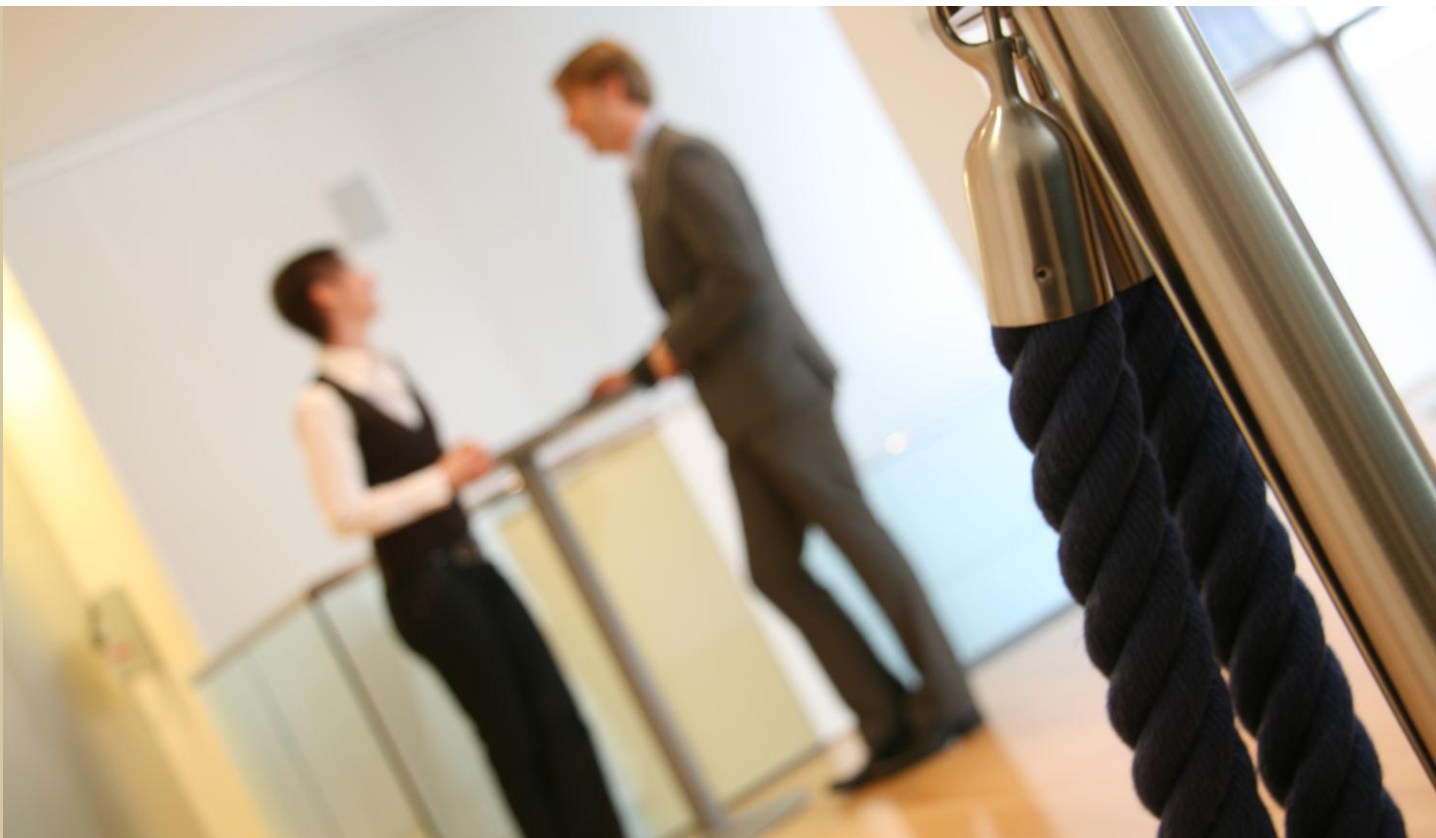


DOCUMENTATION

THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES



111DV70

Madrid, 15 & 16 December 2011

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The UN Convention on the Rights of Persons with Disabilities

Getafe (Madrid), 15-16 December 2011

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¹ The information contained in this publication does not necessarily reflect the position or opinion of the European Commission.

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Getafe (Madrid), 15-16 December 2011

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La convención sobre los derechos de las personas con discapacidad de Naciones Unidas

Getafe (Madrid), 15-16 de diciembre 2011

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Getafe (Madrid), 15-16 de diciembre 2011

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Getafe (Madrid), 15-16 de diciembre 2011

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Getafe (Madrid), 15-16 December 2011

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Getafe (Madrid), 15-16 de diciembre 2011

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Getafe (Madrid), 15-16 December 2011

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ERA PARTICIPANT EVALUATION

Your opinion matters to us: For the benefit of future participants, we should be grateful if you would reply briefly to the following questions.

As a thank-you for completing the questionnaire you will receive a souvenir.

EU Disability Law and the UN Convention on the Rights of Persons with Disabilities (111DV70)

Your profession

University Professor Assoc. Professor, Senior lecturer, Reader etc.
 Assistant professor, Lecturer, etc. Other (please specify)

Communication

Before you attended this event, were you aware of ERA? yes no
 If yes, have you already attended an ERA event? yes no

How did you hear about this event?

E-Mailing Postal mailing
 Website (www.era.int) From my employer
 Internet search engine At another ERA event
 Advert / listing Other word-of-mouth
 Other:

What particularly met with your approval?

What did not meet with your approval?

What is your assessment of this event?

very good
good
satisfactory
adequate
poor

Your comments:

What is your assessment of this event?	<i>very good</i>	<i>good</i>	<i>satisfactory</i>	<i>adequate</i>	<i>poor</i>	Your comments:
Did the event match your needs?						
Did you gain relevant knowledge and information?						
Will you be able to apply such knowledge and information in your work?						
Interpreters						
Conference documentation						
Preliminary practical information						
Website (www.era.int)						
Execution of the programme						
Assistance during the seminar						

Name of speaker						Your comments:
	very good	good	satisfactory	adequate	poor	
01 Jenny Goldschmidt						
02 Delia Ferri						
03 José Javier Soto Ruiz						
04 Ignacio Campoy Cervera						
05 Esperanza Alcaín Martínez						
06 Eilíonóir Flynn						
07 Alexander Hoefmans						
08 Stefan Trömel Sturmer						
09 Ana Sastre Campo						
10 Miguel Ángel Ramiro Avilés						

What is your assessment of ...

... the conference venue?						Your comments:
	very good	good	satisfactory	adequate	poor	
Seminar room facilities						

... the hotel?						Your comments:
	very good	good	satisfactory	adequate	poor	
Hotel Opera						
Hotel AC Getafe						

General

What is most important for you when choosing a conference or training programme?
 Need for training Networking opportunity Practical applicability
 High-level speakers Location International exchange
 Other:

Would you recommend ERA events to colleagues? yes no
 Why?

On which further topics should ERA organise events?

Your age group (optional)
 Under 30 30-39 40-49 50-60 Over 60

Your gender (optional)
 Female Male

Travelling expenses claim form

Original receipts only please



Seminar title The UN Convention on the Rights of Persons with Disabilities

Event number 111DV70/cs (15-16 December 2011)

Mr/Mrs				
Institution				
Address				
Postal code	City		Country	
Telephone	Fax		Email	

Account in Germany	Account in foreign country		
Account No.		IBAN	
Sort code		BIC/SWIFT	
Bank			
Address of the bank			
Account holder			
Address of the Account holder			

Participation as Interpreter Speaker Delegate

Travel expenses:	Number of vouchers		Amount in €
Air ticket	<input type="text"/>		
Rail ticket	<input type="text"/>		
Car (€0,22/Km) <small>(Please issue an invoice)</small>		Km. <input style="width: 50px;" type="text"/>	
Bus/Taxi	<input type="text"/>		
Hotel	<input type="text"/>		
Other expenses	<input type="text"/>		
Total	<input type="text"/>	Max. €400 (for delegates)	

I have incurred the above expenses, and enclose original receipts and tickets. I vouch the for accuracy of this claim.

Place, Date Signature

To be completed by ERA!	
<div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"><i>ERA Ledger Entry</i></div> <div style="border: 1px solid black; height: 80px; width: 100%;"></div>	<div style="text-align: right; padding-right: 10px;"><i>Approved</i></div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;">Date <input style="width: 80%;" type="text"/></div> <div style="border: 1px solid black; padding: 5px;">Signature <input style="width: 80%;" type="text"/></div>

Invoice

(Accompanying travelling expenses claim form in case of car travel)

From

Name:

Address:

To: Europäische Rechtsakademie

Metzer Allee 4, 429 Trier

Germany

Description		
Date:		
Departure (address):		
Arrival (address):		
Date:		
Departure (address):		
Arrival (address):		
Distance	Km	Total amount in (0,22 /Km.):

Place, Date:

Signature:

Speakers' Contributions

Jenny Goldschmidt

Jenny Goldschmidt

Jenny Goldschmidt is Director of the Netherlands Institute of Human Rights (SIM) since 1 October 2007 where she was appointed professor in human rights law since 1 January 2004. From 1994-2003 she was president of the Equal Treatment Commission and also part time professor Equality and Legal Pluralism at Leiden University. Before, she was professor Legal Women's Studies at Utrecht University.

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Introduction to the UN Convention on the Rights of Persons with Disabilities and its added value

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December 2011



Outline- combined presentation

- Introduction
 - Position of Convention in Int HR Law
 - General principles
- Part 1:
- Structure and contents of the Convention
 - Normative framework
 - Concept of disability
 - Monitoring system
 - Concluding remarks and questions.
- Part 2
- Nature and contents of H.R. obligations
 - Relevant Disability rights document and cases
 - Comparison with UNCRPD
 - Concluding remarks and questions



Disability Convention as Turning Point in attitude and approach

Disability caused by two elements:

- a. impairment of person**
- b. Environmental barriers**

See:

Preamble of Convention sub (e) and art 2

- Development from 'hand in cap' to rights based
- Medical model → human rights



CRPD background

- Start 1971 Declaration



- 2006 CRPD adopted



CPRD as part of UN system

- 1948: Charter
 - 1966 ICCPR
 - 1966 ICESCR
 - 1965 CERD
 - 1979 CEDAW
 - 1989 CRC
 - 2006 CRPD
- **Part of larger body**
- **No new rights created but elaborated obligations**



CRPD as part of International anti-discrimination law: some important instruments

- CRPD art 1 EQUAL ENJOYMENT OF ALL Human rights
- Equality framework to be incorporated, e.g.
- article 26 ICCPR
 - Art 2 CDESCR: GC No 20 → see next slides
 - ECHR art 14 (accessory nature)
 - 12th Protocol ECHR
 - EU Charter art 21 (non discrimination) and 26 (integration of persons with disabilities)
 - EU Framework Directive 2000/78/EC



GC CESCR (2009) no 20

* Disability

- 28. In its general comment No. 5, the Committee defined discrimination against persons with disabilities^[1] as “any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights”.^[1] The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability.^[2] States parties should address discrimination, such as prohibitions on the right to education, and denial of reasonable accommodation in public places such as public health facilities and the workplace,^[3] as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.



GC CESCR no 20 (Ctd)

- ^[1]For a definition, see CRPD, art. 1: “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.”
- The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability.^[1] States parties should address discrimination, such as prohibitions on the right to education, and denial of reasonable accommodation in public places such as public health facilities and the workplace,^[2] as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.
- ^[1] See CRPD, art. 2: “‘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.”
- ^[2] See CESCR general comment No. 5, para. 22.



Concept of 'disability' itself

- Article 1 CRPD Purpose
 - Includes long-term physical , mental, intellectual and sensory impairments *which in interaction with barriers*
- art 2 CRPD:
 - Discrimination : distinction, exclusion, restriction
 - Including: 'assumed' disabilities
 - Including association: Case C-303/06 EUCoJ: Coleman



General Principles

- Article 3
 - Human dignity
 - Autonomy
 - Non-discrimination
 - Participation
 - Inclusion



Scope of obligations CRPD

- Article 4
 - Par 1: broad scope, includes training, research, third party effect (e)
 - Par 2: Soc Ec rights: progressive implementation
 - Par 3: involvement of target groups
- Article 8: awareness raising
- Art 31 Data Collection



Overarching obligations

- Non-discrimination → art 5 and 12 (incl: legal capacity, ownership)
- Accessibility → art 9



Intersectionality

- Art 5 (2) : on *all grounds*
- Art 6: women
- Art 7: children



Substantive rights protected

- Art 10 Right to life
- Art 13 Access to Justice
- Art 14 Liberty and security
- Art 15 Freedom from torture and IT
- Art 16 Freedom from abuse
- Art 17 Integrity
- Art 18 movement and nationality
- Art 19 Living independently
- Art 20 Mobility
- Art 21 Expression
- Art 22/23 Privacy and family life
- Art 24 Education
- Art 25 Health
- Art 26 (Re)Habilitation
- Art 27 Work
- Art 28 Social Protection
- Art 29/30. Participation



Monitoring and implementation

- Art 33: National implementation
 - Focal point
 - Independent framework
- Art 34 Int'l Com on RPD
 - State reports Art 35/36: see handbok
 - Optional Protocol : Individual complaints



Concluding remarks on CRPD

- Innovative
- Progressive
- Concrete



Added value

- No new rights so added value lies in concretization of obligations
- New explicit obligations:
 - Accessibility
 - Participation
 - Autonomy



Human Rights Obligations

- Different forms of positive obligations defined by international and national human rights courts and commissions



General Human Rights obligations

Duty to

- Respect
- fulfill and
- protect as Human Rights obligations



Equality and Difference

CRPD Fits into non-discrimination framework: obligation to *take difference into account*.

- Duty to investigate
- Duty to *collect data*
- Challenge neutrality
- Burden of proof
- Sanctions



Relevant cases

- Thlimennos v. Greece, ECtHR 6 April 2000, No. 34369/97
- D.H. and others V. Czech Rep. , ECtHR 13 November 2007, No. 57325/00
- Opuz v. Turkey, ECtHR 9 June 2009, No. 33401/02



Progressive implementation

- Autism France v. France, ECSR 4-11-2003, Complaint No. 13/2002.
- ERRC v. Portugal, ECSR 20-6-2011, No. 61/2010



Reasonable accommodation- general aspects

- not only relevant in cases of disability
- e.g. obligation to have women's facilities in the workplace
- but: absolute necessity in disability cases.
- barriers are caused by the environment
- Refusal is sui generis form of discrimination, but no exception to equality.



Reasonable accommodation- specific aspects

- no absolute duty
- but: proportionality test
- depends on concrete circumstances.



Reasonable accomodation ≠ preferential treatment

- Not temporary
- Aim is to guarantee equality, not to repair inequalities or to accelerate equality.



Broad scope

- Relation to torture: see Report of UN SR on Torture 2008
- Access to Justice: ECtHR *Farcas v. Romania* 32596/04 (non admissible)
- Prison Conditions: ECtHR 24-1—2006, *Vincent v. France*



Concluding remarks

Added Value:

- Treaty Conform interpretation
- Due Diligence
- Impact assessment
- Additional burden of proof
- Progressive approach strengthened



Relevant websites

- SIM data base
: <http://sim.law.uu.nl/SIM/Dochome.nsf?Open>
- Equal Treatment Commission of the Netherlands:
www.cgb.nl
- EU and disability:
http://ec.europa.eu/employment_social/disability/index_en.html
- UN and disability:
<http://www.un.org/esa/socdev/enable/>
- UNHCR and disability:
<http://www.ohchr.org/english/issues/disability/index.htm>
- Case law:
 - <http://cmiskp.echr.coe.int/>
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The implications of the UNCRPD for EU Law

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**SEMINAR FOR
UNIVERSITY PROFESSORS AND
LAW LECTURERS**

MADRID, 15-16 DECEMBER 2011

The UNCRPD is a “Mixed Agreement”



- Mixity is due to the fact that part of an international agreement falls within the scope of the EU powers and part within the scope of the powers of the Member States (see *ex multis* Koutrakos, 2006, p. 150 *et seq.*; Eeckhout, II ed., 2011, p. 213 *et seq.*)
- Mixity has been a very complex topic of scholarly debate: the phenomenon of mixed agreements is not only deeply interrelated to EU Law and its division of powers doctrine, but also to public international law (see Hillion, Koutrakos, 2010)

The implications of the UNCRPD for EU Law



- I. The conclusion of the UNCRPD by the EU
- II. Status and the effects of the UNCRPD within the EU legal order
- III. Concluding remarks on the implementation of the UNCRPD in the EU



I.



THE CONCLUSION OF THE UNCRPD BY THE EU

The Conclusion of the UNCRPD by the EC/EU



- The EC (now EU) acceded to the UNCRPD with **Council Decision 2010/48/EC, formally adopted on 26 November 2009**, under the former EC Treaty.
- The instrument of ratification was deposited in December 2010, after the **adoption of a Code of Conduct** by the Council.
- The Decision has 2 substantive **legal bases**, namely **Arts. 13 and 95 EC** (now Arts. 19 and 114 TFEU), in conjunction with the procedural provision of Art. 300 EC (now Art. 218 TFEU).
- A **Declaration of competence** is annexed to the Decision, in compliance with Art. 44 UNCRPD

Declaration of Competence



*“... this Declaration **indicates the competences transferred to the Community** by the Member States under the TEC, in the areas covered by the Convention. The scope and the exercise of Community competence are, by their nature, **subject to continuous development** and the Community will complete or amend this Declaration...”*

- The **Declaration is intended to specify to Third Countries the distribution of competence** (cfr. *Opinion 2/2000, Cartagena Protocol*).

Declaration of Competence



- The Declaration is relevant to determine the ultimate **international responsibility** for the performance of the UNCRPD (see *inter alia* Cremona, 2006).
- Legal scholars have expressed criticism on this kind of declarations, because they are vague and they have “the unwarranted effect of exporting internal EU problems to the international context” (*ex multis* Govaere, 2010)

II.



STATUS AND EFFECTS OF THE UNCRPD IN THE EU LEGAL ORDER

Status of the UNCRPD



- International agreements concluded by the EU are binding upon the institutions of the Union and on its Member States (Art 216 TFEU).
- “In accordance with case-law, **mixed agreements** concluded by the Community, its Member States and non-member countries **have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence**” (Case C-239/03, *Etang de Berre*)

Status of the UNCRPD



The UNCRPD has become an integral part of EU law [incorporation of international agreements in EU law; some scholars deal with a monist approach of EU legal order towards international law, see *inter alia* Schutze, 2010]

In hierarchical terms, the UNCRPD is inferior to the provisions of the Treaty on the Functioning of the European Union and the Treaty on European Union, but superior to secondary EU law

...but the UNCRPD is a Human Rights Treaty

- The UN CRPD represents a progressive development of existing human rights law by placing the rights of the disabled within the conceptual framework of classical human rights
- The UNCRPD encapsulates fundamental rights which are already “constitutional norms” within the EU legal order
- The UNCRPD is in line with the EU Charter of Fundamental Rights, especially with Arts. 21 and 26
- Could the UNCRPD be considered a “constitutional source” of the EU?????

The Jurisdiction of the CJEU

- The CJEU has the jurisdiction to interpret mixed agreements (and so the UNCRPD) under Art. 267 TFEU (*inter alia* Case 12/86, *Demirel*; Case C-53/96, *Hermes*; Joined Cases C-300/98 and 392/98, *Dior*).
- It is a task of the CJEU, under the preliminary ruling procedure, to determine whether a provision of a mixed agreement can be invoked by individuals before a national court, but only when the provision falls within the scope of EU law (Case C-431/05, *Merck Genéricos*)

The Jurisdiction of the CJEU



- The CJEU has jurisdiction to **rule on the validity** of EU measures *vis a vis* an international agreement, but the legality of a EU measure can be called in question on grounds of breach of international agreements to which the EU is a party **only if the provisions of those agreements have direct effect**.
- There are two famous **exceptions** (cases C-69/89 *Nakajima*, and C-70/87 *Fediol*): the legality of EU measures can be reviewed in the light of international rules when the EU measure is intended to implement a particular obligation or “refers expressly” to the international agreement (see also Case C-352/96 *Italy v Council*)
- In another case, the CJEU did not consider the requirement of direct effect to be necessary with regard to the CBD (Case C-377/98, *The Netherlands v EP and Council*)

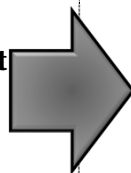
Effects of the UNCRPD



- *In abstracto*, the UNCRPD seems capable, in light of its objectives and ‘spirit’, of conferring rights upon individuals. However, its provisions are literally addressed to the Parties. Thus, it could be argued that none of its provisions have direct effect under the standard established by the CJEU.
- Case law leaves the door open to the review of EU measures in light of the UNCRPD, where the EU intends to implement a specific obligation entered into within the framework of international rules, or if a EU act expressly refers to specific provisions of the UNCRPD
- The judgment of the Court in *The Netherlands v EP and Council* provides good grounds to consider that the review of EU measures in light of the UNCRPD may be possible regardless of whether the Convention has direct effect.

Effects of the UNCRPD

International agreements or provisions of those agreements that are not directly applicable may have effect in the EU legal order on the basis of the **principle of consistent interpretation**, derived from the primacy of international agreements binding the Union over secondary legislation (Art. 216 (2) TFEU)



EU law must be interpreted in a manner consistent to the UN CRPD (e.g. on the meaning of disability: overruling of *Chacon Navas*??)

