cases, it is not necessary for all elements to be manifest. Which elements have to be present thus depends on *the specific real area* in which the term "disability" is relevant.

Let us now assume that the person experiencing difficulty with walking is a man applying for a job as a precision mechanic, and it is likely that, in terms of the core professional activities (i.e. his occupational performance), he would not be considered as disabled. His participation, however, is almost certainly limited on account of problems in getting to the place of work. We might now compare him with a man suffering a learning disability, and, once more, it will depend on the specific facts of each situation whether his participation is impaired or not. This second man would appear to suffer a disability as regards having access to measures of employment policy through participation in training programmes[30]. But we would have to conclude that that he had no relevant disability if he were to apply for a job consisting in no more than simple manual activities. In cases of doubt, a further-reaching understanding of the concept of disability would be assumed in the field of *employment law*[31].

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(2) Sturm "*Der europarechtliche Gleichbehandlungsgrundsatz und dessen Umsetzung im österreichischen Arbeitsrecht*", dissertation, Vienna 2003, p. 171 in FN 536; (3) Steinmeyer, in Council of Europe Publishing "Legislation to counter discrimination against persons with disabilities"[2] (2003).

[25] cf. Steinmeyer, in Council of Europe Publishing: "Legislation to counter discrimination against persons with disabilities" 23.

[26] cf. (for more details) (1) Mrozynski "*SGB IX Teil 1*" (2002) Section 2 paragraph 1 ff; (2) Rolfs "*Erfurter Kommentar 580, SGB IX*", Sections 68, 69, paragraph 1.

[27] Mrozynski "*SGB IX Teil 1*" Section 2, paragraph 1 ff.

[28] Rolfs, "*Erfurter Kommentar 580, SGB IX*" Sections 68, 69, paragraph 1.

[29] Mrozynski "*SGB IX Teil 1*" Section 2, paragraph 5.

[30] According to Mrozynski, "*SGB IX Teil 1*" Section 2, paragraph 33 (to the best of the author's knowledge).

[31] Brodil, in Tomandl/Schrammel: "*Arbeitsrechtliche Diskriminierungsverbote*", pp. 63 ff.

3.3. Reasonable accommodation and promotional measures

In its Section 6 (1a), the law governing disabled recruitment ("BEinstG.") begins by laying down that "employers shall take appropriate measures, as needed in particular cases, to enable persons with disabilities to have access to, participate in, or advance in employment and to undergo training, unless such measures would impose a disproportionate burden on them. Such a burden is not disproportionate if it can be adequately compensated for by promotional measures in accordance with federal or state legal provisions."

The provisions of Section 6 (1a) just referred to contain a *general* duty for the employer to eliminate or avoid obstacles to access for persons with disabilities. How that fits in with Section 7c (4) ff. of the same law is, however, left entirely unanswered[32]. Section 7c forms the kernel of the law for our purposes, so let us next remind ourselves of what its most relevant passages actually say:

(3) Differences of treatment in connection with a given characteristic shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
(4) It shall not constitute indirect discrimination for the purposes of paragraph 2 if the removal of conditions that cause disadvantages, in particular obstacles, were to be against the law or were to give rise to disproportionate burdens.
(5) In examining whether burdens are disproportionate, consideration shall be given, in particular, to:

1. *the financial and other costs entailed in eliminating the conditions causing the disadvantage,*
2. *the financial resources available to the employer or, in the cases governed by Section 7b (1)(8-10), of the particular legal entity,*
3. *the availability of grants from public sources for the corresponding measures,*
4. *the time elapsed between the entry into force of this federal act and the alleged discrimination.*

