

The Fight against Discrimination In Daily Practice

The Transposition Process

Disability Case Study

Gerard Quinn

Trier, 2 May, 2005

Baseline Study - 2004

TOPICS

**A. Key Conceptual Issues & How they
are Reflected in the Transposition Process**

**B. Issues that will Require Further
Legislation / Adjudication**

A: Key Conceptual Issues

1. Disability as the Subject of Non-Discrimination Law.

2. Definition of 'Disability'?

3. Added Value of 'Reasonable Accommodation.'

4. Application of 'Indirect Discrimination' on Disability Ground.

5. Reconcilability of Positive Action Measures

1. Disability as a Ground of Non-Discrimination Law?

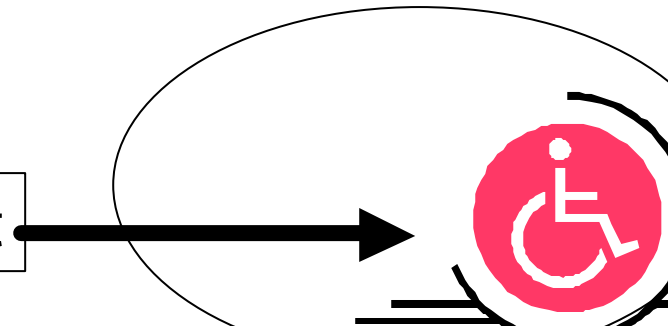
Backdrop of Extensive Social Programming

Public
Sphere

Private
Sphere



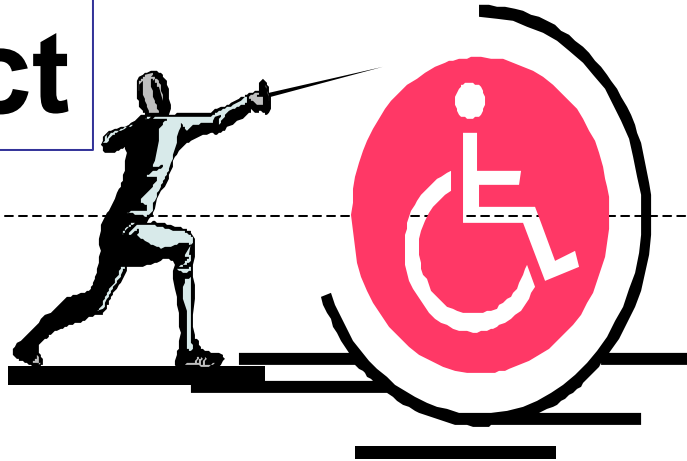
Social Support



Discrimination Idea....

Public
Sphere

Direct



Private
Sphere

Indirect



Default 'Social' Setting of Constitutional Law

Only 3 Countries include
Disability in Equality
Guarantees

Disability Appears in
General 'Social' Provisions
And within Specific
Social Rights

Austria, Finland, Germany

2. Definition of Disability

Art. 2 prohibits discriminatory behavior 'on ground' of Disability.

No need to define 'race', 'age', 'religion'.

Impulse to maintain focus on discriminatory behaviour –
Not on particularities of the person

Possible Approaches:

- no definition
- medical definition
- social definition
- definition reaches, record, perceived disability
future disability
- reach 'health status'

Transposition....Definition...

No Definition: Netherlands, Denmark, Finland, Greece
Luxembourg

Medical Definition: Austria, Ireland, Portugal

Social Definition: Germany, UK, Spain

Includes Record, Perceived, Future: Ireland, UK., Finland

Reaches 'Health Status': Belgium, France, Finland

3. Notion of Reasonable Accommodation

Conceptual Roots???

- Reaches Persons who can perform ‘essential functions’ of a job **if** afforded RA
- **Not** ‘Positive Action’
- Integral Part of Prohibition on Non-Discrimination – both ‘Direct’ and ‘Indirect’
- Individualised Process

However...

Drafting History Complicated

Article 2



Article 5

Transposition....Reasonable Accommodation

Linked to 'Discrimination': Belgium, Ireland, UK,

Not Linked to 'Discrimination': Finland (?), Germany,

Applied across all Grounds: Flanders

Includes Family Members: France

4. Application of 'Indirect Discrimination' on Disability Ground.

.../Complicated Drafting History

Article 2(2)(b)(ii)

Issue: Is the 'Indirect Discrimination' norm exhausted by meeting the obligation of 'reasonable accommodation'?

5. Reconcilability of 'Positive Action' Measures (Art. 7).

Issue: Are **ALL** Positive Action Measures Immunised From Scrutiny under Article 2?

- Quotas widespread at time of drafting of Directive therefore presumptively 'safe'.
- But – manner of implementing quotas may be open to scrutiny.
- Reference to 'Health & Safety' Measures in 7.(2) intended to be positive.

B: Issues that Require Further Legislation Adjudication.

- Need to Highlight / Distinguish 'Essential Functions' of a Job.
- Need to Frame 'Definition' of Disability (if any) in way that keeps focus on discriminatory behaviour.
- Need to make better provision for 'Reasonable Accommodation.'
- Need to Seriously tackle 'Medical' and 'Genetic' Testing.
- Need to Ensure better Fit between Non-Discrimination and 'Health & Safety Law.'
- Need to move away from Literal Transposition of the Directive
- Use Criminal Law to Complement – not supplant – Civil Law