UNCRPD e EUCFR

“The EU CFR has become the reference text and the starting point for the CJEU’s assessment of the fundamental rights which that legal instrument recognises” (Joint communication from Presidents Costa and Skouris- Jan 2011; see also Case C-92/09 and C-93/09 *Volker and Markus Schecke*; Case C-236/09 *Tests-Achats*)



- The validity of EU acts can be assessed in light of the EUCFR (interpreted in a manner consistent with the UNCRPD)

The Jurisdiction of the CJEU in Enforcement Proceedings

*“In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the **Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement**” (Case C-239/03, *Etang de Berre*, at (25); see also Case C-459/03 *Commission v. Ireland*)*

The Commission might bring an infringement case against a Member State not properly implementing the UN CRPD under Art. 258 TFEU. **A Member State has a EU law obligation to implement the UN CRPD insofar as its provisions are within the scope of EU competence.**

Criticism

- The jurisdiction of the CJEU on mixed agreements “remains ill-defined and questions persist as to which parameters constitute the basis for its definition” (Koutrakos, 2010, p. 136) ...but it is solely up to the CJEU to interpret the limits of its own jurisdiction!



III.



IMPLEMENTING THE UNCRPD

Code of Conduct



1. ...sets out the arrangements between the Council, the Member States and the Commission on cooperation on various aspects of the implementation
2. ...applies to preparation of and participation in meetings of the bodies created by the Convention
3. ...lays down the details of the function of focal point.



The EU institutions and the Member States will ensure close cooperation in the implementation of the UNCRPD, bearing in mind the **principle of sincere cooperation** (Art. 4(3) TEU; see *inter alia* Delgado Casteleiro, Larik, 2011)

Implementing the UN CRPD



- **European Disability Strategy 2010-2020** (COM (2010)636 fin), launched in November 2010, is intended to harness the combined potential of the EUCFR, the TFEU, and the UNCRPD and to make full use of Europe 2020 and its instruments”

“The European Disability Strategy sets an ambitious agenda for the next 10 years. The EU remains committed to empowering people with disabilities so that they can enjoy their full rights, and benefit fully from participating in society and the economy”

J.M. Barroso, 6 December 2011

- **Proposal for a Council Directive** on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual in areas outside of employment.

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**THANK YOU
FOR YOUR ATTENTION!**



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- PRESIDENT OF THE FOUNDATION FOR THE PROMOTION AND SUPPORT TO PERSONS WITH DISABILITY ("FUTUEX") also during the period 2001- 2008
- MEMBER OF THE SUB-COMMISSION OF EXPERTS ABOUT THE UN CONVENTION OF THE ROYAL PATRONAGE ABOUT DISABILITY OF SPAIN during 2004-2006

He still ostents the charge of President of the Permanent Congress on Human Rights and Disability.

**LEGAL CAPACITY OF PERSONS
WITH DISABILITIES
IN THE LIGHT OF THE
UNITED NATIONS CONVENTION ON THE
RIGHTS OF PERSONS WITH DISABILITIES**

JOSE JAVIER SOTO

**LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON
THE RIGHTS OF PERSONS WITH DISABILITIES**

**Article 12 - Equal recognition before
the law**

1. "States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

**Artículo 12 - Igual reconocimiento
como persona ante la Ley**

1. "Los estados partes reafirman que las personas con discapacidad tienen derecho en todas partes al reconocimiento de su personalidad jurídica.

2. Los estados partes reconocerán que las personas con discapacidad tienen capacidad jurídica en igualdad de condiciones con las demás en todos los aspectos de la vida.

3. Los estados partes adoptarán las medidas pertinentes para proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON
THE RIGHTS OF PERSONS WITH DISABILITIES

Article 12 - Equal recognition before the law

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Artículo 12 - Igual reconocimiento como persona ante la Ley

4. Los estados parte asegurarán que en todas las medidas relativas al ejercicio de la capacidad jurídica se proporcionen salvo a guardias adecuadas y efectivas para impedir los abusos de conformidad con el derecho internacional en materia de derechos humanos. Esas salvaguardias asegurarán que las medidas relativas al ejercicio de la capacidad jurídica respeten los derechos, la voluntad y las preferencias de las personas, que no haya conflicto de intereses ni influencia indebida, que sean proporcionales y adaptadas a las circunstancias de la persona, que se apliquen en el plazo más corto posible y que estén sujetas a exámenes periódicos por parte de una autoridad o un órgano judicial competente, independiente, e imparcial. Las salvaguardias serán proporcionales al grado en que dichas medidas afecten a los derechos e intereses de las personas .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON
THE RIGHTS OF PERSONS WITH DISABILITIES

Article 12 - Equal recognition before the law

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property".

Artículo 12 - Igual reconocimiento como persona ante la Ley

5. Sin perjuicio de lo dispuesto en el presente artículo, los estados partes tomarán todas las medidas que sean pertinentes y efectivas para garantizar el derecho de las personas con discapacidad, en igualdad de condiciones con los demás, a ser propietarias y heredar bienes, controlar sus propios asuntos económicos y tener acceso en igualdad de condiciones a préstamos bancarios, hipotecas y otras modalidades de crédito financiero, y velarán por que las personas con discapacidad no sean privadas de sus bienes de manera arbitraria".

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

- **ANNUAL REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS AND REPORTS OF THE OFFICE OF THE HIGH COMMISSIONER AND THE SECRETARY-GENERAL**

- *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities*

- **26 January 2009**

- **INFORME ANUAL DEL ALTO COMISIONADO DE LAS NACIONES UNIDAS PARA LOS DERECHOS HUMANOS E INFORMES DE LA OFICINA DEL ALTO COMISIONADO Y DEL SECRETARIO GENERAL**

- *Estudio temático preparado por la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos para mejorar el conocimiento y la comprensión de la Convención sobre los derechos de las personas con discapacidad*

- **26 de enero de 2009**

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

4. Recognition before the law, legal capacity and decision-making

43. Article 12 of the Convention requires States parties to recognize persons with disabilities as individuals before the law, possessing legal capacity, including capacity to act, on an equal basis with others. Article 12, paragraphs 3 and 4, requires States to provide access by persons with disabilities to the support they might require in exercising their legal capacity and establish appropriate and effective safeguards against the abuse of such support. The centrality of this article in the structure of the Convention and its instrumental value in the achievement of numerous other rights should be highlighted.

44. Article 16, paragraph 1, of the International Covenant on Civil and Political Rights already requires the recognition of legal personality of persons with disabilities. The implementation of the obligations contained in article 12, paragraphs 2, 3, 4 and 5, of the Convention on the Rights of Persons with Disabilities, on the other hand, requires a thorough review of both civil as well as criminal legislation containing elements of legal competence.

4. Reconocimiento de la personalidad jurídica, y de la capacidad jurídica y de obrar

43. Según el artículo 12 de la Convención, los Estados partes reconocerán la personalidad jurídica de las personas con discapacidad, así como su capacidad jurídica y de obrar en igualdad de condiciones con los demás. Los párrafos 3 y 4 del artículo 12 obligan a los Estados a proporcionar a las personas con discapacidad el apoyo que puedan necesitar para ejercer su capacidad jurídica, así como salvaguardias adecuadas y efectivas para impedir los abusos. Debe resaltarse el carácter central de este artículo en la estructura de la Convención y su valor instrumental para el disfrute de otros muchos derechos. A/HRC/10/48 página 16

44. El párrafo 1 del artículo 16 del Pacto Internacional de Derechos Civiles y Políticos ya reconoce la personalidad jurídica de las personas con discapacidad. Ahora bien, el cumplimiento de las obligaciones enunciadas en los párrafos 2, 3, 4 y 5 del artículo 12 de la Convención sobre los derechos de las personas con discapacidad requiere un examen a fondo de toda la legislación civil y penal que contenga elementos de capacidad jurídica.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

45. In the area of civil law, interdiction and guardianship laws should represent a priority area for legislative review and reform. Legislation currently in force in numerous countries allows the interdiction or declaration of incapacity of persons on the basis of their mental, intellectual or sensory impairment and the attribution to a guardian of the legal capacity to act on their behalf. Whether the existence of a disability is a direct or indirect ground for a declaration of legal incapacity, legislation of this kind conflicts with the recognition of legal capacity of persons with disabilities enshrined in article 12, paragraph 2. Besides abolishing norms that violate the duty of States to respect the human right to legal capacity of persons with disabilities, it is equally important that measures that protect and fulfil this right are also adopted, in accordance with article 12, paragraphs 3, 4 and 5.

45. En el ámbito del derecho civil, las leyes que regulan la incapacidad y la tutela deben ser una esfera prioritaria del examen y la reforma de las leyes. En muchos países la legislación en vigor permite declarar incapaz a una persona por deficiencia mental, intelectual o sensorial y atribuir a un tutor la capacidad jurídica para actuar en su nombre. Toda ley que prevea que la existencia de una discapacidad es motivo directo o indirecto para declarar la incapacidad jurídica entra en conflicto con el reconocimiento de la capacidad jurídica de las personas con discapacidad consagrado en el pfo 2 del art 12. Además de derogar las normas que violan el deber de los Estados de respetar el derecho humano a la capacidad jurídica de las personas con discapacidad, es igualmente importante que se adopten medidas que protejan y hagan efectivo ese derecho, de conformidad con los párrafos 3, 4 y 5 del artículo 12.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

45.... This includes: legal recognition of the right of persons with disabilities to self-determination; of alternative and augmentative communication; of supported decision-making, as the process whereby a person with a disability is enabled to make and communicate decisions with respect to personal or legal matters; and the establishment of regulations clarifying the legal responsibilities of supporters and their liability.

45.... Esto incluye lo siguiente: el reconocimiento jurídico del derecho de las personas con discapacidad a la autonomía; a disponer de medios alternativos y aumentativos de comunicación; a la adopción de decisiones asistida, entendida como el proceso por el que una persona con discapacidad está habilitada para adoptar y comunicar decisiones con respecto a cuestiones personales o jurídicas; y el establecimiento de normas que precisen las facultades de quienes prestan el apoyo y su responsabilidad.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

46. Norms of laws disqualifying a person from office or performing a function on the basis of their disability also need to be abolished. These include norms disqualifying persons with disabilities from running for political positions, or from participating in juries or as witnesses to legal acts.

47. In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability.⁴¹ Instead disability-neutral doctrines on the subjective element of the crime should be applied, which take into consideration the situation of the individual defendant. Procedural accommodations both during the pretrial and trial phase of the proceedings might be required in accordance with article 13 of the Convention, and implementing norms must be adopted.

46. También deben abolirse las normas o leyes que inhabilitan a una persona para desempeñar un cargo o función debido a su discapacidad. Esto incluye las normas que inhabilitan a las personas con discapacidad para ejercer cargos políticos, formar parte de jurados o testificar.

47. En el ámbito del derecho penal, el reconocimiento de la capacidad jurídica de las personas con discapacidad lleva a suprimir la circunstancia eximente de la responsabilidad penal constituida por la discapacidad mental o intelectual⁴¹. Por consiguiente, al examinar el elemento subjetivo del delito, se debe prescindir de la discapacidad y atender a la situación concreta del autor. De conformidad con el artículo 13 de la Convención, tal vez sea necesario retocar las normas procesales referidas, tanto a la fase de instrucción como al juicio, y ponerlas en práctica.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES HOLDS DAY OF GENERAL DISCUSSION ON RIGHT TO EQUAL RECOGNITION BEFORE THE LAW

21 OCTOBER 2009

MOHAMMED AL-TARAWNEH

The goal of the Convention was not solely about abstract rights, but instead about the capacity for people to act.

Rights of persons with disabilities had been established before, but the true test of a right was whether or not it was applied in practice.

EL COMITÉ DE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD CELEBRA EL DÍA DE DEBATE GENERAL SOBRE EL DERECHO AL IGUAL RECONOCIMIENTO COMO PERSONA ANTE LA LEY

21 OCTUBRE 2009

MOHAMMED AL-TARAWNEH

El objetivo de la Convención no fue exclusivamente sobre los derechos abstractos, sino sobre la capacidad de las personas a actuar.

Los derechos de las personas con discapacidad se habían establecido antes, pero la verdadera prueba de un derecho era si se aplicó o no en la práctica

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

IBRAHIM SALAMA

Article 12 had the potential to provide many opportunities in meaningful change for persons with disabilities to reach equality of all persons before the law. The goals of the Convention would not be nearly as comprehensive without the assurances of a fair trial. There were many interesting questions that were raised by Article 12

One issue was that of supported decision making vs. substitutive decision making in courts. In the case of mental disability, under what circumstances would it be acceptable to make decisions on behalf of an individual through guardianship, ombudsmen or other relevant services, and how should these services be conducted?

IBRAHIM SALAMA

El artículo 12 tiene el potencial para proporcionar muchas oportunidades de un cambio significativo a las personas con discapacidad para alcanzar la igualdad de todos ante la ley. Los objetivos de la Convención no sería tan amplios sin las garantías de un juicio justo. Hubo muchas preguntas interesantes que se han planteado en el artículo 12

Uno de los problemas era el de la decisión apoyada frente a la decisión sustitutiva en los tribunales. En el caso de discapacidad mental, ¿en qué circunstancias sería aceptable tomar decisiones en nombre de un individuo a través de la tutela, los defensores del pueblo u otros servicios pertinentes, y cómo deberían ser llevados a cabo?

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

IBRAHIM SALAMA

While Article 12 did not specifically mention the use of support for persons with disabilities in legal proceedings, it did ask that States use appropriate measures to provide access by persons with disabilities to the support they might require in exercising their legal capacity. It might be that supported decision making could be applied to the vast majority of cases, but that perhaps a small percentage would not be able to use this kind of assistance

IBRAHIM SALAMA

Mientras que el artículo 12 no menciona específicamente el uso de apoyo para las personas con discapacidad en los procedimientos judiciales, se pidió que los Estados el uso de medidas apropiadas para proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica. Puede ser que el apoyo en la toma de decisiones podría aplicarse a la gran mayoría de los casos, pero que tal vez un pequeño porcentaje no sería capaz de utilizar este tipo de asistencia.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

IBRAHIM SALAMA

Another question had to do with the so-called “insanity defense”. Should courts recognize that in certain situations, some forms of disability could amount to the non-accountability for crimes? There were those who argued that this type of defense should be abolished in courts, given the recognition of the capacity to act. But it was not entirely clear what should be done in cases of criminality where the perpetrator experienced a genuine loss of self volition? The balance lay perhaps somewhere in the process of determining what constituted loss of faculty

IBRAHIM SALAMA

Otra pregunta tenía que ver con la llamada "defensa de la locura". ¿Deben los tribunales reconocer que en ciertas situaciones, algunas formas de discapacidad podría llevar a la falta de responsabilidad por los delitos? Había quienes sostenían que este tipo de defensa debería ser abolida en los tribunales, dado el reconocimiento de la capacidad de actuar. Pero no fue del todo claro qué debe hacerse en los casos de delincuencia en que el autor experimentó una pérdida genuina de la voluntad propia? El equilibrio estaba tal vez en el proceso de determinar qué constituye la pérdida de la facultad

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

AMITA DHANDA

Article 12 was at the heart of the Convention. It was important to look closely at it if one wanted to be serious about addressing the issue of exclusion. People with intellectual and psychosocial disabilities had been, in a large part, at the forefront of negotiations when Article 12 was drafted. Article 12 had been formulated totally accepting the vision of inclusions for all; including people with sensory, physical, intellectual and psychosocial disabilities. It was extremely appropriate that the Committee had taken this Article as the first it had wished to look closely at.

The Office of the High Commissioner for Human Rights Handbook on Legal Capacity project would highlight the existing discrimination in existing laws and elaborate on Article 12 obligations. It would assist countries in planning for law reform, policy and programme. Article 12 spoke to the entire human community. There was no question or misunderstanding on the provisions of Article 12. What needed to be worked through was how to ensure its implementation.

AMITA DHANDA

El artículo 12 estaba en el corazón de la Convención. Es importante observar de cerca si se quería tomar en serio abordar el problema de la exclusión. Las personas con discapacidad intelectual y psicosocial habían estado, en gran parte, a la vanguardia de las negociaciones cuando se redactó el artículo 12. El artículo 12 se había formulado aceptando totalmente la visión de las inclusiones para todos, incluidas las personas con discapacidad sensorial, física, intelectual y psicosocial. Era sumamente apropiado que el Comité hubiera tomado este artículo como el primero que ha querido mirar de cerca

El proyecto del Manual de Capacidad Legal de la Oficina del Alto Comisionado para los Derechos Humanos pondría de relieve la discriminación existente entre las leyes actuales y las obligaciones basadas en el artículo 12. Esto ayudaría a los países en la planificación de la reforma legal, la política y la programación. El artículo 12, habló a toda la comunidad humana. No había duda o mala interpretación de las disposiciones del artículo 12. Lo que había que trabajar era acerca de la forma de garantizar su aplicación

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Committee on the Rights of Persons with Disabilities
Fifth session **Quinto período de sesiones**
Geneva, 11-15 April 2011

The Committee has received the following initial reports which are pending consideration:
El Comité ha recibido los siguientes informes iniciales cuyo examen está pendiente:

<i>State party</i>	<i>Due</i>	<i>Date received</i>	<i>Symbol</i>
Spain	2010	3 May 2010	CRPD/C/ESP/1
Tunisia	2010	1 July 2010	CRPD/C/TUN/1
Peru	2010	8 July 2010	CRPD/C/PER/1
China	2010	30 August 2010	CRPD/C/CHN/1
Argentina	2010	6 October 2010	CRPD/C/ARG/1
Hungary	2010	14 October 2010	CRPD/C/HUN/1
Paraguay	2010	21 October 2010	CRPD/C/PRY/1
Austria	2010	2 November 2010	CRPD/C/AUT/1
Australia	2010	3 December 2010	CRPD/C/AUS/1
El Salvador	2010	5 January 2011	CRPD/C/SLV/1
Sweden	2010	7 February 2011	CRPD/C/SWE/1
Azerbaijan	2011	16 February 2011	CRPD/C/AZE/1

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Tunisia

Equal recognition before the law (art. 12)

The Committee is concerned that no measures have been undertaken to replace substitute decision-making by supported decision-making in the exercise of legal capacity.

The Committee recommends that the State party review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making. It further recommends that training be provided on this issue to all relevant public officials and other stakeholders.

Tunez

Igual reconocimiento como persona ante la ley (art. 12)

Al Comité le preocupa que no se han adoptado medidas para reemplazar la sustitución en la toma de decisiones por el apoyo en la toma de decisiones en el ejercicio de la capacidad jurídica.

El Comité recomienda al Estado Parte que revise las leyes que permitan la guarda y tutela, y tomar medidas para desarrollar leyes y políticas para reemplazar los regímenes de sustitución en la toma de decisiones por el apoyo en la toma de decisiones. Además, recomienda que se sensibilice sobre este tema a todos los funcionarios públicos pertinentes y otras partes interesadas.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Spain

52. With regard to paragraphs 1 and 2 of this article, under article 29 of the Civil Code personality is established by the fact of birth provided that the conditions stipulated in article 30 are met, and every individual enjoys legal capacity from the moment of birth. Since persons with disabilities enjoy recognized legal personality and the same legal capacity as others, it may therefore be stated that the legal order is fully in line with article 12, paragraphs 1 and 2, of the Convention .

España

52. Apartados 1 y 2 del artículo 12. Conforme a nuestro Código Civil (art. 29) el nacimiento determina la personalidad, siempre que se den las condiciones señaladas en el artículo 30, y toda persona física tiene capacidad jurídica desde su nacimiento. En consecuencia, dado que las personas con discapacidad tienen reconocida personalidad jurídica e igual capacidad jurídica que las demás personas, hay que afirmar la plena compatibilidad del ordenamiento jurídico con las previsiones de los apartados 1 y 2 del artículo 12 de la Convención.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Spain

53. Paragraph 3 requires States parties to take appropriate measures to provide persons with disabilities with the support they may require in exercising their legal capacity. This obligation appears to be met in Spanish legislation by the institutions for the guardianship and protection of persons and property in general or exclusively for that of persons with disabilities. These institutions are governed by Parts IX and X of Book I of the Civil Code, which govern deprivation of capacity (articles 199 to 201), guardianship (articles 215 to 285), curatorship (articles 286 to 293), the Legal Defender and the de facto custodian (articles 303 and 304).

España

53. El apartado 3 del artículo 12 obliga a los Estados Partes a adoptar las medidas pertinentes para proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica. Obligación que en nuestra legislación quedaría cubierta por las instituciones de guarda y protección de la persona y bienes, o solamente de la persona o de los bienes del incapacitado. Estas instituciones están reguladas en los Títulos IX y X del Libro I del Código civil en cuanto regulan la Incapacitación (arts. 199 a 201), la Tutela (arts. 215 a 285), la Curatela (arts. 286 a 293), el Defensor judicial (arts. 299 a 302) y la Guardia de hecho (arts. 303 y 304).

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Spain

55. The safeguards and measures concerning the exercise of legal capacity mentioned in paragraph 4 of this article are enshrined in Spanish legislation in the following terms:

56. Respect for the rights, will and preferences of the individual is fundamentally reflected in article 200 of the Civil Code, which requires guardians to perform their task in a manner in line with the personalities of their wards and respectful of their physical and psychological integrity.

España

55. Apartado 4. Las salvaguardas de las medidas relativas al ejercicio de la capacidad jurídica contenidas en este apartado 4, subyacen en nuestra legislación en los términos que seguidamente se indican.