(6) Should the removal of the conditions that cause a disadvantage prove to be a disproportionate burden within the meaning of paragraph 4, discrimination nonetheless occurs in the event of a failure to implement proportionate measures to bring about at least an appreciable improvement in the situation of the person affected in the sense of moving as close as possible to equal treatment. In appraising whether the burden is proportionate, the provisions of paragraph 5 shall be taken into consideration.
(7) In evaluating the presence of indirect discrimination caused by obstacles, there shall be both a general appraisal as regards whether, in the particular case, legal provisions exist requiring that there be no obstacle and a more specific appraisal as to what extent such provisions have been complied with. Buildings and other installations, means of transport, technical utilitarian objects, data-processing systems as well as other organised areas of life shall be considered obstacle-free if they are, in the standard general manner, accessible for

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[32] cf. (1) Brodil in an earlier publication "*Invalidi v avstrijskem pravnem redu*" (people with disabilities in the Austrian legal system; bilingual version), in *Nacionalni informativni dnevi* 2005 - *Nediskriminacija in enake pravice invalidov v zakonodaij* (National Information Days - Non-discrimination and equal rights in legislation for persons with disabilities, Slovenia 2005) pp. 69 ff. and 151 ff.; (2) Schindler "*Zur Umsetzung des EU-Rechts in Österreich – Teil 2: Überblick über die Richtlinien, deren Umsetzung bevorsteht, insb. die Antidiskriminierungs-Richtlinie*.", DRdA, 2003, 523 (530).

and usable by persons with disabilities, without any particular difficulty and basically without the assistance of others.

Section 7c constitutes the central anti-discrimination provision for persons with disabilities. Where a disability exists, it is prohibited to discriminate indirectly or directly on the grounds of that disability, to harass or to give instruction to discriminate. According to general criteria, discrimination also exists in the area of disabilities if there are no *objective, factual grounds for justifying it*. Section 7c (1) and (2) thus correspond to "familiar anti-discrimination structures".

Turning to paragraph 3, the point to be made is that actual differences in performance lie in the nature of a disability. Such differences are at least in part a characteristic of a disability. This establishes a clear difference between the field of disability and differences in treatment, for instance, on grounds of gender, sexual orientation or racial origin. In terms of the structure of the provisions, the problematical field has to be *divided in two*. Firstly, there is a need to look at those cases in which the possible discrimination does not arise in connection with access restrictions in the technical sense. In such cases, it is typically possible to avoid discrimination by a proactive decision or autonomous measures by the employer (paragraph 3). The second group takes in those cases in which the restrictions on the participation of persons with disabilities can only be eliminated by the execution of technical measures in a broad sense of the term (essentially paragraphs 4 ff.).

On Section 7c (3):
Discrimination does not exist, where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, a given characteristic constitutes a genuine and determining occupational requirement. At all events, the objective must be a legitimate one, and the requirement must be proportionate – in the sense of the established concept of objective justification. From the relevant available legal texts[33], it is only possible to consider such a characteristic as a genuine and determining occupational requirement for a particular position if it is a matter of activities central to the employment contract. This would mean, by way of example, the expected sporty image of a sales representative for sports equipment would (certainly) not justify excluding a person bound to a wheelchair from such a position. In a certain sense, this contradicts the case law of the Austrian Supreme Court (*Oberster Gerichthof, OGH*) in matters involving sexual discrimination, whereby the refusal of an employer to take on fashion saleswomen as travelling representatives does not constitute a violation of the prohibition on discrimination on grounds of sex[34]. Reserving this activity for male employees is thus to be seen as having a corresponding objective justification.

Without doubt, whether discrimination occurs or not is not decided on exclusively by the *arrangements* chosen by employers. If this were to be taken to its extreme, it would mean that sufferers of hyper-perspiration or obesity (for whom it *might be* possible to make a case that they were sufferers of disabilities on the basis of the understanding presented above of dysfunction and a restricted capacity for participation) could be refused employment, and this could be considered as objectively justified solely, for instance, for the sake of a particular desired image.

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[33] no. 836 in BlgNR EBzRV XXII. GP, p. 14.