56. El respeto de los derechos, la voluntad y las preferencias de la persona, está reflejado básicamente en el artículo 268 del Código civil en cuanto obliga a los tutores a ejercer su cargo de acuerdo con la personalidad de sus pupilos, respetando su integridad física y psicológica.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Spain

57. The requirement of absence of conflicts of interest is mentioned in article 244(4), which states that the existence of major conflicts of interest with the incapacitated person is a disqualification for guardianship, while article 247 provides for removal of guardianship where this disqualifying factor arises or the guardian is guilty of misconduct in the performance of his task through failure to discharge the duties pertaining thereto, either through manifest incompetence or when serious and continuing problems of coexistence arise. . Both provisions also apply to curators and legal defenders. Article 299 provides for the appointment of a legal defender to represent and safeguard the interests of the disabled person when a conflict of interest arises between that person and his/her legal representatives or curator. Finally, article 221 prohibits any person discharging a guardianship function from representing the ward when by so doing he or she will intervene in a personal capacity or on behalf of a third person and there is a conflict of interest

España

57. La inexistencia de conflicto de intereses está prevenida en el Código civil, artículo 244-4, al considerar causa de inhabilidad para ser tutor la existencia de importantes conflictos de intereses con el incapacitado y artículo 247, que establece la remoción de la tutela a los que incurrir en dicha causa de inhabilidad o cuando el tutor se conduzca mal en el desempeño de sus funciones por incumplimiento de los deberes propios del cargo o por notoria ineptitud de su ejercicio o cuando surgieran problemas de convivencia graves y continuados. Ambos preceptos son extensivos al curador y al defensor judicial. Además, el artículo 299 prevé el nombramiento de un defensor judicial que represente y ampare los intereses del incapacitado cuando en algún asunto exista conflicto de intereses entre éste y sus representantes legales o el curador. Finalmente, el artículo 221 prohíbe a quien desempeñe un cargo tutelar representar al tutelado cuando en el mismo acto intervenga en nombre propio o de un tercero y existiera conflicto de intereses.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Spain

58. There is no express safeguard in current legislation against undue influence. However, that safeguard may be deemed implicit in articles 208 (mentioned earlier) and 216, which require guardianship to be exercised for the benefit of the ward and under the safeguard of the judiciary.

59. As regards proportionality and adaptation to the circumstances of a person with disabilities, article 760 of the Civil Judgements Act No. 1/2007 (LEC), taken in conjunction with articles 267, 289 and 290 of the Civil Code, require the declaration of incapacity to specify the extent and limits thereof, the acts which the person concerned can perform unaided and those requiring the intervention of a guardian or the assistance of a curator.

España

58. Inexistencia de influencia indebida. Esta salvaguarda no está recogida expresamente en la vigente regulación, aunque puede considerarse implícita en los artículos 268, ya comentado, y 216, en cuanto exige ejercer las funciones tutelares en beneficio del tutelado y bajo la salvaguarda de la autoridad judicial.

59. Proporcionalidad y adaptación a las necesidades y circunstancias de la persona con discapacidad. De conformidad con la el artículo 760 de la Ley Nº 1/2007 de Enjuiciamiento Civil (LEC) y en relación con los artículos 267, 289 y 290 del Código Civil, la sentencia que declare la incapacitación deberá indicar la extensión y límites de ésta y especificar los actos que el incapacitado puede realizar por sí solo y aquellos en los que necesita la intervención del tutor o la asistencia del curador.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Spain

60. With regard to application of measures for the shortest possible time and their regular review by a competent, independent and impartial authority or judicial body, proceedings concerning legal capacity are regulated by articles 756 to 768 of the LEC. This Act makes provision for subsequent proceedings for the restoration of capacity and amendment to the scope of a declaration of incapacity. Such proceedings may be instituted by the persons empowered to seek the declaration of incapacity. Automatic review of these measures is not envisaged.

España

60. Aplicación de las medidas en el plazo más corto posible y revisión periódica por parte de una autoridad o un órgano judicial competente, independiente e imparcial. Los artículos 756 a 768 de la LEC regulan el proceso sobre la capacidad de las personas. Esta ley procesal prevé la posibilidad de instar ulteriores procesos para la reintegración de la capacidad y modificación del alcance de la incapacitación. Están legitimados para instar estos procesos las personas legitimadas para promover la declaración de incapacidad, pero no se contempla la revisión de oficio de estas medidas.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Spain

62. To achieve full compliance with article 12(4) and better adaptation to the spirit and terminology of the Convention, work is proceeding on the preparation of a draft Act amending Parts IX and X of the Civil Code and Book IV, Part I, chapter II, of the Civil Judgements Act, which regulate proceedings concerning the capacity of individuals, and also introducing minor amendments, principally to adapt the terminology used in the Commercial Code, the Mortgages Act and the Organization Statute of the Public Prosecutor's Office

España

62. Para el cumplimiento completo del artículo 12.4 y una mejor adaptación al espíritu y a la terminología de la Convención, se está trabajando en la redacción de un anteproyecto de ley que modificará los Títulos IX y X del Libro I del Código civil y el Capítulo II del Título I del Libro IV de la LEC que regula los procesos sobre la capacidad de las personas e introducirá algunas modificaciones puntuales, básicamente para adaptación de la terminología empleada en el Código de Comercio, Ley Hipotecaria y Estatuto Orgánico del Ministerio Fiscal.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Spain

63. Paragraph 5 of article 12 requires States parties to take all necessary measures to secure the right of persons with disabilities to own or inherit property and control their own financial affairs on an equal basis with others. The Civil Code contains provisions concerning the capacity to inherit and to make wills which may apply to persons with disabilities; these are described below

España

63. El apartado 5 del artículo 12 obliga a los Estados Partes a tomar todas las medidas que sean necesarias para garantizar el derecho de las personas con discapacidad a ser propietarias, heredar bienes y a controlar sus propios asuntos económicos, en igualdad de condiciones con las demás. El Código civil contiene previsiones relativas a la capacidad de heredar y la capacidad de testar que pueden incidir en las personas con discapacidad que seguidamente se comentan

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

HUMAN RIGHTS AND DISABILITY

ALTERNATIVE REPORT SPAIN 2010

Drawn up by CERMI State Delegation for the UN Convention.

**For the
UN Committee on the rights of persons with disability**

**www.cermi.es
www.convenciondiscapacidad.es**

**DERECHOS HUMANOS
Y DISCAPACIDAD**

INFORME ALTERNATIVO ESPAÑA 2010

**Elaborado por la
Delegación del CERMI Estatal para la
Convención de la ONU**

**Presentado al
Comité de la ONU sobre los Derechos de
las Personas con Discapacidad**

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LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Article 12. Equal recognition before the law

30. Spain does not have a support system in line with the Convention. Spain's legal system governing the legal capacity and capacity to act of persons (Articles 200 and following of the Civil Code and Civil Procedure Act - *Ley de Enjuiciamiento Civil*) regulates a system which restricts certain persons with disabilities' exercising their rights by legal ruling.

31. Limiting the capacity to act is based in these cases on the existence of "illness or persistent impairments of a physical or mental nature which prevent the persons acting for themselves" (Art 200 CC).

32. The legal system covers the substitution of the rights of persons who have been "incapacitated" and places them under a protection regime by legal ruling. These persons may not then exercise their rights themselves, this is undertaken by a guardian who will do so in their name.

Artículo 12. Igual reconocimiento ante la ley

30. España no cuenta con un sistema de apoyos acorde a la Convención. El ordenamiento jurídico español que regula la capacidad jurídica y de obrar de las personas, (Código Civil artículos 200 y ss. y Ley de Enjuiciamiento Civil), regula un sistema para determinadas personas con discapacidad que les limita en el ejercicio de sus derechos por sentencia judicial.

31. La limitación de la capacidad de obrar se fundamenta en estos casos en la existencia de "*enfermedades o deficiencias persistentes de carácter físico o psíquico que impida a la personas gobernarse por sí misma*" (art 200 CC).

32. El sistema legal prevé la sustitución en el ejercicio de los derechos de aquellas personas que hayan sido "incapacitadas" y sujetas a un régimen de tutela a través de una sentencia judicial. Estas personas no podrán ejercer entonces sus derechos por sí mismas si no que serán sustituidas en su ejercicio por un tutor que lo hará en su nombre.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

33. Although the law contains other concepts and safeguards, there is **an abuse of the substitution system** which means that the rights of persons with disabilities are generally exercised via a legal representative. The experience of the organisations for persons with disabilities and their families confirms this perception, but the official data needs to be looked at which shows the number of guardianships in the total of completed proceedings, and how many of them cover the person and their assets (legal substitution for asset-based and very personal rights).

33. Aunque la ley contiene otras figuras y salvaguardas, existe un **abuso del sistema de sustitución total** que da lugar a que los derechos de una persona con discapacidad sean ejercidos a través de su representante legal con carácter general. Esta percepción se constata en la experiencia de las organizaciones de personas con discapacidad y sus familias, pero sería necesario conocer los datos oficiales que reflejen el número de tutelas del total de procedimientos concluidos, y cuantas de ellas son sobre la persona y los bienes (sustitución legal para derechos patrimoniales y personalísimos).

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

34. Spain lacks a support system for decision making in order to promote autonomy in exercising rights; this “protection system” is almost exclusively turned to when legal business (asset based) involving persons with support needs requires validation – or when their admission into a care home has been requested. This recurring reason highlights the lack of a support system to exercise fundamental rights other than asset-based rights, which in accordance with the Convention, should exist to ensure equality before the law for persons in need of this.

34. España carece de un sistema de apoyo a la toma de decisiones que fomente la autonomía en el ejercicio de los derechos; de forma casi exclusiva se acude a este “sistema de protección” cuando es necesario validar un negocio jurídico (de ámbito patrimonial) en el que participa una personas con necesidades de apoyo- o cuando se solicita su ingreso en una residencia-. Esta recurrente motivación evidencia la carencia de un sistema de apoyos en el ejercicio de derechos fundamentales otros de los patrimoniales, que de acuerdo a la Convención debería existir para garantizar la igualdad ante la ley de aquellas personas que lo necesiten.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

35. The safeguards demanded under the CRPD are not guaranteed by our legislation:

- Our legal system does not guarantee respect of a person's will and preferences: on the one hand because the guardian has the capacity to substitute their ward in exercising his or her rights and is not obliged to respect their will. Respect for *the ward's personality* cannot be compared with respect for their will (as mentioned in the Report presented by Spain), *will* being understood as the power to decide and be in charge of their own behaviour at any given moment.
- The Government's report itself recognises the absence of any specific legal guarantees in place to prevent *undue influence*.

35. Las salvaguardas exigidas en la CDPD no están garantizadas por nuestra legislación:

- El respeto a la voluntad y a las preferencias de la persona no están garantizados por nuestro ordenamiento jurídico: de una parte porque el tutor tiene la capacidad de sustituirle en el ejercicio de sus derechos y no cuenta con la obligación de respetar la voluntad del pupilo. No se puede asimilar *el respeto de la personalidad* del pupilo con el respeto a su voluntad, (como menciona el Informe presentado por España) entendiéndolo por *voluntad* la facultad de decidir y ordenar la propia conducta en un momento concreto.
- El propio informe del Gobierno reconoce la ausencia de garantías legales expresas que eviten la *influencia indebida*.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

35....

- There is no obligation for court review of rulings modifying the capacity to act. This safeguard, which should be mandatory in accordance with the Convention (periodic examinations), is optional and in practice there is no data on reviews of these rulings.
- Abuse of the concept of guardianship confirms that the *proportionality* of the rulings is not guaranteed either. There is no data on the number of guardianships appointed with regard to the number of rulings modifying the capacity to act.

35....

- No existe una obligación de revisar de oficio las sentencias de modificación de la capacidad de obrar. Esta salvaguarda, que debiera ser obligatoria de acuerdo a la Convención (exámenes periódicos), es potestativa y en la práctica no existen datos de revisiones de estas sentencias.
El abuso de la figura de tutela constata que la *proporcionalidad* de las sentencias tampoco está garantizada. No existen datos del número de tutelas constituidas respecto al número de sentencias de modificación de la capacidad de obrar.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

36. Adaptation to the Convention requires substantial changes to Spanish legislation on the capacity to act of persons with disabilities. CERMI understands that the limiting capacity system which exists in Spain is not compatible with the mandates of the Convention, therefore no tweaks or adjustments would be acceptable. A new model needs to be created instead, based on support. For CERMI the Convention is an historical opportunity to abandon paternalistic systems which compromise the equality of persons with disabilities before the law, and change them for others which promote free determination, with the necessary supports and safeguards.

37. On occasion the equality before the law of persons with disability is obstructed due to the lack of awareness of the social model and human rights of the CRPD. We attach as an appendix a ruling which reflects this lack of awareness as it uses a situation of disability to take the custody of a child away from a mother with a disability.

36. La adaptación a la Convención requiere cambios sustanciales en la regulación española de la capacidad de obrar de las personas con discapacidad. El CERMI entiende que el sistema de limitación de la capacidad existente en España no es compatible con los mandatos de la Convención, por lo que no serían admisibles retoques o ajustes de detalle, sino que hay que crear un nuevo modelo, centrado en los apoyos. Para el CERMI, la Convención es una oportunidad histórica para abandonar sistemas paternalistas que merman la igualdad de las personas con discapacidad ante la ley, y cambiarlos por otros que potencien la libre determinación, con los soportes y salvaguardias necesarios.

37. La igualdad ante la ley de las personas con discapacidad en ocasiones se ve obstaculizada por la falta de concienciación sobre el modelo social y los derechos humanos de la CDPD. Adjuntamos como anexo una sentencia que refleja esta falta de concienciación ya que parte de la situación de discapacidad para justificar la retirada de la custodia de una menor a una madre con discapacidad.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Article 29. Participation in political and public life.

136. Current electoral legislation in Spain allows the active and passive right of suffrage to be removed from people who have been legally incapacitated, as long as the incapacitation ruling specifically covers this.

137. This possibility also extends to people who are interned in a psychiatric hospital by legal authorisation, during the period of their internment, as long as the judge expressly decides that they are incapable of exercising their right to vote.

Artículo 29. Participación en la vida política y pública.

136. La legislación electoral vigente en España permite que se prive del derecho del sufragio, activo y pasivo, a las personas incapacitadas judicialmente, siempre que la sentencia que declara la incapacitación lo prevea expresamente.

137. Esta posibilidad también se extiende a las personas internadas en un hospital psiquiátrico con autorización judicial, durante el período que dure su internamiento, siempre que en la autorización el juez declare expresamente la incapacidad para el ejercicio del derecho de sufragio.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

138. This deprivation of fundamental rights, which can principally affect people with intellectual disabilities or mental illnesses, makes no sense from a human rights point of view and clearly contravenes the United Nations' International Convention on the Rights of Persons with Disabilities, signed and ratified by Spain.

139. Article 12 of this international treaty declares the full legal equality of persons with disabilities in all spheres of life, without room for any restrictions on the grounds of disability. In addition, it guarantees the right of persons with disabilities to participate in political life and in the electoral processes with no exclusion of any type.

140. Current Spanish legislation, therefore, is incompatible with the UN Convention, and thus has to be urgently amended in order that persons with disabilities may exercise their basic rights to the full.

138. Esta privación de derechos fundamentales, que puede afectar principalmente a personas con discapacidad intelectual o con enfermedad mental, carece de sentido desde una visión derechos humanos y entra en clara contradicción con la Convención Internacional sobre los Derechos de las personas con Discapacidad de Naciones Unidas, firmada y ratificada por España.

139. Este tratado internacional, en su artículo 12, establece la plena igualdad legal de las personas con discapacidad en todas las esferas de la vida, sin que quepan restricciones por razón de discapacidad. Además, garantiza el derecho de las personas con discapacidad a participar en la vida política y en los procesos electorales sin ningún tipo de exclusiones.

140. La vigente legislación española es incompatible, por tanto, con las Convención de la ONU, por lo que tiene que ser modificada con urgencia para que las personas con discapacidad puedan ejercer sus derechos básicos en plenitud.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Implementation of the Convention on the Rights of Persons with Disabilities

List of issues to be taken up in connection with the consideration of the initial report of Spain (CRPD/C/ESP/1), concerning articles 1 to 33 of the Convention on the Rights of Persons with Disabilities

Aplicación de la Convención sobre los derechos de las personas con discapacidad

Lista de cuestiones que deben abordarse en relación con el examen del informe inicial de España (CRPD/C/ESP/1), con respecto a los artículos 1 a 33 de la Convención sobre los derechos de las personas con discapacidad

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Equal recognition before the law (article 12)

1. Please provide data on how many persons with disabilities have been put under guardianship to enable them to exercise legal capacity and on the number of rulings modifying the capacity to act, if any (Cf. paras.52-69).

2. Please explain on how it is ensured that guardianship is exercised to the benefit of the ward, in view of the absence of explicit safeguards in current legislation against undue influence or conflict of interest. (Cf. para.58).

3. Please provide information on the measures planned or undertaken to replace substitute decision-making (guardianship) by supported decision-making in the exercise of legal capacity, in accordance with article 12 of the Convention (Cf. para.53).

Igual reconocimiento ante la ley (art 12)

9. Sírvanse facilitar datos sobre el número de personas con discapacidades que han sido puestas bajo tutela como forma de ejercer la capacidad jurídica y, en su caso, sobre el número de decisiones modificando la capacidad de actuar (párrafos 52 a 69 del informe del Estado parte).

10. Sírvanse explicar como se garantiza que la tutela se ejerza en beneficio del pupilo teniendo en cuenta que en la legislación actual no existen salvaguardas contra la influencia indebida o el conflicto de intereses (párrafo 58 del informe del Estado parte).

11. Sírvanse facilitar información sobre las medidas previstas o que se han tomando para que, en vez de la sustitución en la adopción de decisiones (guarda) se recurra al apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica, de conformidad con el artículo 12 de la Convención (párrafo 53 del informe del Estado parte).

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

**Equal recognition before the law
and equal capacity to act:
understanding and
implementing
Article 12 of the UN Convention
on the Rights of Persons with
Disabilities**

*EDF Position paper - October
2009*

**Igual reconocimiento como
persona ante la ley
e igual capacidad para
actuar:
comprensión y aplicación de
el artículo 12 de la
Convención de la ONU
sobre los Derechos de las
Personas con Discapacidad**

*EDF Position paper - October
2009*

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

“Equal recognition before the law”

The notion of “equal recognition before the law” is wider than “legal capacity” (the concept that is also present in Article 12). It builds on other human rights treaties, mainly on Article 6 of the Universal Declaration of Human Rights and on Article 16 of the International Convention on Civil and Political Rights (ICCPR), which states that *“everyone shall have the right to recognition everywhere as a person before the law”*.

“Igual reconocimiento como persona ante la ley”

La noción de "Igual reconocimiento como persona ante la ley" es más amplia que la "capacidad jurídica" (el concepto que también está presente en el artículo 12). Se basa en otros tratados de derechos humanos, principalmente en el artículo 6 de la Declaración Universal de los Derechos Humanos y en el artículo 16 del Convenio Internacional de Derechos Civiles y Políticos (PIDCP), que establece que "toda persona debe tener el derecho al reconocimiento en todas partes, como persona ante la ley".

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

“Legal capacity”

“Legal capacity” in the sense of Article 12 is understood as *evolving* capacity to exercise these equal rights and includes the capacity to act. This applies to the legal systems of all countries for all people, irrespective of the nature or degree of their disability or apparent need for support. Under Article 12 CRPD, legal capacity cannot be challenged or denied based on the disability of a person. Instead, support measures to exercise legal capacity may have to be provided whenever needed.

“Capacidad jurídica”

"La capacidad jurídica" en el sentido del artículo 12, se entiende como la capacidad evolutiva de ejercer estos derechos iguales e incluye la capacidad de actuar. Esto se aplica a los sistemas jurídicos de todos los países para todas las personas, independientemente de la naturaleza o el grado de su discapacidad o necesidad evidente de apoyo. Según el artículo 12 CDPD, la capacidad jurídica no puede ser cuestionada o negada basada en la discapacidad de una persona. En cambio, las medidas de apoyo a ejercer su capacidad jurídica puede tener que ser siempre que sea necesario.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

“Support in exercising legal capacity”

Supported decision-making as enshrined in Article 12 starts from the presumption of full and equal legal capacity of all citizens, including those with severe and profound levels of disability. The Convention provides that the States Parties take *“appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”* (Article 12.3) and *“ensure that all measures that related to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse”* (Article 12.4).

“El apoyo en el ejercicio de la capacidad jurídica”

El apoyo de toma de decisión, consagrado en el artículo 12, parte de la presunción de capacidad jurídica plena e igualitaria de todos los ciudadanos, incluyendo aquellos con niveles severos y profundos de la discapacidad. La Convención dispone que los Estados Partes adoptarán *“medidas adecuadas para facilitar el acceso de las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica”* (artículo 12.3) y *“garantizar que todas las medidas relacionadas con el ejercicio de la capacidad jurídica proporcionen salvaguardias adecuadas y efectivas para impedir los abusos”* (artículo 12.4).

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

In accordance with the international human rights law, the respect of equal and inalienable rights must be in the centre of the discourse on determining the extent of support needed by the particular individual with a disability. Therefore, the concept of incapacity must be rejected from the outset, and the degree of assistance made proportional to the needs and abilities of the person and vary depending on the situation (for example, they might need support making important financial decisions, but can manage their daily tasks independently).

Consequently, the support in exercising legal capacity must always be based on a personal knowledge of the person (but not such as to create a conflict of interests!), and involve trust-building activities through alternative and augmentative communication methods.

De conformidad con la ley internacional de derechos humanos, el respeto de los derechos iguales e inalienables deben estar en el centro del discurso sobre la determinación del grado de apoyo que necesita el individuo con una discapacidad. Por lo tanto, el concepto de incapacidad debe ser rechazada desde el principio, y el grado de asistencia debe ser proporcional a las necesidades y capacidades de la persona y variar dependiendo de la situación (por ejemplo, puede ser que necesite apoyo para la toma de decisiones financieras importantes, pero pueda gestionar sus tareas diarias de forma independiente).

En consecuencia, el apoyo en el ejercicio de la capacidad jurídica siempre debe basarse en un conocimiento personal de la persona (pero no como para crear un conflicto de intereses!), e implicar actividades de fomento de la confianza a través de métodos de comunicación alternativos y aumentativos

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People whose abilities to make complex decisions or to communicate their decisions to others are either temporarily or permanently impaired may need high levels of support in most or all areas of life. In such cases they must be provided with such support that ensures that their legal capacity is nevertheless enjoyed on an equal basis with others while helping them to evaluate the implications and consequences of some of their actions or inactions.

At present, there is no sufficient evidence and practice to determine how supported decision-making can be ensured for this group of persons with disabilities. States Parties as well as disability organisations are called upon to test with urgency practical models of supported decision-making in pilot projects to resolve this outstanding question. The crucial point is how a trusting support relationship can be established in the cases of *all* people with disabilities.

Las personas cuyas habilidades para tomar decisiones complejas o para comunicar sus decisiones a los demás están temporal o permanentemente deterioradas necesitarán altos niveles de apoyo en la mayoría o todos los ámbitos de la vida. En este caso, deberán contar con tal apoyo que asegure que su capacidad jurídica se disfruta en todo caso en igualdad de condiciones con los demás al tiempo que se les ayuda a evaluar las implicaciones y consecuencias de algunas de sus acciones o inacciones.

En la actualidad, no hay pruebas ni práctica suficientes para determinar cómo el apoyo en la toma de decisiones se puede garantizar para este grupo de personas con discapacidad. Los Estados Partes, así como las organizaciones de discapacidad están llamados a probar con urgencia modelos prácticos de apoyo de toma de decisiones en los proyectos piloto para resolver esta cuestión pendiente. El punto crucial es cómo se puede establecer una relación de apoyo con confianza en todos los casos de personas con discapacidad

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“Safeguards”

The Convention requires that appropriate and effective safeguards be put in place to prevent abuse of persons with disabilities in the exercise of their legal capacity.

The text of the Convention itself provides important guidelines to be respected by the support measures. Namely, they must be *“appropriate and effective”, “proportional and tailored to the person’s circumstances, apply for the shortest time possible”* as well as *“subject to regular review by a[n...] independent authority”*. The Convention obliges States Parties to develop disability-neutral criteria to protect persons with disabilities against abuse in the same way as all other citizens are protected

“Salvaguardias”

La Convención exige que las salvaguardias apropiadas y efectivas sean puestas en marcha para prevenir el abuso de las personas con discapacidad en el ejercicio de su capacidad jurídica.

El texto de la propia Convención establece pautas importantes que deben respetar las medidas de apoyo. Es decir, deben ser *“adecuadas y eficaces”, “proporcionales y adaptadas a las circunstancias de la persona, aplicadas durante el menor tiempo posible”,* así como *“sujetas a revisión periódica por una [n. ...] autoridad independiente”*. La Convención obliga a los Estados Partes a desarrollar criterios imparciales por la incapacidad para proteger a las personas con discapacidad contra el abuso de la misma manera que están protegidos los demás ciudadanos

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In practice that means the establishment of a system for impartial assessment of the actual need for supported decision-making in exercising legal capacity, performed with the assistance of recognised independent experts, rigorous determination of the extent of the supporters' role and power, periodical re-examination of the measures adopted and possible appeal of decisions by disabled persons or their families. Again, it must be emphasised that the disabled person's wishes must always be the determining factor.

Special attention must be paid to safeguarding the rights of people in need of high level of support in all areas of life, who may be particularly vulnerable to undue influence.

These safeguards must be clearly separate from the support network, since they should also protect the person from exploitation or abuse by supporters.

En la práctica eso significa el establecimiento de un sistema para la evaluación imparcial de las necesidades actuales de apoyo en la toma de decisiones en el ejercicio de la capacidad jurídica, realizado con la ayuda de reconocidos expertos independientes, la determinación rigurosa de la extensión de la actuación y facultades de las personas que prestan el apoyo, la revisión periódica de las medidas adoptadas y el posible recurso de las decisiones por parte de las personas con discapacidad o sus familias. Una vez más, hay que destacar que los deseos de la persona con discapacidad debe ser siempre el factor determinante.

Se debe prestar especial atención a la protección de los derechos de las personas necesitadas de un alto nivel de apoyo en todos los ámbitos de la vida, que pueden ser particularmente vulnerables a la influencia indebida.

Estas garantías deben estar claramente separadas de la red de apoyo, ya que también deben proteger a la persona de la explotación o abuso por parte de la persona que presta el apoyo.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Eight steps for achieving equal recognition before the law

- 1. Promotion and support of self-determination of people with disabilities*
- 2. Replacing traditional guardianship by a system of supported decision-making*
- 3. Developing a system for supporting decision-making*
- 4. Selection and registration of support persons*
- 5. Overcoming communication barriers*
- 6. Preventing and resolving conflicts between supporter and supported person*
- 7. Implementing safeguards*
- 8. Using mainstream mechanisms for the protection of the best interests of a person*

Ocho pasos para lograr el igual reconocimiento como persona ante la ley

- 1. Promoción y apoyo de la autodeterminación de las personas con discapacidad*
- 2. Sustitución de la tutela tradicional por un sistema de apoyo de toma de decisiones*
- 3. Desarrollar un sistema de apoyo a la toma de decisiones*
- 4. Selección y registro de las personas de apoyo*
- 5. Superar las barreras de comunicación*
- 6. Prevención y resolución de conflictos entre la persona que presta el apoyo y la que lo recibe*
- 7. La aplicación de salvaguardias*
- 8. Utilización de los mecanismos principales para la protección de los intereses de una persona*

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

CERMI initial proposal for establishing a new procedure for providing support for decision making

“The full legal equality of persons with disabilities is an area where the effects of the International Convention on the Rights of Persons with Disabilities are most strongly felt. Disability is now no longer an excuse or justification for limiting or reducing people’s capacity in the legal system. Systems, like the Spanish system, based on substituted decision-making on the grounds of disability – usually intellectual or mental– must cease to be effective, as they go against the new paradigm of the free determination of individuals, all individuals, including men and women with disabilities”.

Propuesta inicial del CERMI para instaurar un nuevo procedimiento de provisión de apoyos para la toma de decisiones

“Si hay una esfera donde los efectos de la convención se dejan sentir con mayor contundencia esa es la de la plena igualdad jurídica de las personas con discapacidad. La discapacidad ya no puede ser excusa o cuartada para limitar o reducir la capacidad de las personas de realizar actos válidos en el tráfico jurídico. Los sistemas como el español, basados en la sustitución de la voluntad de la persona por razón de discapacidad – de ordinario intelectual o mental – han de quedar sin efecto, pues son contrarios al nuevo paradigma de la libre determinación de los individuos, de todos, incluidos los hombres y mujeres con discapacidad.

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For these reasons, CERMI has put it to the Ministry of Justice that the current civil process of legal incapacitation should be replaced by one of supported free decision-making for people with disabilities who need it.

The Convention, in force in Spain since 2008, makes it mandatory for the States Parties to revoke any systems which, like legal incapacitation, limit the equal legal capacity of people, including those with disabilities, and replace them with other systems which guarantee supported free and autonomous decision-making.

Por estos motivos, el CerMI ha planteado al Ministerio de Justicia que el actual proceso civil de incapacitación judicial, sea sustituido por uno de apoyos a la toma libre de decisiones, en el caso de personas con discapacidad que así lo precisen.

La convención, vigente en España desde 2008, obliga a los estados partes a derogar los sistemas que como el de la incapacitación judicial limitan la igualdad jurídica de las personas, incluidas aquellas que presentan una discapacidad, y a reemplazarlos por otros que garanticen apoyos para la toma libre y autónoma de decisiones.

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CERMI considers that Spain's system of legal capacity limitation is not compatible with the mandates of the Convention, and therefore just a few adjustments to details would not be acceptable (an easy way out which some courts find tempting), a new model needs to be created which focuses on autonomy and support. For CERMI, the Convention presents an historical opportunity to abandon paternalistic systems which compromise the equality of persons with disabilities under the law, and exchange them for others, in tune with the times, which promote free determination with the necessary supports and safeguards.

El Cermi entiende que el sistema de limitación de la capacidad existente en España no es compatible con los mandatos de la convención, por lo que no serían admisibles retoques o ajustes de detalles (salida fácil a la que algunas instancias están tentadas), sino que hay que crear un nuevo modelo centrado en la autonomía y en los apoyos. Para el Cermi, la convención es una oportunidad histórica de abandonar sistemas paternalistas que merman la igualdad de las personas ante la Ley, y trocarlos por otros, en consonancia con los tiempos, que potencian la libre determinación, con los soportes y salvaguardias necesarios.

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Despite the resistance from legal sectors which cling on to age-old institutions, which they consider to be immovable, the Convention is an indisputable and irreversible legal fact which overrides any pre-existing internal Law.

CERMI considers that the Executive and the Legislature have to be brave and meet the challenges set them in terms of the law by the UN Convention on legal equality and the right to freely make decisions. The time has come for supported free choice in decision-making.

This requires legally analysing how the new system should replace the institution of incapacitation regulated in the Civil Code (Title IX) and the institution of guardianship of incapacitated persons (Title X). Article 200 of the Civil Code establishes that "persistent physical or mental diseases or impairments which prevent the person being able to govern him/herself are causes for incapacitation". The basis of the civil institution of incapacitation has become obsolete and it does not conform to article 12 of the Convention.

A pesar de las resistencias de sectores jurídicos que se aferran a instituciones seculares que a su entender son inamovibles, la convención es un hecho jurídico indiscutible e irreversible que esta por encima del derecho interno preexistente.

A juicio del Cermi, el ejecutivo y el legislador han de ser valientes y audaces para responder normativamente a los desafíos que en materia de igualdad jurídica y toma libre de decisiones plantea la convención de la ONU. Es llegada la hora de los apoyos para la libre toma de decisiones.

Ello obliga a analizar jurídicamente como debe sustituir el nuevo sistema al de la institución de la incapacitación regulado en el código civil (título IX) y a la institución de la tutela de incapacitados (título X). El artículo 200 del código civil establece que "son causas de incapacitación las enfermedades o deficiencias persistentes de carácter físico o psíquico que impidan a la persona gobernarse por sí misma". El mismo fundamento de la institución civil de la incapacitación ha quedado obsoleto y no se ajusta al artículo 12 de la convención".

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Right of suffrage

Letter from **Luis Cayo Perez Bueno** as a president of the Spanish Committee of Representatives of Persons with Disabilities (CERMI) dated October 5, 2010, states that the current electoral law in Spain allows the deprivation of the right of suffrage, active and passive for persons incapacitated by court if the sentence expressly declares it.

This possibility also applies to persons interned in a psychiatric hospital with judicial authorization, during the period of their internment if the court's authorization expressly states the inability to exercise the right to vote

Derecho de sufragio

Carta dirigida al Defensor del Pueblo por Luis Cayo Perez Bueno en su condición de presidente del comité español de representantes de personas con discapacidad (CERMI) de fecha 5 de octubre de 2010, expone que la legislación electoral vigente en España permite que se prive del derecho del sufragio, activo y pasivo a las personas incapacitadas judicialmente, siempre que la sentencia que declara la incapacitación lo prevea expresamente.

Esta posibilidad también se extiende a las personas internadas en un hospital psiquiátrico con autorización judicial, durante el periodo que dure su internamiento, siempre que en la autorización el juez declare expresamente la incapacidad para el ejercicio del derecho de sufragio.

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This deprivation of fundamental rights, which may affect mainly persons with intellectual disabilities or mental illness, it has no sense from a human rights vision and comes in contradiction with International Convention on the Rights of Persons with Disabilities of United Nations signed and ratified by Spain.

This international treaty, in its article 12, recognize the full legal equality of persons with disabilities in all aspects of life without any restrictions by reason of disability. It also guarantees the right of persons with disabilities to participate in the political and electoral processes without any kind of exclusions.

Esta privación de derechos fundamentales, que puede afectar fundamentalmente a personas con discapacidad intelectual o con enfermedad mental, carece de sentido desde una visión de derechos humanos y entra en clara contradicción con la convención internacional sobre los derechos de las personas con discapacidad de naciones unidas, firmada y ratificada por España.

Este tratado internacional, en su artículo 12, establece la plena igualdad legal de las personas con discapacidad en todas las esferas de la vida, sin que quepan restricciones por razón de discapacidad. Además, garantiza el derecho de las personas con discapacidad a participar en la vida política y en los procesos electorales sin ningún tipo de exclusiones.

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That's why the current Spanish legislation is against the UN convention, so it has to be changed urgently so that persons with disabilities can exercise fully their basic rights, and it is requested the intervention of the Ombudsman in order to amend the Organic Law of General Electoral System to eliminate the possibility to deprive the right of suffrage to persons with disabilities.

Por ello dado que la vigente legislación Española es incompatible, por tanto, con la convención de la ONU, por lo que tiene que ser modificada con urgencia para que las personas con discapacidad puedan ejercer sus derechos básicos en plenitud, solicita la intervención del defensor del pueblo a fin de que se modifique la Ley orgánica de régimen electoral general para suprimir la posibilidad de que se pueda privar del derecho de sufragio a las personas con discapacidad.

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Fabián Cámara,
President of Down Spain, states that the UN Convention opens up new horizons for equal legal capacity before the Law.

Para Fabián Cámara,
Presidente de Down España, la Convención de la Onu abre nuevos horizontes para la igual capacidad jurídica ante la ley

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The highest degree of friction between the content of the CIDPCD and the Spanish legislation is about the regulation of personality rights and legal capacity of persons with disabilities. The Article 12 of the Convention declares explicitly the full equality under the law of persons with disabilities without any kind of distinction.

This statement comes into full confrontation with some of the institutions that in our law regulate the legal capacity, such as the guardianship, the conservatorship, the extended parental authority or the judicial incapacitation.

El mayor grado de fricción entre la convención y la legislación española se encuentra en la regulación de los derechos de la personalidad y la capacidad jurídica y de obrar de las personas con discapacidad .El artículo 12 de la Convención declara explícitamente la igualdad plena ante la ley de las personas con discapacidad sin distinción alguna .

Esta afirmación entra en plena confrontación con algunas de las instituciones que en nuestro derecho regulan la capacidad jurídica , tales como la tutela , la curatela , la prórroga de la patria potestad , ..., o la propia incapacitación judicial

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Given this diatribe, the Spanish Down´s position is absolutely support the statement of the article 12 of the Convention and therefore, requires:

- The disappearance, because it is unacceptably and discriminatory, of any judicial or administrative proceeding which removes, deletes, forbids or simply restricts the legal capacity of a person by reason of disability, this is, the institution generally known as "judicial incapacitation" (or any other name that is tried to give it in the future).

- The disappearance (with the transitional arrangements necessary respect of situations existing and settled in the practice) of any institution that replaces the civil will of persons with disabilities, such as the guardianship, the conservatorship or any other similar institution.

- The establishment of the new system of supports to the legal capacity of the convention respecting the basic principle of "respect the rights, the will and the preferences of the person with disability, ensure the other conditions also established by the convention, this is, the "appropriate and effective safeguards to prevent abuses", "the conflict of interests and the undue influence "

Ante esta diatriba, la postura de Down España es la de apoyar absolutamente lo expresado en el artículo 12 de la Convención, y en consecuencia, exigir :

-la desaparición, por inaceptablemente discriminatoria, de cualquier proceso, judicial o administrativo , por el que se retire , elimine , prohíba o simplemente se restrinja la capacidad de obrar de una persona por razón de su discapacidad , esto es , la institución generalmente conocida como "incapacitación "(o cualquier otro nombre que se le pretenda dar en el futuro).

-La desaparición (con el régimen transitorio que sea preciso, respecto de situaciones ya existentes y asentadas en la práctica) de toda institución sustitutiva de la voluntad civil de las personas con discapacidad , ya se trate de tutelas, curatelas o cualquier otra institución similar .

-La instauración del nuevo sistema de la convención de apoyos a la capacidad de obrar propia de tal manera que tales apoyos respetando el principio básico del respeto a los derechos, la voluntad y las preferencias de la persona con discapacidad, aseguren el resto de condiciones también establecido por la convención, esto es, las salvaguardias adecuadas y efectivas para impedir los abusos, el conflicto de intereses y la influencia indebida"

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Symposium on the legal capacity of persons with disabilities in the light of the UN Convention on the Rights of Persons with Disabilities, organized by the European Foundation Centre and the European Disability Forum in Brussels on June 4, 2009.

Simposium sobre la capacidad jurídica de las personas con discapacidad a la luz de la Convención de la ONU de los derechos de las Personas con discapacidad, organizado por el EUROPEAN FOUNDATION CENTER y el EUROPEAN DISABILITY FORUM en Bruselas, el 4 de Junio de 2009

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Miguel Angel Cabra de Luna highlighted the challenges of Article 12 and the need to explore the impact of this provision in the national and the European Union level, and the clear protection of legal personality and legal capacity of persons with disabilities will require the revision of national legal institutions such as guardianship or incapacitation.

Miguel Angel Cabra de Luna destacó los desafíos del artículo 12 y la necesidad de explorar el impacto de esta disposición en el ámbito nacional y en el de la Unión Europea ,y que la clara protección que en él se contiene a la personalidad jurídica y la capacidad legal de las personas con discapacidad requerirá la revisión de instituciones legales nacionales tales como la tutela o la incapacitación .

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Yannis Vardakastanis, president of the European Disability Forum, intervened saying that for too long the rights of persons with intellectual and psychosocial disabilities, people living in institutions and others have been deprived of their most basic human rights, and that the Convention deleted the outdated system of guardianship, which suppresses the rights and duties of persons with disabilities, and replaces it with the support system in making decisions, imposes on governments the obligation to ensure the political right to vote of persons with disabilities, and ensures that the communication will be developed so that every person, regardless of disability, will be heard and heeded.

Yannis Vardakastanis , presidente del European Disability Forum , intervino señalando que durante demasiado tiempo los derechos de las personas con discapacidad intelectual , con discapacidades psicosociales , personas que vivían en instituciones y otras , han sido privados de sus más básicos derechos humanos , y que la Convención suprime el sistema pasado de moda de la tutela , que suprime los derechos y los deberes de las personas con discapacidad , y lo substituye por el sistema de apoyo en la toma de Decisiones, impone a los gobiernos la obligación de asegurar el derecho político al voto de las personas con discapacidad , y se asegura de la comunicación estén desarrollados de modo que cada persona , sin importar su discapacidad , sea oída y escuchada

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Emphasized that understanding the impact of the Convention on the legal capacity involves the reassessment of concepts like the dignity, integrity and equality, and a review civil and criminal legislation to improve accessibility for people with disabilities in communication and procedures and educate all relevant actors in the paradigm shift.

Acentuó que entender el impacto de la Convención en la capacidad legal implica el reevaluar conceptos como el de la dignidad , la integridad y la igualdad , y revisar la legislación civil y penal mejorando la accesibilidad de las personas con discapacidad en la comunicación y procedimientos y educando a todos los agentes relevantes en el cambio de paradigma

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Johan Ten Geuzendam, head of the Unit for the Integration of Persons with Disabilities in the European Commission, explained that with regard to the implementation of the Convention, the Commission has identified some key issues including the development of consistent and comparable data, targets and indicators, the exchange of good practices and sharing experiences with the following initial priorities with respect to the Convention: Accessibility, Access to justice, Independent living and Right to vote, Monitoring mechanisms, Empowerment of people with disabilities and Legal capacity.

Johan Ten Geuzendam ,jefe de la Unidad para la Integración de las Personas con Discapacidad de la Comisión europea , explicó que en lo referente a la puesta en práctica de la Convención , la Comisión ha identificado algunas cuestiones claves incluyendo el desarrollo de datos constantes y comparables , de objetivos e indicadores , del intercambio de buenas prácticas y de compartir experiencias con las siguientes prioridades iniciales con respecto a a la Convención :Accesibilidad , acceso a la justicia , vida independiente y derecho al voto , mecanismos de supervisión , otorgamiento de poder a las personas con discapacidad , y la capacidad jurídica .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Gerard Quinn said why the reform discussion with regard to Article 12 is so important in both practical and symbolic terms. Article 12 is the vehicle that allows us to complete the journey of non-discrimination to protect people from the behavior of others, giving voice to people to run their own lives. For **Quinn**, the revolution of the Article 12 is emblematic of a paradigm shift that has been happening in the field of disability in the last fifteen years at European level and through the heart of the Convention.

Gerard Quinn destacó por qué la discusión de la reforma en lo referente al artículo 12 es tan importante tanto en términos prácticos como simbólicos .Por su parte , el artículo 12 es el vehículo que nos permite terminar el viaje de la no discriminación que proteja a las personas del comportamiento de terceros , dando voz de nuevo a las personas para dirigir sus propias vidas . Para **Quinn** , la revolución contenida en el artículo 12 es emblemática del cambio de paradigma que ha estado ocurriendo en el campo de la discapacidad en los últimos quince años a nivel europeo, y atraviesa el núcleo de la Convención .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Dignity, autonomy and equality are essential values.

Dignity, all human beings are ends in themselves. People with disabilities were traditionally viewed as objects and not subjects worthy of equal respect.

Autonomy, we decide our fates, the Government's job is to provide our freedom.

The balance between autonomy and protection was not present in our laws inherited on legal capacity. An excessive paternalism and over-protective attitude led us go against the autonomy of individuals.

Dignidad , autonomía e igualdad son valores esenciales .

Dignidad ,todos los seres humanos son un fin en sí mismos .Las personas con discapacidad fueron vistas tradicionalmente como objetos y no como sujetos merecedores de igual respeto.