[34] OGH (supreme-court) judgement of 12 Jan. 2000, 9 Ob A 318/99a, RdW 2000, p. 474 – "Men's fashion representatives"; and commentaries thereon by Gerlach "*Gleichbehandlung bei der Begründung des Dienstverhältnisses*", RdW 2000, p. 610 and Rauch "*Zum Schadenersatz nach dem GlBG*", ecolex 2000, p. 441.

Now, it is a requirement that a disability must objectively exist. My view is that it must be possible in abstract terms to establish the existence of **any degree of disability or reduction in ability to do a job of work**[35]. Admittedly, Art. 14 of Austria's specific law on disabled recruitment (*BEinstG.*) lays down that only a reduction in work capacity of at least 50% is relevant for *establishing* the favoured disability status. Looking to uniformity throughout the legal system and considering things systematically, such a dysfunction can only lead to the existence of a disability if it leads to a reduction in work capacity in accordance with the systematic methodology of that same law or related regulated areas. The existing guideline values, which are inspired by the indemnity levels for lost or damaged bones and limbs, are quite considerable. Bodily characteristics, which would not lead to a reduction in work capacity according to these criteria, could thus never be the point of departure for discrimination. From this it follows that any differentiations practised by employers within this range are not subject to any substantive check.

On the other hand, there needs to be a teleological interpretation of the prohibition on discrimination. The starting points for this are the actual wording of the Austrian law ("determining occupational requirement") and the stated intent of European law. From the instances documented to date, it appears the differentiation criteria based on bodily characteristics are actually only going to be admissible if they concern the central activities of the employment contract. A narrow view must thus be applied to the exceptional provision of Section 7b paragraph 3[36], so it is not permissible for differences of treatment to result *solely from a disability*. Differences of treatment on the grounds of a general consideration not related to a specific activity are thus impermissible.

As the degree of disability increases, so too will the likelihood of objective justifications for differences in treatment. For severe disabilities, particular bodily functions and capabilities are easier to both present and perceive as being genuine and determining occupational requirements. It is at that selfsame time that particular incentive schemes come into play, such as waiving the duty to pay a compensatory levy, or the like. The opposite is true too: the more moderate the disability, the more difficult it will be for the employer to justify a differentiation using the argument of genuine and determining occupational requirements as laid down in Section 7c (3).

On Section 7c (4) ff.:
Those provisions that make it mandatory to eliminate the causes of disadvantages for persons with disabilities create an abundance of difficult demarcation issues. The European legislation, after all, includes the compulsory requirement for employers to take the appropriate measures, where needed in a particular case, to make it possible for persons with disabilities to have access to employment and to exercise a profession, unless such measures would impose a disproportionate burden on them. What is at stake here is not so much a single decision by the employer to that end but the actual physical removal of obstacles. It is worth making the point that this is at least partially new terrain for equal treatment, in that the duties placed on employers are not limited to desisting from particular actions but expressly require them to take positive action[37].

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[35] Brodil, in Tomandl/Schrammel: "*Arbeitsrechtliche Diskriminierungsverbote*" pp. 63 ff.

[36] Which is the case for the German approach too. Cf. Rolfs: "*Erfurter Kommentar 580 SGB IX*", Section 81 paragraph 7.

[37] No hint whatsoever of any constitutional-law consideration of the interference thereby created in the rights of property owners is to be found in the process that led to these provisions. For a critique, see, *inter alia*,

The first reference to be made in this context is to the provision of Section 6 (1a). This (just like Section 7c (4) and (5)) lays down a duty to avoid or remove obstacles to access. It is interesting to observe that Section 6 (1a) clearly lays down a *fundamental* existing obligation to equip workplaces in a broad sense so that they are suitable for persons with disabilities, although there is a certain ceiling in the outlay incurred by the employer, beyond which grants from public sources may come into play. Compared with this, Section 7c (4) (or (5)) speaks only of the *elimination* of obstacles, and, in this instance, promotional measures and grants are to be no more than "taken into consideration" when assessing the proportionality of a measure[38].