Autonomía ,somos nosotros quienes decidimos nuestros destinos , el trabajo del gobierno es facilitar nuestra libertad .

El equilibrio entre autonomía y protección no estaba presente en nuestras leyes heredadas sobre capacidad jurídica .

Un exceso de paternalismo y una actitud excesivamente protectora nos llevó a ir en contra de la autonomía de las personas .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Quinn stressed that many of the first laws were decreed to protect actives or property rather than people. A perverse result of intervention to protect them against each other has been the institutionalization, I mean, placing people in institutions where their exposure to violence, exploitation and abuse were even worse.

The bridge here is equality, this is what the Convention brings back to the field of disability, and is what clearly animates Article 12. Respect for equality means to extend to people with disabilities the same expansive freedom that allowed other people to commit their own lives and make their own mistakes.

Destacó **Quinn** que muchas de las primeras leyes fueron decretadas para proteger activos o propiedades más bien que a las personas .Un resultado perverso de la intervención para para proteger a unos contra otros ha sido la institucionalización , es decir , colocar a las personas en instituciones donde su exposición a la violencia , a la explotación y al abuso eran incluso peores .

El puente aquí es la igualdad , esto es lo que trae de nuevo la Convención al campo de la discapacidad , y es lo que anima claramente el artículo 12 .El respeto a la igualdad significa ampliar a las personas con discapacidad la misma libertad expansiva permitida al resto de las personas para cometer sus propias vidas y cometer sus propias equivocaciones .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Gerard Quinn added another value to the dignity, autonomy and equality, the solidarity.

If we are serious about respecting the autonomy of persons with disabilities on an equal base with others our first impulse to a certain lack of functional capacity should not remove it but to support.

Gerard Quinn also highlighted an essential aspect of reservations. He reminded that any reservation that would defeat the object and purpose of a treaty is invalid. In his opinion, a reserve that allows to maintain in force the laws of guardianship is unacceptable

Gerard Quinn añadió otro valor a los de dignidad, autonomía e igualdad , el de la solidaridad .

Si somos serios en el respeto de la autonomía de las personas con discapacidad sobre una base igual con otras nuestro primer impulso ante una cierta carencia de la capacidad funcional no debe ser quitarla sino apoyarla .

También destacó **Gerard Quinn** un aspecto esencial , las reservas. Recordó que cualquier reserva que frustre el objeto y el propósito de un tratado no es válida .A su juicio , parece claro que una reserva que deje hueco para mantener las leyes en pleno de las tutelas es inaceptable .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

**DECLARATIONS
AND RESERVATIONS**

**DECLARACIONES
Y RESERVAS**

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

AUSTRALIA

Upon ratification
Declaration

Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life.

Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;

Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others.

AUSTRALIA.

Momento de la ratificación .
Declaración .

Australia reconoce que las personas con discapacidad tienen capacidad jurídica en igualdad de condiciones con las demás en todos los aspectos de la vida .

Australia declara su entendimiento de que la Convención permite por completo los apoyos o la sustitución en la toma de decisiones en nombre de una persona solamente cuando tales decisiones sean necesarias, como último recurso y sujeto a las salvaguardias .

Australia reconoce que toda persona con discapacidad tiene derecho a que se respete su integridad física y psíquica en igualdad de condiciones con los demás .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;

Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others.

Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.

Australia declara su entendimiento de que la Convención permite la asistencia obligatoria o el tratamiento de las personas, incluidas las medidas adoptadas para el tratamiento de la discapacidad mental, cuando ese tratamiento sea necesario, como último recurso y sujeto a las salvaguardias .

Australia reconoce los derechos de las personas con discapacidad a la libertad de movimiento, a la libertad para elegir su residencia y a una nacionalidad, en igualdad de condiciones con los demás .

Australia además declara su entendimiento de que la convención no crea el derecho de toda persona a entrar o permanecer en un país en el que no es nacional, o se pueda incidir en los requisitos de salud de Australia por los extranjeros que intentan entrar o permanecer en Australia, donde estos requisitos se basan en criterios legítimos, objetivos y razonables

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

CANADA

Declaration and reservation:

“Canada recognizes that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law.

To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards.

CANADA

Declaración y reserva .

Canadá reconoce la presunción de que las personas con discapacidad tienen capacidad jurídica en igualdad de condiciones con los demás en todos los aspectos de la vida .Canadá declara su entendimiento de que el artículo 12 permite los mecanismos de apoyo y sustitución de toma de decisiones en circunstancias apropiadas y de conformidad con la ley .

En la medida en el artículo 12 puede interpretarse como una exigencia de eliminación de todos los mecanismos de sustitución en la toma de decisiones Canadá se reserva el derecho de continuar usándolos en circunstancias apropiadas y con las garantías adecuadas y efectivas .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

CANADA

With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal”.

CANADA

Con respecto al artículo 12 . 4 . Canadá se reserva el derecho de no someter estas medidas a un a revisión periódica por una autoridad independiente, cuando esas medidas ya está sujetas a revisión o apelación .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

EGYPT

Interpretative declaration made upon signature:

The Arab Republic of Egypt declares that its interpretation of article 12 of the International Convention on the Protection and Promotion of the Rights of Persons with Disabilities, which deals with the recognition of persons with disabilities on an equal basis with others before the law, with regard to the concept of legal capacity dealt with in paragraph 2 of the said article, is that persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility ('ahliyyat al-wujub) but not the capacity to perform ('ahliyyat al-'ada'), under Egyptian law.

EGIPTO

Declaración interpretativa hecha en el momento de la firma .

La república Árabe de Egipto declara que su interpretación del artículo 12 de la Convención Internacional sobre la protección y promoción de los derechos de las personas con discapacidad, que declara el reconocimiento de de las personas con discapacidad en igualdad de condiciones con los demás ante la ley, con relación al concepto de capacidad jurídica tratado en el apartado 2 de dicho artículo, es que las personas con discapacidad tienen capacidad para adquirir derechos y asumir responsabilidades, pero no la capacidad para ejercitarla (actuar) bajo la legislación egipcia .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

FRANCE

With regard to article 29 of the Convention, the exercise of the right to vote is a component of legal capacity that may not be restricted except in the conditions and in accordance with the modalities provided for in article 12 of the Convention.

FRANCIA

Con respecto al artículo 29 de la Convención, el ejercicio del derecho al voto es un componente de la capacidad jurídica que no puede ser restringido sino en las condiciones y de conformidad con las modalidades previstas en el artículo 12 de la Convención .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

MEXICO

Interpretative declaration

The Mexican State reiterates its firm commitment to creating conditions that allow all individuals to develop in a holistic manner and to exercise their rights and freedoms fully and without discrimination.

Accordingly, affirming its absolute determination to protect the rights and dignity of persons with disabilities, the United Mexican States interprets paragraph 2 of article 12 of the Convention to mean that in the case of conflict between that paragraph and national legislation, the provision that confers the greatest legal protection while safeguarding the dignity and ensuring the physical, psychological and emotional integrity of persons and protecting the integrity of their property shall apply, in strict accordance with the principle "pro homine".

MEXICO

Declaración interpretativa

El Estado mexicano reitera su compromiso de crear condiciones que permitan a todos los individuos desarrollar de manera integral el ejercicio de sus derechos y libertades plenamente y sin discriminación .

En consecuencia, afirmando su absoluta determinación de proteger los derechos y la dignidad de las personas con discapacidad los estados Mexicanos interpretan el párrafo 2 del artículo 12 de la convención en el sentido de que en caso de conflicto entre dicho párrafo y la legislación nacional la disposición que confiere la mayor protección jurídica al tiempo que garantizan la dignidad y garantizar la integridad física, psíquica y emocional de las personas y la protección de la integridad de sus bienes se aplicará en estricta conformidad con el principio pro homine .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

SYRIAN ARAB REPUBLIC

Upon signature:

Understanding:

Our signature of this Convention does not in any way, imply recognition of Israel or entry into relations with Israel, in any shape or form, in connection with the Convention.

We signed today on the basis of the understanding contained in the letter dated 5 December 2006 from the Permanent Representative of Iraq to the United Nations addressed, in his capacity as Chairman of the Group of Arab States for that month, to the Chairman of the Committee, which contains the interpretation of the Arab Group concerning article 12 relating to the interpretation of the concept of "legal capacity".

REPUBLICA ARABE DE SIRIA.

En el momento de la firma:

Entendimiento:

Nuestra firma de la presente Convención no implica en modo alguno reconocimiento de Israel o la entrada en relaciones con Israel, en cualquier forma y manera, en conexión con la Convención .

Hemos firmado hoy sobre la base del entendimiento que figura en la carta de fecha 5 de diciembre de 2006, dirigida por el representante permanente de Iraq acreditado ante las Naciones Unidas, en su calidad de presidente del grupo de estados arabes durante ese mes, al presidente del comité, que contiene la interpretación del grupo de estados árabes relativa al artículo 12 relativo a la interpretación del concepto de capacidad jurídica .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Reservations:

Equal Recognition before the Law – Convention Article 12.4

The United Kingdom's arrangements, whereby the Secretary of State may appoint a person to exercise rights in relation to social security claims and payments on behalf of an individual who is for the time being unable to act, are not at present subject to the safeguard of regular review, as required by Article 12.4 of the Convention and the UK reserves the right to apply those arrangements. The UK is therefore working towards a proportionate system of review."

REINO UNIDO DE GRAN BRETAÑA Y NORTE DE IRLANDA.

Reservas :

Igual reconocimiento ante la ley - Convención artículo 12.4

Las disposiciones del Reino Unido, por el que el secretario de estado puede designar una persona para el ejercicio de derechos en relación a las demandas de seguridad social y los pagos en nombre de una persona que es en ese momento incapaz de actuar no están actualmente sometidas a la salvaguardia de una regular revisión, como exige el artículo 12.4 de la convención y el Reino Unido se reserva el derecho de aplicar dicho régimen .El Reino Unido está por lo tanto trabajando hacia un sistema proporcional de revisión .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Gabor Gombos

The Convention indicates the way to follow. First, "*nothing for us without us*", which means the involvement of persons with disabilities, having the Government a legal obligation to consult civil society.

In second place, the Convention recognizes personality to all persons with disabilities, which involves two aspects: identity and capacity to act.

Gabor Gombos

La Convención indica el camino a seguir .En primer lugar , "*nada para nosotros sin nosotros*" , lo que significa la implicación de las personas con discapacidad teniendo el Estado la obligación legal de consultar a la sociedad civil .

En segundo lugar , la Convención reconoce personalidad a todas las personas con discapacidad , lo que implica dos aspectos :identidad y capacidad de acción .

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

He remembered that during the negotiations in the ad hoc Committee of the UN some States were opposed to accept that Article 12 could mean that the legal capacity should include capacity to act. But in his opinion, this can not be refuse now because Convention engages an equalitarian principle that includes both aspects of the personality and clearly includes all persons even those with severe disabilities.

Currently, the most guardianships of the member states are not consequent with the Convention. In his view, any attempt to present the guardianship as a support mechanism is problematic.

Recordó que durante las negociaciones en el comité ad hoc de la ONU algunos estados eran renuentes a aceptar que el artículo 12 pudiera suponer que la capacidad jurídica debe incluir capacidad de actuar .Pero esto a su es juicio es innegable ahora pues la Convención engarza un principio igualitario que incluye ambos aspectos de la personalidad e incluye claramente a todas las personas incluso a aquellas con discapacidades severas .

Las tutelas actuales, según lo aplicado en la mayoría de los estados miembros, no son consecuentes con la Convención. En su opinión, cualquier tentativa de presentar la tutela como mecanismo de apoyo es problemático.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

In his opinion, there is a minimum core of aspects in relation to Article 12:

- Complete protection (incapacitation) should be deleted or removed.
- The main gaps should be identified.
- New laws are needed.
- Article 12 is an ambitious article.
- The Convention calls for full legal inclusion and not only for legal recognition.
- How to access to support decision making within the institutions

A su juicio, existe un núcleo de aspectos mínimos en relación al artículo 12 :

- la tutela completa (incapacitación) debe suprimirse.
- las principales lagunas deben ser identificadas.
- Nuevas leyes son necesarias.
- El artículo 12 es un artículo ambicioso
- La Convención llama a la inclusión legal completa y no sólo al reconocimiento legal.
- Cómo tener acceso para apoyar la toma de decisión dentro de las instituciones.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Fernando Santos Urbaneja,
in 2009,
asked himself what is going
wrong

Fernando Santos Urbaneja,
en 2009,
se preguntaba qué es lo que
está fallando.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Human Rights Institute Bartolomé de las Casas of the Carlos III University of Madrid

the shift of model that will require gradual changes, in which there are probably periods where both institutions, the incapacitation and the new measures "must coexist" because while this mechanism is not articulated should be set curatorship, as the mechanism to which the judge should go as a general rule

Instituto de Derechos Humanos Bartolomé de las Casas de la Universidad Carlos III de Madrid

el cambio de modelo requerirá cambios graduales, en los que probablemente existan períodos en los que ambas instituciones – incapacitación y las nuevas medidas – deban coexistir, mostrándose partidario de que mientras ese mecanismo no esté articulado debe configurarse la curatela, como el mecanismo al que el juez deba acudir como regla general

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Torcuato Recover:

The approach of Article 12 is openly opposed to regulating the civil code, which says the opposite, persons with disabilities subject to a process and a judgment that meant his total inability, is openly opposed, not only for the terminology and the nature of the underlying concepts behind words, is absolutely opposed to that definition in paragraph 2 of Article 12.

Torcuato Recover:

El planteamiento del artículo 12 es abiertamente contrario a lo que regulaba el Código civil, que decía lo contrario, las personas con discapacidad que se han de someter a un procedimiento y acababan en una sentencia que suponía su incapacitación, es abiertamente contrario, no sólo por la terminología sino por la naturaleza de los conceptos que subyacen detrás de palabras, es abiertamente contrario a esa definición del apartado 2 del artículo 12.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

**LEGISLATIVE REFORMS
AFTER THE CONVENTION.**

**REFORMAS LEGISLATIVAS
TRAS LA CONVENCION.**

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

RUSSIA

Analysis of legal capacity law reform in Russia

Mental Disability Advocacy Center, 22 April 2011

1. Courts must notify an individual of a legal capacity case initiated against him. Legal capacity proceedings must always take place with the participation of the person concerned

Currently courts can deprive a person of legal capacity without even notifying them

RUSIA

Análisis de la reforma de la ley de capacidad jurídica en Rusia

Mental Disability Advocacy Center, 22 Abril 2011

1. Los tribunales deben notificar a una persona de un caso de capacidad legal iniciado en su contra. Los procedimientos de capacidad jurídica siempre deben realizarse con la participación de la persona afectada

En la actualidad los tribunales pueden privar a una persona de la capacidad jurídica sin siquiera notificárselo

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

2. A person deprived of legal capacity may apply to court in order to seek restoration of legal capacity

Currently a person deprived of legal capacity may not initiate proceedings in order to have his legal capacity restored

3. A person deprived of legal capacity may appeal against the incapacity judgment personally or through his representative such as a lawyer

Currently, once the ten-day appeal term has passed, the judgment depriving legal capacity may be appealed only through the person's guardian, and the person has no right to choose a representative to assist him in this matter

2. Una persona privada de la capacidad jurídica puede solicitar a los tribunales la restauración de la capacidad jurídica

Actualmente una persona privada de la capacidad jurídica no puede incoar el procedimiento con el fin de que su capacidad jurídica sea restaurada

3. Una persona privada de la capacidad jurídica podrá recurrir contra la sentencia de incapacidad personalmente o a través de su representante, como un abogado

En la actualidad, una vez transcurrido el plazo de diez días para recurrir, la sentencia privativa de la capacidad jurídica sólo puede ser apelada a través del tutor de la persona, y la persona no tiene derecho a elegir a un representante para que le ayuden en este asunto

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

4. Courts can request participation of a person deprived of legal capacity in a hearing on any matter

Currently people deprived of legal capacity have no right to participate in court proceedings

5. Informed consent must be sought and obtained from anyone for mental health care interventions, regardless of the person's legal capacity

At present the person's guardian has unchecked power to send the person under guardianship to a psychiatric hospital

4. Los tribunales pueden solicitar la participación de una persona privada de la capacidad jurídica en una audiencia sobre cualquier asunto

En la actualidad las personas privadas de capacidad jurídica no tienen derecho a participar en los procedimientos judiciales

5. El consentimiento informado debe ser solicitado y obtenido de cualquiera de las intervenciones de salud mental, independientemente de la capacidad jurídica de la persona

En la actualidad el tutor tiene poder ilimitado para enviar a la persona bajo tutela a un hospital psiquiátrico

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

6. Guardians cannot decide to send a person under their guardianship to a social care institution.

At present a guardian or the local government can place the person to social care institution on the basis of the psychiatric report, ignoring the wishes of the person under guardianship.

6. Los tutores no pueden decidir enviar a una persona bajo su custodia a una institución de asistencia social

En la actualidad, un tutor o el gobierno local puede enviar a la persona a una institución de asistencia social sobre la base del informe psiquiátrico, haciendo caso omiso de los deseos de la persona bajo tutela.

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON
THE RIGHTS OF PERSONS WITH DISABILITIES

SPAIN

second book of the **Catalan Civil Code** (Law of July 29, 2010), concerning to the person and the family, invokes in its preamble, the Convention

"The present law keeps the traditional institutions of protection linked to the incapacitation, but also regulates other ones which operate outside it, because in many cases the person with disabilities or their families prefer not to promote it. This diversity of protection systems recognize the duty to respect the rights, the will and the preferences of the person and the principles of proportionality and adaptability to the circumstances of the protection measures, as advocated by the Convention ..."

ESPAÑA

libro segundo del **Código Civil de Cataluña**, relativo a la persona y la familia , invoca en su exposición de motivos a la Convención:

"La presente ley mantiene las instituciones de protección tradicionales vinculadas a la incapacitación , pero también regula otras que operan o pueden eventualmente operar al margen de ésta , ateniéndose a la constatación de que en muchos casos la persona con discapacidad o sus familias prefieren no promoverla .Esta diversidad de regímenes de protección sintoniza den el deber de respetar los derechos , voluntad y preferencias de la persona y con los principios de proporcionalidad y de adaptación a las circunstancias de las medidas de protección , tal y como preconiza la Convención ..."

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON
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"Along with the provision that allows not provide the guardianship if it had been granted a power in anticipation of the loss of capacity, changes in relation to the custody of fact are a reflection of the new model of protection of the individual subject...that´s the reason why ... includes a new instrument of protection, assistance, created for the adult who needs to take care of his person or property because of the decrease nondisabling of his physical or mental faculties.

So we start from a conception of the protection of the person who is not necessarily linked to lack of capacity but also includes instruments based on the free development of personality to protect them in situations such as aging, mental illness or disability.

"Junto a la disposición que permite no constituir la tutela si se hubiese otorgado un poder en previsión de la pérdida de capacidad , los cambios en relación con la guarda de hecho son un reflejo del nuevo modelo de protección de la persona ...Es por ello mismo que ...incluye un nuevo instrumento de protección , la asistencia , dirigido al mayor de edad que lo necesita para cuidar de su persona o bienes debido a la disminución no incapacitante de sus facultades físicas o psíquicas

Se parte así de una concepción de la protección de la persona que no se vincula necesariamente a la falta de capacidad sino que incluye instrumentos que basándose en el libre desarrollo de la personalidad sirven para proteger a esas personas en situaciones como la vejez , la enfermedad psíquica o la discapacidad

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

This instrument can be very useful to certain vulnerable groups for which the incapacitation and the implementation of a system of guardianship or conservatorship (curatorship) are disproportionate, as the individuals affected by mild mental retardation or other for which the type of decrease suffering, the traditional instruments are not appropriate for their needs.

In line with the guidelines of Committee of Ministers of the Council of Europe's recommendation of 28 February 1999 and following the precedents existing in different legal systems in Cataluña is considered more appropriate this model of protection parallel to the guardianship or curatorship. Also, this is the trend that inspires the Convention on the Rights of Persons with Disabilities. "

Este instrumento puede ser muy útil también para determinados colectivos especialmente vulnerables pero para los cuales la incapacitación y la aplicación de un régimen de tutela o curatela resultan desproporcionadas, como las personas afectadas por un retraso mental leve u otras para las que por el tipo de disminución que sufren los instrumentos tradicionales no son apropiados para atender sus necesidades.

En línea con las directrices de la recomendación de 28 de febrero de 1999 de Comité de Ministros del Consejo de Europa y con los precedentes existentes en diferentes ordenamientos jurídicos del entorno de Cataluña se considera más adecuado este modelo de protección paralelo a la tutela o curatela . Además, esta tendencia es la misma que inspira la Convención sobre los derechos de las personas con discapacidad."

LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

General observation of the Committee on the Elimination of All Forms of Discrimination against Persons with Disabilities, on the need to interpret Article I.2, Section B) in fine of the InterAmerican Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities, under Article 12 of the United Nations Convention on the Rights of Persons with Disabilities in its extraordinary meeting on 4 and 5 May 2011 in El Salvador

Observación General del Comité para la Eliminación de todas las formas de Discriminación contra las Personas con Discapacidad, sobre la necesidad de interpretar el artículo I.2, Inciso B) In fine de la Convención Interamericana para la Eliminación de todas las formas de Discriminación contra las Personas con Discapacidad, en el marco del artículo 12 de la Convención de Naciones Unidas sobre los Derechos de las Personas con Discapacidad, en su reunión extraordinaria de 4 y 5 de Mayo de 2011 en El Salvador

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Judiciary sentences

Sentence of the European Court of Human Rights, April 30, 2009

Italy: Decree of Catanzaro Court on April, 9, take a position on the "amministrazione di sostengo" and the Convention

Argentina: National Chamber of Civil Appeals of the Federal Capital March 29, 2010

Colombia: Plenary Chamber of the Constitutional Court on April 21, 2010

Pronunciamientos judiciales

Sentencia del Tribunal europeo de Derechos Humanos, de 30 de abril de 2009

Italia: decreto de 9 de Abril del Tribunal de Catanzaro se pronuncia sobre la "amministrazione di sostengo " y la Convención

Argentina: Cámara Nacional de Apelaciones en lo Civil de la capital federal, 29 de Marzo de 2010

Colombia: Sala Plena de la Corte Constitucional, el 21 de Abril de 2010

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SPAIN

Supreme Court Sentence, on April 29, 2009

Sentence of the court 15th of Las Palmas de Gran Canaria, on April 27, 2010

Sentence of the court 8th of Gijon, on October 13, 2009

Sentence of the Provincial court of Guipuzcoa, on February 11, 2011

Instructions of the Attorney General's Office 4/2008

4/2009

y 3/2010

ESPAÑA

Sentencia del Tribunal Supremo de 29 de Abril de 2009

Sentencia de 27 de abril de 2010 del juzgado 15 de las Palmas de Gran Canaria

Sentencia del juzgado número 8 de Gijón de 13 de Octubre de 2009

Sentencia de 11 de Febrero de 2011 de la Audiencia Provincial de Guipúzcoa

Instrucciones de la Fiscalía General del Estado 4/2008

4/2009

y 3/2010

*LEGAL CAPACITY OF PERSONS WITH DISABILITIES IN THE LIGHT OF THE UNITED NATIONS CONVENTION ON
THE RIGHTS OF PERSONS WITH DISABILITIES*

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CAPACIDAD JURIDICA Y DISCAPACIDAD A LA LUZ DE LA CONVENCION DE NACIONES UNIDAS DE DERECHOS DE LAS PERSONAS CON DISCAPACIDAD.

ACADEMIA EUROPEA DE DERECHO.

Jose Javier Soto

Dicen que el tiempo pone las cosas en su sitio.

En diciembre se habrán cumplido cinco años desde que la Organización de Naciones Unidas, en su sesión de 13 de diciembre de 2006, aprobara la Convención de los derechos las personas con discapacidad .

Tiempo para que los estados ratificaran el texto, para que los legisladores, tribunales, y profesionales del derecho lo conocieran.

Tiempo para ponderar las distancias entre las legislaciones vigentes y el texto y los propósitos de la Convención.

Tiempo para conocer otras respuestas.

Para preguntarse ahora, en este momento, si estamos después de casi cinco años en el mismo sitio .En aquel donde en todas partes del mundo se siguen vulnerando los derechos de las personas con discapacidad, en donde el Estado sigue instalado en el conformismo, en la autocomplacencia de los que aplican el Derecho.

O si estamos en el camino que señaló de forma clara ese 13 de diciembre de 2006 .El camino hacia la dignidad y la igualdad de todas las personas.

LA CAPACIDAD, EL PUNTO DE PARTIDA.

Esta es quizás mi primera impresión sobre la respuesta a la anterior pregunta.

En la relevancia que se dé a la persona, en el reconocimiento de su valor, de su autonomía.

Y en ese camino, no es redundante la manifestación de que las personas con discapacidad tienen derecho en todas partes al reconocimiento de su personalidad jurídica, que enmarca el artículo 12 de la Convención.

Y no lo es a la vista de la historia, ni la realidad, en el 2006 o en el 2011, y mucho menos en un tratado internacional en que confluyen sociedades tan diversas.

Ese igual reconocimiento como persona ante la ley obliga a los estados a reconocer la capacidad jurídica en igualdad de condiciones con los demás y en consecuencia a proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica.

Obliga a los estados a proporcionar salvaguardias para impedir los abusos, en las que los derechos, la voluntad y las preferencias de la persona son la base de las medidas para el apoyo, que no haya conflicto de intereses ni influencia indebida, que sean proporcionales y adaptadas a las circunstancias de la persona, que se apliquen en el plazo más corto posible y que estén sujetas a exámenes periódicos, por parte de una autoridad o un órgano judicial competente, independiente e imparcial.

Más allá de los debates sobre los conceptos de “capacidad jurídica” y “capacidad de obrar”⁽¹⁾- que sí tienen alcance tras las

¹ En relación a las discusiones sobre el concepto de capacidad se suele poner de relieve que en el borrador de Agosto de 2006 del Octavo período de sesiones, anterior al texto definitivo, el artículo 12 iba acompañado de algo cuando menos inusual : una nota a pie de página que decía “En árabe, chino y ruso, la expresión “capacidad jurídica” se refiere a la “capacidad jurídica de ostentar derechos “ y no a la “capacidad de obrar “.

Ello motivó una reacción inmediata de la que es ejemplo una de las conclusiones del seminario informativo sobre la convención celebrado por el Cermi el 26 de Septiembre de 2006:” El Cermi se adhiere a las peticiones promovidas desde diferentes instancias, tanto públicas como de representantes de la sociedad civil, solicitando enérgicamente la supresión de la nota a pie de página incluida en el artículo 12 de la Convención, dedicado a la igualdad ante la ley “

declaraciones y reservas efectuadas al texto-(²) es a mi juicio destacable sobre todo el punto de partida .

Y este es la persona.

Por ello, tras la constancia de la igualdad, el artículo 12 no pretende a mi entender dar lugar a excepciones que en la práctica desvirtúen esta afirmación, sino que hace un esbozo de cual debe ser el marco en que hacerlo posible sin llegar a una regulación completa de esos sistemas de apoyo.

Especialmente destacable es el respeto a la voluntad y preferencias de las personas, en que se exige al estado la diligencia debida para conocerla y aplicarla, ámbito en que además cobran especial valor las manifestaciones previas ante una futura discapacidad. (³)

Así, el artículo 12 de la Convención en su versión definitiva dice que:

Artículo 12

Igual reconocimiento como persona ante la Ley.

1. Los estados partes reafirman que las personas con discapacidad tienen derecho en todas partes al reconocimiento de su personalidad jurídica.

2. Los estados partes reconocerán que las personas con discapacidad tienen capacidad jurídica en igualdad de condiciones con las demás en todos los aspectos de la vida.

3. Los estados partes adoptarán las medidas pertinentes para proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica.

4. Los estados parte asegurarán que en todas las medidas relativas al ejercicio de la capacidad jurídica se proporcionen salvo a guardias adecuadas y efectivas para impedir los abusos de

² Las Declaraciones y reservas pueden verse en el anexo al texto.

³ En este sentido son de interés las declaraciones legales preliminares de la legislación de Hungría, el mandato de protección futura de Francia y el poder preventivo del Código Civil español y del Derecho foral catalán, así como la legislación sobre esta misma materia de Canadá, Nueva Zelanda y Australia

conformidad con el derecho internacional en materia de derechos humanos. Esas salvaguardias asegurarán que las medidas relativas al ejercicio de la capacidad jurídica respeten los derechos, la voluntad y las preferencias de las personas, que no haya conflicto de intereses ni influencia indebida, que sean proporcionales y adaptadas a las circunstancias de la persona, que se apliquen en el plazo más corto posible y que estén sujetas a exámenes periódicos por parte de una autoridad o un órgano judicial competente, independiente, e imparcial. Las salvaguardias serán proporcionales al grado en que dichas medidas afecten a los derechos e intereses de las personas.

5. Sin perjuicio de lo dispuesto en el presente artículo, los estados partes tomarán todas las medidas que sean pertinentes y efectivas para garantizar el derecho de las personas con discapacidad, en igualdad de condiciones con los demás, a ser propietarias y heredar bienes, controlar sus propios asuntos económicos y tener acceso en igualdad de condiciones a préstamos bancarios, hipotecas y otras modalidades de crédito financiero, y velarán por que las personas con discapacidad no sean privadas de sus bienes de manera arbitraria.

Pero si este es el texto, para responder a la pregunta inicial, es importante fijarnos una serie de referentes: Análisis de los trabajos en el seno del comité de derechos de las personas con discapacidad, manifestaciones del movimiento asociativo, opiniones doctrinales, reformas legislativas producidas y pronunciamientos judiciales. .

I-El Comité de los derechos de las personas con discapacidad de la Organización de Naciones Unidas en relación al artículo 12 de la Convención.

Especial atención merece en el seno de Naciones Unidas el trabajo del Comité de los derechos de las personas con discapacidad.

Sus funciones se recogen en los artículos 34 a 39 de la Convención, y en el Protocolo Facultativo de la Convención sobre los derechos de las personas con discapacidad.

Con carácter previo es interesante el informe realizado el **26 de enero de 2009**, que a continuación se transcribe en lo referente al artículo 12

“INFORME ANUAL DEL ALTO COMISIONADO DE LAS NACIONES UNIDAS PARA LOS DERECHOS HUMANOS E INFORMES DE LA OFICINA DEL ALTO COMISIONADO Y DEL SECRETARIO GENERAL

4. Reconocimiento de la personalidad jurídica, y de la capacidad jurídica y de obrar

43. Según el artículo 12 de la Convención, los Estados partes reconocerán la personalidad jurídica de las personas con discapacidad, así como su capacidad jurídica y de obrar en igualdad de condiciones con los demás. Los párrafos 3 y 4 del artículo 12 obligan a los Estados a proporcionar a las personas con discapacidad el apoyo que puedan necesitar para ejercer su capacidad jurídica, así como salvaguardias adecuadas y efectivas para impedir los abusos. Debe resaltarse el carácter central de este artículo en la estructura de la Convención y su valor instrumental para el disfrute de otros muchos derechos.

44. El párrafo 1 del artículo 16 del Pacto Internacional de Derechos Civiles y Políticos ya reconoce la personalidad jurídica de las personas con discapacidad. Ahora bien, el cumplimiento de las obligaciones enunciadas en los párrafos 2, 3, 4 y 5 del artículo 12 de la Convención sobre los derechos de las personas con discapacidad requiere un examen a fondo de toda la legislación civil y penal que contenga elementos de capacidad jurídica.

45. En el ámbito del derecho civil, las leyes que regulan la incapacitación y la tutela deben ser una esfera prioritaria del examen y la reforma de las leyes. En muchos países la legislación en vigor permite declarar incapaz a una persona por deficiencia mental, intelectual o sensorial y atribuir a un tutor la capacidad jurídica para actuar en su nombre. Toda ley que prevea que la existencia de una discapacidad es motivo directo o indirecto para declarar la incapacitación jurídica entra en conflicto con el reconocimiento de la capacidad jurídica de las personas con discapacidad consagrado en el párrafo 2 del artículo 12. Además de derogar las normas que violan el deber de los Estados de respetar el derecho humano a la capacidad jurídica de las personas con

discapacidad, es igualmente importante que se adopten medidas que protejan y hagan efectivo ese derecho, de conformidad con los párrafos 3, 4 y 5 del artículo 12. Esto incluye lo siguiente: el reconocimiento jurídico del derecho de las personas con discapacidad a la autonomía; a disponer de medios alternativos y aumentativos de comunicación; a la adopción de decisiones asistida, entendida como el proceso por el que una persona con discapacidad está habilitada para adoptar y comunicar decisiones con respecto a cuestiones personales o jurídicas; y el establecimiento de normas que precisen las facultades de quienes prestan el apoyo y su responsabilidad.

46. También deben abolirse las normas o leyes que inhabilitan a una persona para desempeñar un cargo o función debido a su discapacidad. Esto incluye las normas que inhabilitan a las personas con discapacidad para ejercer cargos políticos, formar parte de jurados o testificar.

47. En el ámbito del derecho penal, el reconocimiento de la capacidad jurídica de las personas con discapacidad lleva a suprimir la circunstancia eximente de la responsabilidad penal constituida por la discapacidad mental o intelectual⁴. Por consiguiente, al examinar el elemento subjetivo del delito, se debe prescindir de la discapacidad y atender a la situación concreta del autor. De conformidad con el artículo 13 de la Convención, tal vez sea necesario retocar las normas procesales referidas, tanto a la fase de instrucción como al juicio, y ponerlas en práctica.”

En relación al trabajo del Comité, es asimismo destacable el **día de discusión general sobre el artículo 12, celebrado en Ginebra el 21 de Octubre del 2009.**

En él, Mohammed Al-Trawneh, Presidente de la Comisión, dijo que era una desafortunada circunstancia histórica el que las personas con discapacidad hubieran tenido poco recurso legal en todo el mundo. Los derechos fundamentales habían sido subyugados en el pasado, y en algunos lugares lo siguen siendo hoy en día, para las personas con discapacidad. Las formas de discriminación a que se enfrentan abarcan casi todas las esferas de influencia en sus vidas, que van desde la comunicación y la

⁴ Often referred to as "insanity defence".

arquitectura, hasta el transporte y las normas y políticas que ahogaron su potencial inherente. Ellos también habían sido testigos de los efectos de la desigualdad ante la ley, y habían reconocido su carácter inaceptable

Había muchas partes de la Convención que no se prestan a interpretación, y que estaban destinados a proporcionar modelos explícitos para el tratamiento de las personas con discapacidad, dijo el Sr. Al-Tarawneh. El artículo 12, dio una indicación clara de la dirección en la que tenían que ir; garantizó el derecho al igual reconocimiento como persona de todos ante la ley, aseguró que todos los individuos deben ser reconocidos como personas ante el tribunal, y en todas las formas de interacción con la corte. Para aquellas personas con ciertas formas de discapacidad que no pudieron ejercer su capacidad por sí solos, la Convención exige que los Estados proporcionen siempre las medidas adecuadas a las personas para apoyarlos en la realización de su capacidad de actuar.

Los tribunales tienen la responsabilidad de ejercer la tutela significativa. Incluso en el caso de los intermediarios designados por el tribunal, tenía que haber un mecanismo de supervisión para garantizar que los asistentes estaban trabajando únicamente en el interés de los asistidos. Las salvaguardias tuvieron que ser puestas en marcha para luchar contra el interés personal o financiero que pudiera interferir con los intereses de la persona que recibe asistencia. El logro de estas normas para el apoyo intermediario requerirá regulación y formación, dijo el Sr. Al-Tarawneh.

Algunas de las circunstancias más difíciles se referirían a situaciones en las que la determinación de la voluntad de las personas con discapacidad mental extrema no fue directamente posible. ¿Dónde se puso la línea de la autoridad para la intermediación de terceros en estos casos? ¿Cuánta flexibilidad interpretativa se les debe dar y cómo podría esto ser legislado? También hay que tener en cuenta la necesidad de objetividad entre permitir que la justicia se cumpla y reconocer la realidad de la discapacidad mental grave, dijo el Sr. Al-Tarawneh. Cuando las personas puedan ser consideradas peligrosas para sí mismas, el apoyo tenía que ser de un tipo extraordinariamente profesional, educado, y especializado.

Aunque no está directamente sobre el artículo 12, también deben ser conscientes de las declaraciones en que fueron hechas por los Estados Partes al convertirse en signatarios de la Convención. A modo de ejemplo, el Reino Unido declaró que los derechos a la igualdad de trato y el empleo no debe aplicarse a cualquier forma de servicio militar. Sin embargo, esta declaración evitó reconocer el espectro de tareas que uno podría realizar en el servicio militar. Cuando el objetivo sea la igualdad jurídica en todos los ámbitos de la vida, deben ser extremadamente cuidadosos de tales reservas, dijo el Sr. Al-Tarawneh.

El objetivo de la Convención no fue exclusivamente sobre los derechos abstractos, sino sobre la capacidad de las personas a actuar, dijo el Sr. Al-Tarawneh. Los derechos de las personas con discapacidad se habían establecido antes, pero la verdadera prueba de un derecho era si se aplicó o no en la práctica. ⁽⁵⁾

Ibrahim Salama, Jefe de la Subdivisión de Tratados de Derechos Humanos, Oficina del Alto Comisionado para los Derechos Humanos, en una declaración de apertura, dijo que hoy sería el examen de dos cuestiones, ambas en torno al tema del reconocimiento de la igualdad ante la ley. Se espera que a través de sus discusiones, como mejor y consolidó una mayor comprensión de estos temas se alcanzaría, que iban a avanzar en la comprensión de las acciones necesarias para la aplicación del artículo 12

El artículo 12 tiene el potencial para proporcionar muchas oportunidades de un cambio significativo a las personas con discapacidad para alcanzar la igualdad de todos ante la ley, dijo Salama. Los objetivos de la Convención no sería tan amplios sin las garantías de un juicio justo. Hubo muchas preguntas interesantes que se han planteado en el artículo 12.

Uno de los problemas era el de la decisión apoyada frente a la decisión sustitutiva en los tribunales, dijo Salama. En el caso de discapacidad mental, ¿en qué circunstancias sería aceptable tomar decisiones en nombre de un individuo a través de la tutela, los

⁵ NB. Traducción del autor.

Texto en inglés disponible en:

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9547&LangID=E>

defensores del pueblo u otros servicios pertinentes, y cómo deberían ser llevados a cabo estos servicios?

Mientras que el artículo 12 no menciona específicamente el uso de apoyo para las personas con discapacidad en los procedimientos judiciales, se pidió que los Estados el uso de medidas apropiadas para proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica, dijo el Sr. Salama . Puede ser que el apoyo en la toma de decisiones podría aplicarse a la gran mayoría de los casos, pero que tal vez un pequeño porcentaje no sería capaz de utilizar este tipo de asistencia.

Otra pregunta tenía que ver con la llamada "defensa de la locura". ¿Deben los tribunales reconocer que en ciertas situaciones, algunas formas de discapacidad podría llevar a la falta de responsabilidad por los delitos? Había quienes sostenían que este tipo de defensa debería ser abolida en los tribunales, dado el reconocimiento de la capacidad de actuar. Pero no fue del todo claro qué debe hacerse en los casos de delincuencia en que el autor experimentó una pérdida genuina de la voluntad propia? El equilibrio estaba tal vez en el proceso de determinar qué constituye la pérdida de la facultad, dijo Salama.

Todas estas preguntas tenían un significado importante para la interpretación del artículo 12 y las formas en que se aplicaba la Convención. Fue a través de los principios de inclusión e integración que el artículo 12 deriva su significado, y fue a través de ellos que iban a encontrar su mejor aplicación, dijo Salama. ⁽⁶⁾

Amita Dhanda, Consultor en el artículo 12 de la Convención, de la Oficina del Alto Comisionado para los Derechos Humanos, dijo que el artículo 12 estaba en el corazón de la Convención. Es importante observar de cerca si se quería tomar en serio abordar el problema de la exclusión. Las personas con discapacidad intelectual y psicosocial habían estado, en gran parte, a la vanguardia de las negociaciones cuando se redactó el artículo 12. El artículo 12 se había formulado aceptando totalmente la visión de las inclusiones para todos, incluidas las personas con discapacidad

⁶ NB. Traducción del autor.

Texto en inglés disponible en:

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9547&LangID=E>

sensorial, física, intelectual y psicosocial. Era sumamente apropiado que el Comité hubiera tomado este artículo como el primero que ha querido mirar de cerca

La Sra. Dhanda también se refirió al proyecto del Manual de Capacidad Legal de la Oficina del Alto Comisionado para los Derechos Humanos. En este documento se pondría de relieve la discriminación existente entre las leyes actuales y las obligaciones basadas en el artículo 12. Esto ayudaría a los países en la planificación de la reforma legal, la política y la programación. El artículo 12, habló a toda la comunidad humana. No había duda o mala interpretación de las disposiciones del artículo 12. Lo que había que trabajar era acerca de la forma de garantizar su aplicación.

La Sra. Dhanda presentó a continuación dos ejemplos de proyectos de reformas a las leyes que se habían producido en la India y Hungría - dos países que habían estado entre los primeros en ratificar la Convención. ⁽⁷⁾

En el **Quinto período de sesiones del Comité**, celebrado en Ginebra del **11 al 15 de Abril de 2011**, se citan los informes iniciales cuyo examen está pendiente a esa fecha, además del examen del informe inicial de Túnez, y la aprobación de la lista de cuestiones sobre el informe de España ⁽⁸⁾.

⁷ NB. Traducción del autor.

Texto en inglés disponible en:

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9547&LangID=E>

⁸ Presentación de informes por los Estados partes en virtud del artículo 3 de la Convención

El Comité ha recibido los siguientes informes iniciales cuyo examen está pendiente:

<i>Estado parte</i>	<i>Fecha en que debía presentarse</i>	<i>Fecha de recepción</i>	<i>Signatura</i>
Argentina	2010	6 de octubre de 2010	CRPD/C/ARG/1
Australia	2010	3 de diciembre de 2010	CRPD/C/AUS/1
Austria	2010	2 de noviembre de 2010	CRPD/C/AUT/1
Azerbaiján	2011	16 de febrero de 2011	CRPD/C/AZE/1
China	2010	30 de agosto de 2010	CRPD/C/CHN/1
El Salvador	2010	5 de enero de 2011	CRPD/C/SLV/1

En relación a Túnez, y a propósito del artículo 12, el Comité dice:

“22. Al Comité le preocupa que no se han adoptado medidas para reemplazar la sustitución en la toma de decisiones por el apoyo en la toma de decisiones en el ejercicio de la capacidad jurídica.

23. El Comité recomienda al Estado Parte que revise las leyes que permitan la guarda y tutela, y tomar medidas para desarrollar leyes y políticas para reemplazar los regímenes de sustitución en la toma de decisiones por el apoyo en la toma de decisiones. Además, recomienda que se sensibilice sobre este tema a todos los funcionarios públicos pertinentes y otras partes interesadas.”(9)

En relación a España, del informe inicial presentado por España como estado parte, de conformidad con el artículo 35 de la convención, España afirma en relación a los apartados 1 y 2 del artículo 12 que dado que las personas con discapacidad tienen reconocida personalidad jurídica e igual capacidad jurídica que las demás personas hay que afirmar la plena compatibilidad del ordenamiento jurídico en relación a las previsiones de los apartados 1 y 2 del artículo 12.

En relación al apartado 3, obligación de proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica, se afirma que “quedaría cubierta por las instituciones de guarda y protección de la persona y

España	2010	3 de mayo de 2010	CRPD/C/ESP/1
Hungría	2010	14 de octubre de 2010	CRPD/C/HUN/1
Paraguay	2010	21 de octubre de 2010	CRPD/C/PRY/1
Perú	2010	8 de julio de 2010	CRPD/C/PER/1
Suecia	2010	7 de febrero de 2011	CRPD/C/SWE/1
Túnez	2010	1º de julio de 2010	CRPD/C/TUN/1

Texto completo disponible en
http://www2.ohchr.org/SPdocs/CRPD/5thsession/CRPD.C.5.1_sp.doc

⁹ NB. Traducción del autor.
Texto en inglés disponible en:
http://www2.ohchr.org/SPdocs/CRPD/5thsession/CRPD-C-TUN-CO-1_en.doc

bienes, o solamente de la persona o de los bienes del incapacitado“.

Se afirma asimismo en relación al apartado 4 que las salvaguardas de las medidas relativas al ejercicio de la capacidad jurídica “subyacen en nuestra legislación en la medida que seguidamente se indican “.

“El respeto de los derechos, la voluntad y las preferencias de la persona, está reflejado básicamente en el artículo 268 del Código Civil en cuanto obliga a los tutores a ejercer su cargo de acuerdo con la personalidad de sus pupilos, respetando su integridad física y psicológica “ .

“La inexistencia de conflicto de intereses está prevenida en el Código Civil, artículo 244-4...y 247...el artículo 221 prohíbe a quien desempeñe un cargo tutelar representar al tutelado cuando en el mismo acto intervenga en nombre propio o de un tercero y existiera conflicto de intereses “.

Inexistencia de influencia indebida. “Esta salvaguarda no está recogida expresamente en la vigente regulación, aunque puede considerarse implícita en los artículos 268, ya comentado, y 216, en cuanto exige ejercer las funciones tutelares en beneficio del tutelado y bajo la salvaguarda de la autoridad judicial . “

Proporcionalidad y adaptación a las necesidades y circunstancias de la persona con discapacidad. ”De conformidad con el artículo 760 de la ley de Enjuiciamiento Civil, y en relación con los artículos 267, 289 y 290 del Código Civil la sentencia que declare la incapacitación determinará la extensión y límites de ésta ...”

Aplicación de las medidas en el plazo más corto posible y revisión periódica por parte de una autoridad o u órgano judicial competente, independiente e imparcial. ”Los artículos 756 a 768 de la Ley de Enjuiciamiento Civil regulan el proceso sobre la capacidad de las personas....”

“Para el cumplimiento completo del artículo 12.4 y una mejor adaptación al espíritu y a la terminología de la Convención se está trabajando en la redacción de un anteproyecto de ley...”

Respecto al apartado 5 –derecho de las personas con discapacidad a ser propietarias, heredar bienes y controlar sus propios asuntos –, el informe del gobierno de España habla de cuestión de adaptaciones terminológicas, de matices en definitiva ⁽¹⁰⁾.

¹⁰ 64. Según establece el artículo 744 del Código Civil, pueden suceder aquellos que no estén incapacitados por la ley y, según el artículo 996, si la sentencia de incapacitación por enfermedades o deficiencias físicas o psíquicas no dispusiera otra cosa, el sometido a curatela podrá, asistido de curador, aceptar la herencia pura y simplemente o a beneficio de inventario.

65. De este modo, debe entenderse que el Código Civil no prohíbe heredar ni a las personas con discapacidad ni a los incapacitados judicialmente. Ahora bien, la adquisición de una herencia exige que el heredero acepte la herencia, acto para el cual el Código Civil sí exige la plena capacidad de obrar. Por ello, según el Código Civil, habrá que estar a lo que disponga la sentencia de incapacitación, y si no dispusiese lo contrario, se entenderá que permite al incapacitado aceptar la herencia con la asistencia del curador, o en su caso, al tutor como representante legal del incapacitado y administrador de su patrimonio (el cual, según el artículo 271.4, necesitará además autorización judicial para aceptar la herencia sin beneficio de inventario o para repudiarla).

66. En nuestro derecho, el artículo 662 del Código Civil permite testar a quienes la ley no lo prohíbe expresamente, y el artículo 663 establece la incapacidad para testar de aquel "que habitual o accidentalmente no se hallare en su cabal juicio". Por último, el artículo 665 precisa que en aquellos casos en que la sentencia de incapacitación no precise nada acerca de la capacidad para testar, si el incapacitado quiere otorgar testamento, tendrá que acudir al Notario para que éste designe a dos facultativos para que le reconozcan y le autoricen en su caso, respondiendo de su capacidad.

67. En resumen, no todas las personas con discapacidad ni incapacitadas tienen prohibido testar. Respecto de los incapacitados judicialmente, puede ocurrir que la sentencia haya establecido una prohibición al respecto o puede ocurrir que no diga nada, en cuyo caso se permitirá al incapacitado testar en las condiciones del artículo 665.

68. Por ello, no resulta necesario llevar a cabo ninguna modificación de fondo en este aspecto, si bien sí cabría articular alguna medida de apoyo al incapacitado para que pudiera testar con su asistencia. Por último, de nuevo serían pertinentes ciertas adaptaciones terminológicas, tanto por lo que se refiere a las menciones sobre la "incapacitación", como en relación con el término "cabal juicio", demasiado abierto e indeterminado. La pertinencia de estas modificaciones es objeto de estudio y valoración en los trabajos de redacción del anteproyecto de ley al que se ha aludido anteriormente.

69. Es importante la aprobación de la Ley Nº 1/2009, de 25 de marzo de reforma de la Ley de 8 de junio de 1957, sobre el Registro Civil, en materia de incapacitaciones, cargos tutelares y administradores de patrimonios por la que se impulsa la creación en el Registro Civil Central de un punto de concentración de toda la información relativa a las modificaciones judiciales en la capacidad de obrar, la constitución o la modificación de organismos tutelares. Así, se solucionará el problema de la dispersión de los asientos, que hace que los datos correspondientes a una misma persona puedan constar en distintos registros civiles municipales. Por otro lado establece el compromiso de reforma del procedimiento de incapacitación —que pasa a denominarse procedimiento para la modificación de la capacidad de obrar— a fin de adecuarlo a la Convención sobre los derechos de las personas con discapacidad.

Texto completo disponible en:

http://www2.ohchr.org/SPdocs/CRPD/5thsession/CRPD.C.ESP.1_sp.doc

Para el gobierno de España, prácticamente todo está conforme con la Convención (¹¹).

Frente a esta postura, el informe alternativo presentado por el Cermi como organismo independiente de seguimiento, es rotundo¹²:

“España no cuenta con un sistema de apoyos acorde a la convención “

“Existen un abuso del sistema de sustitución total “

“España carece de un sistema de apoyo a la toma de decisiones que fomente la autonomía en el ejercicio de los derechos”

“Las salvaguardas exigidas en la Convención no están garantizadas en nuestra legislación “

“La adaptación a la Convención requiere cambios sustanciales en la regulación española de la capacidad de obrar de las personas con discapacidad “

Estas afirmaciones respecto al artículo 12 las completa en relación al 13 (“la falta de accesibilidad de las dependencias de la Administración de justicia son notables”, “No existe una obligación legal específica que reconozca el derecho de accesibilidad de las personas con discapacidad en el acceso a la justicia con carácter general “, “el reglamento del Notariado determina la incapacidad de intervenir como testigos a las personas con discapacidad “Existen una falta de previsión para el ejercicio de la función del jurado en los tribunales populares “,”Por sentencia judicial se puede limitar la capacidad procesal para demandar o querrellarse “...

¹¹ Si bien el informe de España intenta ser lo más amplio posible, omite un aspecto esencial, que es la diversidad legislativa consecuencia de la coexistencia del derecho común con los derechos forales. Así el Comité no tiene conocimiento por esta vía, por ejemplo, de la legislación en esta materia de Cataluña, que en su reforma del año 2010 invoca expresamente a la Convención, tal como veremos con posterioridad.

¹² Conviene destacar que el Cermi como entidad representativa de la discapacidad organizada en España integra a más de 5500 asociaciones y entidades de personas con discapacidad y sus familias y tiene entre sus finalidades esenciales la de la defensa de los derechos de este grupo social que en España asciende a más de 4.000.000 de personas que junto con su familia suponen alrededor de 10 millones de ciudadanos y ciudadanas.

También relaciona el artículo 12 con el 29 (Participación en la vida política y pública) : “La legislación electoral vigente en España permite que se prive del derecho de sufragio, activo y pasivo, a las personas incapacitadas judicialmente, siempre que la sentencia que declara la incapacitación lo prevea expresamente .esta posibilidad también se extiende a las personas internadas en un hospital psiquiátrico con autorización judicial ...Esta privación de derechos fundamentales ...entra en clara contradicción con la convención .

Este tratado internacional, en su artículo 12, establece la plena igualdad legal de las personas con discapacidad en todas las esferas de la vida, sin que quepan restricciones por razón de discapacidad, además, garantiza el derecho de las personas con discapacidad a participar en la vida política y en los procesos electorales sin ningún tipo de exclusiones .

La vigente legislación española es incompatible, por tanto, con la Convención.

A la vista de estos dos informes, el Comité de derechos de las personas con discapacidad, en relación al artículo 12, solicita al gobierno de España:

“Sírvanse facilitar datos sobre el número de personas con discapacidad que han sido puestas bajo tutela como forma de ejercer la capacidad jurídica y, en su caso, sobre el número de decisiones modificando la capacidad de actuar “

“Sírvanse explicar cómo se garantiza que la tutela se ejerza en beneficio del pupilo teniendo en cuenta que en la legislación actual no existen salvaguardas contra la influencia indebida o el conflicto de intereses “

“Sírvanse facilitar información sobre las medidas previstas o que se han tomado para que en vez de la sustitución en la adopción de decisiones (guarda) se recurra al apoyo a las personas con discapacidad en el ejercicio de su capacidad jurídica, de conformidad con el artículo 12 de la Convención”.

A fecha de hoy estamos a la espera del informe final del Comité sobre España.

II- EL ARTÍCULO 12 EN EL ÁMBITO ASOCIATIVO.

En el ámbito asociativo destaca el informe elaborado por el **European Disability Forum (EDF) en Octubre de 2009 sobre el igual reconocimiento como persona ante la ley e igual capacidad para actuar: comprensión y aplicación del artículo 12 de la Convención de la ONU** sobre los derechos de las personas con discapacidad, del cual cabe destacar lo siguiente: ⁽¹³⁾

Ningún individuo en cualquier sociedad es verdaderamente independiente de la influencia de los demás. Las estructuras sociales y las jerarquías, la necesidad de una atención positiva, las necesidades económicas y la complejidad de muchas decisiones financieras, de salud y personales hace que a menudo los ciudadanos no discapacitados y personas con discapacidad dependen de otros para el apoyo en la toma de decisiones. Ejemplos de ello son asesores financieros, médicos, arquitectos y todas las otras profesiones que proporcionan experiencia para todos los ciudadanos. Muchas personas toman decisiones por sí mismos que tampoco son en su mejor interés. A menudo están determinados por factores que no están basados en la lógica: la publicidad comercial, el deseo de estatus social, la preferencia por los coches rápidos, etc. Discapacitados o no, toda persona tiene derecho a cometer errores.

Sin embargo, en una situación en la que alguien está asesorando a otra persona en una decisión o ejercitando las facultades de toma de decisiones delegadas en él por esta persona, debe aplicarse la debida diligencia adicional para aceptar y reconocer los deseos y las peticiones de la persona aconsejada. El mantenimiento de la plena capacidad jurídica de las personas debe estar siempre en el centro del discurso

El artículo 12 de la CDPD introduce una serie de conceptos clave que deben ser entendidos e interpretados de manera uniforme a fin de cumplir con las normas de aplicación de la Convención.

2.1 “Igual reconocimiento como persona ante la ley”

¹³ NB. Traducción del autor.

Texto completo disponible en:

http://cms.horus.be/files/99909/MediaArchive/library/EDF_positon_on_equal_recognition_befor_e_the_law_under_Article12_UNCRPD.doc

ó a través de la web de el EDF, <http://www.edf-feph.org/>

La noción de "Igual reconocimiento como persona ante la ley" es más amplia que la "capacidad jurídica" (el concepto que también está presente en el artículo 12). Se basa en otros tratados de derechos humanos, principalmente en el artículo 6 de la Declaración Universal de los Derechos Humanos y en el artículo 16 del Convenio Internacional de Derechos Civiles y Políticos (PIDCP), que establece que "toda persona debe tener el derecho al reconocimiento en todas partes, como persona ante la ley".

El Artículo 12 CDPD establece el principio de que todas las personas con discapacidad, al igual que los demás ciudadanos, tienen derecho a que su estado y capacidad estén reconocidos en el ordenamiento jurídico. Ello permite a todas las personas ostentar, ejercitar y beneficiarse de los derechos iguales e inalienables, independientemente de la naturaleza y el grado de su discapacidad. La personalidad jurídica se entiende como una característica inherente a los seres humanos. Sin este derecho, el individuo ya no sería una persona en el sentido jurídico y por lo tanto puede ser privado de todos los demás derechos.

2.2 “Capacidad jurídica”

"La capacidad jurídica" en el sentido del artículo 12, se entiende como la capacidad evolutiva de ejercer estos derechos iguales e incluye la capacidad de actuar. Esto se aplica a los sistemas jurídicos de todos los países para todas las personas, independientemente de la naturaleza o el grado de su discapacidad o necesidad evidente de apoyo. Según el artículo 12 CDPD, la capacidad jurídica no puede ser cuestionada o negada basada en la discapacidad de una persona. En cambio, las medidas de apoyo a ejercer su capacidad jurídica puede tener que ser siempre que sea necesario.

El carácter evolutivo de la capacidad jurídica se demuestra con el siguiente ejemplo: todos los niños, incluidos aquellos con discapacidades, tienen una capacidad de evolución jurídica, que al nacer comienza con plena capacidad de tener derechos, y se desarrolla en plena capacidad de obrar en la edad adulta. Al nacer, su plena capacidad para tener derechos incluye, por ejemplo, el derecho a la vida y a recibir el mejor tratamiento disponible independientemente de la naturaleza y la gravedad de su discapacidad. A medida que el niño se desarrolla, también lo hace

su capacidad jurídica, y tienen el derecho a disponer de apoyos adecuados a su edad y discapacidad para el ejercicio en igualdad con los niños sin discapacidad, en particular en relación con el derecho a la integridad física y la opción reproductiva. Los padres y tutores tienen el derecho y la responsabilidad de actuar en el mejor interés de sus hijos en el respeto del niño la capacidad de evolución jurídica. Su derecho automático para actuar en nombre de sus hijos cesa cuando el niño alcanza la edad adulta legal.

2.3 “El apoyo en el ejercicio de la capacidad jurídica”

El apoyo de toma de decisión, consagrado en el artículo 12, parte de la presunción de capacidad jurídica plena e igualitaria de todos los ciudadanos, incluyendo aquellos con niveles severos y profundos de la discapacidad. La Convención dispone que los Estados Partes adoptarán "medidas adecuadas para facilitar el acceso de las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica" (artículo 12.3) y "garantizar que todas las medidas relacionadas con el ejercicio de la capacidad jurídica proporcionen salvaguardias adecuadas y efectivas para impedir los abusos "(artículo 12.4).

De conformidad con la ley internacional de derechos humanos, el respeto de los derechos iguales e inalienables deben estar en el centro del discurso sobre la determinación del grado de apoyo que necesita el individuo con una discapacidad. Por lo tanto, el concepto de incapacidad debe ser rechazada desde el principio, y el grado de asistencia debe ser proporcional a las necesidades y capacidades de la persona y variar dependiendo de la situación (por ejemplo, puede ser que necesite apoyo para la toma de decisiones financieras importantes, pero pueda gestionar sus tareas diarias de forma independiente).

En consecuencia, el apoyo en el ejercicio de la capacidad jurídica siempre debe basarse en un conocimiento personal de la persona (pero no como para crear un conflicto de intereses!), e implicar actividades de fomento de la confianza a través de métodos de comunicación alternativos y aumentativos.

Las personas cuyas habilidades para tomar decisiones complejas o para comunicar sus decisiones a los demás están temporal o permanentemente deterioradas necesitarán altos niveles de apoyo en la mayoría o todos los ámbitos de la vida. En

este caso, deberán contar con tal apoyo que asegure que su capacidad jurídica se disfruta en todo caso en igualdad de condiciones con los demás al tiempo que se les ayuda a evaluar las implicaciones y consecuencias de algunas de sus acciones o inacciones.

En la actualidad, no hay pruebas ni práctica suficientes para determinar cómo el apoyo en la toma de decisiones se puede garantizar para este grupo de personas con discapacidad. Los Estados Partes, así como las organizaciones de discapacidad están llamados a probar con urgencia modelos prácticos de apoyo de toma de decisiones en los proyectos piloto para resolver esta cuestión pendiente. El punto crucial es cómo se puede establecer una relación de apoyo con confianza en todos los casos de personas con discapacidad.

2.4 “Salvaguardias”

La Convención exige que las salvaguardias apropiadas y efectivas sean puestas en marcha para prevenir el abuso de las personas con discapacidad en el ejercicio de su capacidad jurídica.

El texto de la propia Convención establece pautas importantes que deben respetar las medidas de apoyo. Es decir, deben ser "adecuadas y eficaces", "proporcionales y adaptadas a las circunstancias de la persona, aplicadas durante el menor tiempo posible", así como "sujetas a revisión periódica por una [n...] autoridad independiente". La Convención obliga a los Estados Partes a desarrollar criterios imparciales por la incapacidad para proteger a las personas con discapacidad contra el abuso de la misma manera que están protegidos los demás ciudadanos.

En la práctica eso significa el establecimiento de un sistema para la evaluación imparcial de las necesidades actuales de apoyo en la toma de decisiones en el ejercicio de la capacidad jurídica, realizado con la ayuda de reconocidos expertos independientes, la determinación rigurosa de la extensión de la actuación y facultades de las personas que prestan el apoyo, la revisión periódica de las medidas adoptadas y el posible recurso de las decisiones por parte de las personas con discapacidad o sus familias. Una vez más, hay que destacar que los deseos de la persona con discapacidad debe ser siempre el factor determinante.

Se debe prestar especial atención a la protección de los derechos de las personas necesitadas de un alto nivel de apoyo en todos los ámbitos de la vida, que pueden ser particularmente vulnerables a la influencia indebida.

Estas garantías deben estar claramente separadas de la red de apoyo, ya que también deben proteger a la persona de la explotación o abuso por parte de la persona que presta el apoyo.

3. Ocho pasos para lograr el igual reconocimiento como persona ante la ley

3.1. Promoción y apoyo de la autodeterminación de las personas con discapacidad

3.2. Sustitución de la tutela tradicional por un sistema de apoyo de toma de decisiones

3.3. Desarrollar un sistema de apoyo a la toma de decisiones

3.4. Selección y registro de las personas de apoyo

3.5. Superar las barreras de comunicación

3.6. Prevención y resolución de conflictos entre la persona que presta el apoyo y la que lo recibe

3.7. La aplicación de salvaguardias

3.8. Utilización de los mecanismos principales para la protección de los intereses de una persona

Asimismo es destacable el INFORME DEL CERMI, que elaboró a modo de propuesta inicial un esquema básico PARA INSTAURAR UN NUEVO PROCEDIMIENTO DE PROVISIÓN DE APOYOS PARA LA TOMA DE DECISIONES, de acuerdo a la convención del cual destaco lo siguiente:

“Si hay una esfera donde los efectos de la convención se dejan sentir con mayor contundencia esa es la de la plena igualdad jurídica de las personas con discapacidad. La discapacidad ya no puede ser excusa o cuartada para limitar o reducir la capacidad de las personas de realizar actos válidos en el tráfico jurídico. Los sistemas como el español, basados en la sustitución de la voluntad de la persona por razón de discapacidad – de ordinario intelectual o mental – han de quedar sin efecto, pues son contrarios al nuevo paradigma de la libre determinación de los individuos, de todos, incluidos los hombres y mujeres con discapacidad.

Por estos motivos, el Cermi ha planteado al Ministerio de Justicia que el actual proceso civil de incapacitación judicial, sea sustituido por uno de apoyos a la toma libre de decisiones, en el caso de personas con discapacidad que así lo precise.

La convención, vigente en España desde 2008, obliga a los estados partes a derogar los sistemas que como el de la incapacitación judicial limitan la igualdad jurídica de las personas, incluidas aquellas que presentan una discapacidad, y a reemplazarlos por otros que garanticen apoyos para la toma libre y autónoma de decisiones.

El Cermi entiende que el sistema de limitación de la capacidad existente en España no es compatible con los mandatos de la convención, por lo que no serían admisibles retoques o ajustes de detalles (salida fácil a la que algunas instancias están tentadas), sino que hay que crear un nuevo modelo centrado en la autonomía y en los apoyos. Para el Cermi, la convención es una oportunidad histórica de abandonar sistemas paternalistas que merman la igualdad de las personas ante la Ley, y trocarlos por otros, en consonancia con los tiempos, que potencian la libre determinación, con los soportes y salvaguardias necesarios.