Now, even the term "*duty to eliminate*" is fuzzy. It is left totally open as to when and to what extent such duties to act exist. It would appear to be excessive to impose a pre-emptive duty on employers to arrange, in particular, for the access to places of work to be obstacle-free, with the sole permitted exception being on grounds of disproportionate burdens[39]. For that reason, there is no requirement for a guarantee that new and converted buildings will afford generalised wheelchair access and incorporate tactile guidance systems for the blind, and so on. Both the requirements laid down in European law and their planned domestic transposition are bound to find themselves in conflict with the rights of property owners, which also enjoy protection in both European law and the constitutional law of the individual countries[40]. That makes it absolutely essential to weigh up the concerns of persons with disabilities against the interests of employers[41]. Until such time as the duty to ensure equal treatment arises in a real situation (for instance if a person with a disability applies or is mediated for a position), there is no duty on employers to take prophylactic action to equip all their workplaces in every respect or to the maximum extent possible for persons with disabilities. Such a general obligation might well make sense for publicly accessible rooms open to customers (as required, for instance, by the general anti-discrimination law). The assumption would, however, appear to be that such a duty does not apply to parts of business premises only accessible to employees. After all, looking forward, there can be no knowing to what extent and in what quality equipping premises to make them suitable for persons with disabilities might prove necessary at some still unknown future time.

Admittedly, Section 6 (1a) clearly speaks of a "general" duty, but only applies it to specific cases. For that reason, a balanced approach is to be preferred, whereby an employer would have a duty to equip a newly-built or converted place of work making it suitable for persons with disabilities *to the extent to which* requirements existed.

Compared with this, Section 7c (4) and (5) deal with the *elimination* of conditions that cause disadvantages for persons with disabilities. This work, however, need not be carried out if it would lead to disproportionate burdens. In appraising this, it is crucial to consider the necessary outlay in comparison with the employer's financial resources. It is always possible

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Winkler: "*Die neuen europäischen Gleichbehandlungsregeln*", ZAS, 2004, p. 52 (57).

[38] What follows is adapted from Brodil: "*Invalidi v avstrijskem pravnem redu*" (people with disabilities in the Austrian legal system; bilingual version), in *Nacionalni informativni dnevi* 2005 - *Nediskriminacija in enake pravice invalidov v zakonodaij* (National Information Days - Non-discrimination and equal rights in legislation for persons with disabilities, Slovenia 2005.

[39] According to *Schindler*, DRdA, 2003, 523 (530).

[40] For example Art. 5 of the Austrian federal constitution and Art. 11 of the additional protocol to the ECHR; as well as commentaries, *inter alia*, by Öhlinger*:* "*Verfassungsrecht*" (2003) pp. 375ff. (to the best of the author's knowledge).

[41] Rolfs: "*Erfurter Kommentar 580 SGB IX*". Section 81, paragraph 16.

for the test of disproportionate burden to invoke an undertaking's financial resources[42], which certainly seem to represent a decisive criterion. The same conclusion can be drawn with adequate clarity from the Directive's 21st recital, which states that account should be taken in particular of the financial and other costs entailed by such measures, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

Taking existing laws dealing with the substance of Section 7c, one example of a disproportionate burden would be the installation of a lift in a building in which the employer operates a workplace with fewer than five employees on an upstairs floor. This example by no means answers all the questions. At all events, it is not only the economic proportionality that needs to be taken into consideration but also the *legal (im)possibility* of removing obstacles. One such case might be, for instance, if the employer were operating in rented premises and it was not possible to compel the owner to carry out the necessary conversion work to make the buildings suitable for persons with disabilities (questions related to rental law are just mentioned here in passing).

Conversion work might also be disproportionate if it were to endanger other workplaces or to cause an intolerable burden for other employees[43]. A claim to *part-time work* by a person with a disability would be disproportionate if it were to force the employer to make changes in the organisation of work, requiring amendments to be made to the employment contracts of others[44]. Other weighty factors are the cost/benefit ratio and the likely duration of the disabled person's period of employment[45]. In short, where precisely to draw the line as regards the proportionality of the outlay on eliminating access obstacles for disabled employees depends on the nature and extent of their disability, on the employer's financial resources and on other conditions related to work in the undertaking.

According to paragraph 6, even if the burdens were to be intolerable and disproportionate, the assumption would still be that that an employer (or organisation) was guilty of discrimination if they were to fail to take any measures that were not disproportionate to create a state-of-affairs corresponding to an appreciable improvement in the situation for persons with disabilities in the sense of a *move to as near as possible to equal treatment*. For this purpose, a multi-stage procedure is to be introduced for ascertaining whether or not measures are disproportionate[46]. One example cited in the legal texts is the *de facto* impossibility of converting a works canteen to make it suitable for persons with disabilities. In such a case, it ought not to be possible for an employer to avoid being found guilty of discrimination simply by dint of doing nothing at all. Rather, the employer would have the duty to adopt other proportionate measures, such as offering disabled employees the alternative of meals vouchers for outside catering establishments with disabled access. According to Section 7c (6), the other (so-called "subsidiary") duties are, in turn, subject to a check of proportionality.

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[42] cf. first two lines of paragraph 5 and commentaries, *inter alia*, by Rolfs: "*Erfurter Kommentar 580 SGB IX*", Section 81, paragraph 16.

[43] Rolfs: "*Erfurter Kommentar 580 SGB IX*", Section 81 paragraph 16 (to the best of the author's knowledge).

[44] One example is Schleswig-Holstein's higher labour court in its report for 2003, p. 29, cited in Rolfs: "*Erfurter Kommentar 580 SGB IX*", Section 81 paragraph 16 (to the best of the author's knowledge) .

[45] Rolfs: "*Erfurter Kommentar 580 SGB IX*", Section 81, paragraph 17 (to the best of the author's knowledge).

[46] cf. law 836 in BlgNR EBzRV XXII. GP, p. 14.

One final point to be considered in assessing proportionality is whether or not there is a possibility of obtaining public grants for the necessary measures. Moreover, the period of time that elapses between when the measure is introduced and when discrimination (allegedly) occurs is of relevance. In examining the absence of obstacles (of a technical nature), attention must be paid to the extent of compliance with applicable building regulations and other legal provisions[47].

4. Conclusions

I should like to wind up my presentation with a brief résumé. The first striking point is that there are even more questions, which have not been answered here. One of these is the problem as to whether, in the process possibly leading to the conclusion of an employment contract, truthful information must be disclosed as regards the existence of obstacles[48]. Another unanswered question (where we may see a parallel with the disadvantaged situation of women) is the extent to which disabilities may play a part in general protection against dismissal, and, in particular, what part they will play. The effects of the prohibition on discrimination on dismissals as such are also still totally unclear. Appraising numerous problems of detail is thus going to continue to occupy those concerned with the academic side of the law.

Looking at the transposition we actually have in Austria, one thing we must certainly note is that much of it can indeed be certified as being in conformity with European law. At the same time, one other problem has been emerging with ever-increasing clarity in the recent past, namely that the specifications laid down in European law are pretty vague, and that national legislators and courts are thus finding themselves confronted with tasks, which, at least in part, it is going to prove impossible for them to solve.

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[47] Paragraph 7. Included are, for instance, regulations to ensure the safety of people at work and the equipping of workplaces (cf. no. 836 in BlgNR EBzRV XXII. GP, p. 15).

[48] Cf. (*inter alia*) Rolfs: "*Erfurter Kommentar 580 SGB IX*", Section 81, paragraph 6 on the former legal situation, approving the judgement of the federal labour court (*Bundesarbeitsgericht, BAG*) of 5 Oct 1995, AP BGB Section 123 no. 40; cf. (also) Düwell: BB 2001, pp. 1527 ff; and, finally, Schaub: "*Ist die Frage nach Schwerbehinderung zulässig*? NZA 2003, p. 299.