A pesar de las resistencias de sectores jurídicos que se aferran a instituciones seculares que a su entender son inamovibles, la convención es un hecho jurídico indiscutible e irreversible que esta por encima del derecho interno preexistente.

A juicio del Cermi, el ejecutivo y el legislador han de ser valientes y audaces para responder normativamente a los desafíos que en materia de igualdad jurídica y toma libre de decisiones plantea la convención de la ONU. Es llegada la hora de los apoyos para la libre toma de decisiones.

Ello obliga a analizar jurídicamente como debe sustituir el nuevo sistema al de la institución de la incapacitación regulado en el código civil (título IX) y a la institución de la tutela de incapacitados (título X). El artículo 200 del código civil establece que “son causas de incapacitación las enfermedades o deficiencias persistentes de carácter físico o psíquico que impidan a la persona gobernarse por si misma”. El mismo fundamento de la institución civil de la incapacitación ha quedado obsoleto y no se ajusta al artículo 12 de la convención”.

En particular, **en relación con el derecho de sufragio**, cabe destacar que uno de los aspectos esenciales relacionado con la capacidad es el ejercicio del derecho del sufragio, activo y pasivo.

En una **carta dirigida al Defensor del Pueblo** por Luis Cayo Perez Bueno en su condición de presidente del comité español de representantes de personas con discapacidad (CERMI) de fecha 5 de octubre de 2010, expone que la legislación electoral vigente en España permite que se prive del derecho del sufragio, activo y pasivo a las personas incapacitadas judicialmente, siempre que la sentencia que declara la incapacitación lo prevea expresamente.

Esta posibilidad también se extiende a las personas internadas en un hospital psiquiátrico con autorización judicial, durante el periodo que dure su internamiento, siempre que en la autorización el juez declare expresamente la incapacidad para el ejercicio del derecho de sufragio.

Esta privación de derechos fundamentales, que puede afectar fundamentalmente a personas con discapacidad intelectual o con enfermedad mental, carece de sentido desde una visión de derechos humanos y entra en clara contradicción con la convención internacional sobre los derechos de las personas con discapacidad de naciones unidas, firmada y ratificada por España.

Este tratado internacional, en su artículo 12, establece la plena igualdad legal de las personas con discapacidad en todas las esferas de la vida, sin que quepan restricciones por razón de discapacidad. Además, garantiza el derecho de las personas con discapacidad a participar en la vida política y en los procesos electorales sin ningún tipo de exclusiones.

Por ello dado que la vigente legislación Española es incompatible, por tanto, con la convención de la ONU, por lo que tiene que ser modificada con urgencia para que las personas con discapacidad puedan ejercer sus derechos básicos en plenitud, solicita la intervención del defensor del pueblo a fin de que se modifique la Ley orgánica de régimen electoral general para suprimir la posibilidad de que se pueda privar del derecho de sufragio a las personas con discapacidad.

Para Fabián Cámara –Presidente de Down España –la Convención de la Onu abre nuevos horizontes para la igual capacidad jurídica ante la ley⁽¹⁴⁾.

En su opinión, “el mayor grado de fricción entre la convención y la legislación española se encuentra en la regulación de los derechos de la personalidad y la capacidad jurídica y de obrar de las personas con discapacidad .El artículo 12 de la Convención declara explícitamente la igualdad plena ante la ley de las personas con discapacidad sin distinción alguna. Esta afirmación entra en plena confrontación con algunas de las instituciones que en nuestro derecho regulan la capacidad jurídica , tales como la tutela , la curatela , la prórroga de la patria potestad , ..., o la propia incapacitación judicial .”

“Ante esta diatriba, la postura de Down España es la de apoyar absolutamente lo expresado en el artículo 12 de la Convención, y en consecuencia, exigir:

-la desaparición , por inaceptablemente discriminatoria , de cualquier proceso, judicial o administrativo , por el que se retire , elimine , prohíba o simplemente se restrinja la capacidad de obrar de una persona por razón de su discapacidad , esto es , la institución generalmente conocida como “incapacitación “(o cualquier otro nombre que se le pretenda dar en el futuro).

-La desaparición (con el régimen transitorio que sea preciso, respecto de situaciones ya existentes y asentadas en la práctica) de toda institución sustitutiva de la voluntad civil de las personas con discapacidad , ya se trate de tutelas , curatelas o cualquier otra institución similar .

-La instauración del nuevo sistema de la convención de apoyos a la capacidad de obrar propia de tal manera que tales apoyos respetando el principio básico del respeto a los derechos, la voluntad y las preferencias de la persona con discapacidad, aseguren el resto de condiciones también establecido por la convención , esto es , las salvaguardias adecuadas y efectivas para impedir los abusos , el conflicto de intereses y la influencia indebida”.

¹⁴ El artículo completo puede verse en la revista CERMI.ES

III- OPINIONES DOCTRINALES.

En Junio de 2009 tuve el honor de moderar, en marco del **Simposium sobre la capacidad jurídica de las personas con discapacidad a la luz de la Convención de la ONU** de los derechos de las Personas con discapacidad, organizado por el EUROPEAN FOUNDATION CENTER y el EUROPEAN DISABILITY FORUM, una mesa redonda en la que intervenían Gerard Quinn y Gabor Gombos .

Como preámbulo, las intervenciones de Miguel Angel Cabra de Luna, Yannis Vardakastanis y Johan Ten Geuzendam.

En ellas, **Miguel Angel Cabra de Luna** destacó los desafíos del artículo 12 y la necesidad de explorar el impacto de esta disposición en el ámbito nacional y en el de la Unión Europea ,y que la clara protección que en él se contiene a la personalidad jurídica y la capacidad legal de las personas con discapacidad requerirá la revisión de instituciones legales nacionales tales como la tutela o la incapacitación .

Yannis Vardakastanis , presidente del European Disability Forum , intervino señalando que durante demasiado tiempo los derechos de las personas con discapacidad intelectual , con discapacidades psicosociales , personas que vivían en instituciones y otras , han sido privados de sus más básicos derechos humanos , y que la Convención suprime el sistema pasado de moda de la tutela , que suprime los derechos y los deberes de las personas con discapacidad ,y lo substituye por el sistema de apoyo en la toma de decisiones, impone a los gobiernos la obligación de asegurar el derecho político al voto de las personas con discapacidad , y se asegura de la comunicación estén desarrollados de modo que cada persona , sin importar su discapacidad , sea oída y escuchada .

Acentuó que entender el impacto de la Convención en la capacidad legal implica el reevaluar conceptos como el de la dignidad, la integridad y la igualdad , y revisar la legislación civil y penal mejorando la accesibilidad de las personas con discapacidad en la comunicación y procedimientos y educando a todos los agentes relevantes en el cambio de paradigma .

Johan Ten Geuzendam ,jefe de la Unidad para la Integración de las Personas con Discapacidad de la Comisión

européa , explicó que en lo referente a la puesta en práctica de la Convención , la Comisión ha identificado algunas cuestiones claves incluyendo el desarrollo de datos constantes y comparables , de objetivos e indicadores , del intercambio de buenas prácticas y de compartir experiencias con las siguientes prioridades iniciales con respecto a la Convención :Accesibilidad , acceso a la justicia , vida independiente y derecho al voto , mecanismos de supervisión , otorgamiento de poder a las personas con discapacidad , y la capacidad jurídica .

Así, la capacidad jurídica es una de las áreas de prioridad a nivel europeo. Asimismo señaló que en esa fecha –junio 2009– siete estados miembros están en proceso de revisar su legislación a la luz de la Convención.

Gerard Quinn destacó por qué la discusión de la reforma en lo referente al artículo 12 es tan importante tanto en términos prácticos como simbólicos .Por su parte, el artículo 12 es el vehículo que nos permite terminar el viaje de la no discriminación que proteja a las personas del comportamiento de terceros, dando voz de nuevo a las personas para dirigir sus propias vidas . Para Quinn, la revolución contenida en el artículo 12 es emblemática del cambio de paradigma que ha estado ocurriendo en el campo de la discapacidad en los últimos quince años a nivel europeo, y atraviesa el núcleo de la Convención .

Dignidad, autonomía e igualdad son valores esenciales .

Dignidad, todos los seres humanos son un fin en sí mismos. Las personas con discapacidad fueron vistas tradicionalmente como objetos y no como sujetos merecedores de igual respeto.

Autonomía, somos nosotros quienes decidimos nuestros destinos , el trabajo del gobierno es facilitar nuestra libertad .

El equilibrio entre autonomía y protección no estaba presente en nuestras leyes heredadas sobre capacidad jurídica.

Un exceso de paternalismo y una actitud excesivamente protectora nos llevó a ir en contra de la autonomía de las personas.

Destacó Quinn que muchas de las primeras leyes fueron decretadas para proteger activos o propiedades más bien que a las personas .Un resultado perverso de la intervención para para proteger a unos contra otros ha sido la institucionalización, es decir ,

colocar a las personas en instituciones donde su exposición a la violencia, a la explotación y al abuso eran incluso peores .

El puente aquí es la igualdad, esto es lo que trae de nuevo la Convención al campo de la discapacidad , y es lo que anima claramente el artículo 12 .El respeto a la igualdad significa ampliar a las personas con discapacidad la misma libertad expansiva permitida al resto de las personas para cometer sus propias vidas y cometer sus propias equivocaciones .

Gerard Quinn añadió otro valor a los de dignidad, autonomía e igualdad , el de la solidaridad.

Si somos serios en el respeto de la autonomía de las personas con discapacidad sobre una base igual con otras nuestro primer impulso ante una cierta carencia de la capacidad funcional no debe ser quitarla sino apoyarla.

También destacó Gerard Quinn un aspecto esencial, las reservas.

Recordó que cualquier reserva que frustre el objeto y el propósito de un tratado no es válida .A su juicio, parece claro que una reserva que deje hueco para mantener las leyes en pleno de las tutelas es inaceptable .

Del mismo modo creo de interés traer a colación las ideas centrales de **Gabor Gombos**⁽¹⁵⁾ en su intervención en dicho simposium , en torno a las obligaciones que el artículo 12 de la Convención impone en lo sucesivo para la Unión europea y sus estados miembros .

A su juicio, la Convención indica el camino a seguir .En primer lugar , “nada para nosotros sin nosotros” , lo que significa la implicación de las personas con discapacidad teniendo el Estado la obligación legal de consultar a la sociedad civil.

En segundo lugar, la Convención reconoce personalidad a todas las personas con discapacidad , lo que implica dos aspectos :identidad y capacidad de acción .

¹⁵ Al presentar a Gabor Gombos, él explico que como sobreviviente de la psiquiatría había estado abogando por los derechos de las personas con discapacidades psicosociales, tratando de ligar la tutela a los derechos humanos desde el año 1993, desempeñando un papel activo en la negociación del artículo 12 de la Convención en el comité ad hoc de la ONU. La importancia de su implicación la he conocido a través del trabajo del MDAC, del que después trataremos al hablar de la legislación en Rusia.

Recordó que durante las negociaciones en el comité ad hoc de la ONU algunos estados eran renuentes a aceptar que el artículo 12 pudiera suponer que la capacidad jurídica debe incluir capacidad de actuar. Pero esto a su juicio es innegable ahora pues la Convención engarza un principio igualitario que incluye ambos aspectos de la personalidad e incluye claramente a todas las personas incluso a aquellas con discapacidades severas.

Las tutelas actuales, según lo aplicado en la mayoría de los estados miembros, no son consecuentes con la Convención. En su opinión, cualquier tentativa de presentar la tutela como mecanismo de apoyo es problemático.

A su juicio, existe un núcleo de aspectos mínimos en relación al artículo 12:

- la tutela completa (incapacitación) debe suprimirse.
- las principales lagunas deben ser identificadas.
- Nuevas leyes son necesarias.
- El artículo 12 es un artículo ambicioso
- La Convención llama a la inclusión legal completa y no sólo al reconocimiento legal.
- Cómo tener acceso para apoyar la toma de decisión dentro de las instituciones.

Fernando Santos Urbaneja, en 2009, se preguntaba qué es lo que está fallando.

Su planteamiento es el siguiente:

“Al abordar este tema tenemos que partir de una dolorosa constatación: En torno al 95% de las demandas de incapacitación terminan con una sentencia de incapacitación plena, para todo y para siempre.

Hace años pensaba que ello se debía fundamentalmente a un problema de actitud de los profesionales que intervienen en estos procedimientos (Juez, Fiscal, Médico Forense, Abogados, etc...) pero hace tiempo que he abandonado esta idea pues donde concurren profesionales motivados no se mejoran mucho los resultados, ni tampoco la concentración de la materia en los Juzgados de Familia o incluso en los Juzgados con competencia

exclusiva ha permitido transformar radicalmente este estado de cosas.

Así, si analizamos nuestra realidad actual y la comparamos con nuestra realidad histórica en este punto, podemos llegar a la demoledora conclusión (sálvese el que pueda) de que seguimos haciendo las cosas como hace cien años. El ámbito judicial, en su conjunto, en su estructura, no se ha sumado aún a la revolución, ya en marcha, de la promoción de la autonomía y el ejercicio efectivo de los derechos de las personas con discapacidad y es que, lo que reflejan las sentencias de incapacidad no se corresponde con la realidad. El 95% de las personas declaradas plenamente incapaces no son plenamente incapaces.

La verdad es que hoy nadie está conforme con el procedimiento de incapacitación y existen varias líneas de reforma, algunas tan radicales como las que solicitan la “desjudicialización” desplazando la declaración de incapacidad a otros ámbitos (administrativo, notarial)” (16)

Asimismo en el ámbito doctrinal, destaca el Informe realizado por el **Instituto de Derechos Humanos Bartolomé de las Casas de la Universidad Carlos III de Madrid** sobre el impacto de la Convención en el ordenamiento jurídico español(17), que parte de el cambio de modelo requerirá cambios graduales, en los que probablemente existan períodos en los que ambas instituciones – incapacitación y las nuevas medidas –deban coexistir, mostrándose partidario de que mientras ese mecanismo no esté articulado debe configurarse la curatela , entendida desde los presupuestos del modelo de apoyo y asistencia y desde el principio del mejor interés de la persona con discapacidad , como el mecanismo al que el juez deba acudir como regla general, quedando reservada la tutela – siempre a la espera de una reforma normativa que signifique su desaparición al estar directamente enfrentada a lo establecido por la convención –para aquellas tomas de decisión en las que las circunstancias y necesidades de una persona con discapacidad impidan que se pueda conocer su voluntad en relación al tráfico (en relación con los actos patrimoniales) pero nunca en relación con los derechos fundamentales.

¹⁶ Texto completo disponible a través de la web de Aequitas:
<http://www.aequitas.org/?do=contribucion&option=actividades> (XXX Jornadas Aequitas-CEJ. "El Ingreso involuntario: Novedades y problemática" III 2009)

¹⁷ Texto completo disponible a través de la web de la Universidad Carlos III

Frente a esta posición que lleva ínsita la provisionalidad, destaco las palabras de **Torcuato Recover**⁽¹⁸⁾:

“Estamos hablando de derechos fundamentales, y es un matiz sustancial, de Derechos Humanos. Es un matiz sustancial porque quiere decir que lo que establece el artículo 199 y siguientes del Código Civil no son normas de interpretación y conflicto de interés entre particulares, no. Cuando el Código Civil regula si una persona debe prestar o no su opinión, su voluntad para arrendar o disponer de un bien patrimonial suyo, si se debe privar o se debe ignorar su voluntad, estamos hablando no de una colisión de derechos particulares sino de un derecho fundamental. Y hablo de cuestiones patrimoniales, pero si lo pasamos al ámbito más personal, si una persona debe estar en un centro, más aún, si una persona puede ejercitar sus derechos a la paternidad o maternidad, eso no puede ser resultado por terceros sin tener en cuenta su opinión, sino todo lo contrario, se ha de partir del derecho que la persona en cuestión tiene para ejercitar esos derechos.”

Después de recordar la cita de Luis Cayo Pérez Bueno, presidente del Cermi “la Convención supone tal carga de profundidad para la visión más tradicional y adocenada de lo que venía siendo la discapacidad que pareciera que aún no somos conscientes de la dimensión y alcance de esta transformación y de lo que lleva a cabo en todas las esferas”, señala que “el planteamiento del artículo 12 es abiertamente contrario a lo que regulaba el Código civil, que decía lo contrario, las personas con discapacidad que se han de someter a un procedimiento y acababan en una sentencia que suponía su incapacitación, es abiertamente contrario, no sólo por la terminología sino por la naturaleza de los conceptos que subyacen detrás de palabras, es abiertamente contrario a esa definición del apartado 2 del artículo 12.”

“No se puede, por lo tanto, hoy, seguir dictándose sentencias en las que se dice que la persona está incapacitada.”

Este planteamiento ya de por sí choca con la práctica jurídica.

¹⁸ Texto disponible en la web del Observatorio Estatal de la Discapacidad de España. Intervención en las Jornadas sobre capacidad jurídica del Observatorio Estatal de la Discapacidad celebradas en Diciembre de 2010

Los juzgados de familia están dictando sentencias que en sus términos son contrarios a una ley que ya es aplicable directamente como es la Convención Internacional. Es urgente, por tanto , una reforma que tiene que ser coherente con los propios postulados de la Convención “.

IV- REFORMAS LEGISLATIVAS TRAS LA CONVENCION.

En Diciembre del 2010, Carlos Ganzenmüller, en las Jornadas sobre capacidad jurídica y discapacidad: de la sustitución de la capacidad al modelo de apoyos, organizadas por el Observatorio Estatal de la Discapacidad de España, decía que “la actividad gubernamental, ya lo hemos indicado, es complicada en esta reforma, piensen ustedes que Finlandia no ha ratificado todavía la Convención, porque ha decidido que tiene que modificar toda su legislación interna, con lo cual el tema no es tan fácil como parece, sino mucho más complicado”.

Podemos destacar, no obstante, algunas reformas recientes; así por ejemplo:

Al respecto, es interesante el análisis sobre la reforma de la legislación sobre capacidad legal en RUSIA, elaborado por el MDAC (Mental Disability Advocacy Center) con fecha 22 de Abril de 2011⁽¹⁹⁾

¹⁹ <http://mdac.info/content/analysis-legal-capacity-law-reform-russia>

1. Los tribunales deben notificar a una persona de un caso de capacidad legal iniciado en su contra. Los procedimientos de capacidad jurídica siempre deben realizarse con la participación de la persona afectada. Si es necesario, la audiencia puede llevarse a cabo en las instalaciones de un hospital psiquiátrico (sección 284 (1) del Código de Procedimiento Civil). En la actualidad los tribunales pueden privar a una persona de la capacidad jurídica sin siquiera notificárselo, como era la situación en el caso de Shtukaturov contra Rusia.

2. Una persona privada de la capacidad jurídica puede solicitar a los tribunales la restauración de la capacidad jurídica (sección 286 (1) del Código de Procedimiento Civil). Actualmente una persona privada de la capacidad jurídica no puede incoar el procedimiento con el fin de que su capacidad jurídica sea restaurada.

3. Una persona privada de la capacidad jurídica podrá recurrir contra la sentencia de incapacidad personalmente o a través de su representante, como un abogado (artículo 284 (3) del Código de Procedimiento Civil).

En la actualidad, una vez transcurrido el plazo de diez días para recurrir, la sentencia privativa de la capacidad jurídica sólo puede ser apelada a través del tutor de la persona, y la persona no tiene derecho a elegir a un representante para que le ayuden en este asunto. El Tribunal Constitucional ruso dictaminó el 27 de febrero de 2009 en un período de tres casos (uno iniciado por MDAC), que una persona privada de la capacidad jurídica debe tener el derecho de

En relación a la reforma de HUNGRÍA, puede consultarse en la web del MDAC, estableciendo una regulación completa de la declaración preliminar, trata del concepto de apoyo al órgano decisorio, el acto del defensor profesional, entre otras.

En relación a ESPAÑA, destaca la reforma del Derecho foral catalán, específicamente la Ley de 29 de Julio de 2010, del libro segundo del Código Civil de Cataluña, relativo a la persona y la familia, invoca en su exposición de motivos a la Convención:

“la presente ley mantiene las instituciones de protección tradicionales vinculadas a la incapacitación , pero también regula otras que operan o pueden eventualmente operar al margen de ésta , ateniéndose a la constatación de que en muchos casos la persona con discapacidad o sus familias prefieren no promoverla .Esta diversidad de regímenes de protección sintoniza den el deber de respetar los derechos , voluntad y preferencias de la persona y con los principios de proporcionalidad y de adaptación a las circunstancias de las medidas de protección , tal y como preconiza la Convención ...”

apelar la decisión del tribunal. Cualquier otra cosa significaría una restricción sobre el derecho a un juicio justo.

4. Los tribunales pueden solicitar la participación de una persona privada de la capacidad jurídica en una audiencia sobre cualquier asunto (artículo 37 (5) del Código de Procedimiento Civil).

En la actualidad las personas privadas de capacidad jurídica no tienen derecho a participar en los procedimientos judiciales. El Tribunal Constitucional declaró en febrero de 2009 que el derecho para defender los propios derechos es imposible sin la participación real de la persona en el caso. El tribunal consideró que privar a una persona de esta posibilidad, viola los principios de un juicio justo, así como el carácter contradictorio y la igualdad de las partes en los procedimientos judiciales.

5. El consentimiento informado debe ser solicitado y obtenido de cualquiera de las intervenciones de salud mental, independientemente de la capacidad jurídica de la persona (artículo 11 de la Ley de Atención Psiquiátrica).

En la actualidad el tutor tiene poder ilimitado para enviar a la persona bajo tutela a un hospital psiquiátrico. En su resolución 27 de febrero 2009, el Tribunal Constitucional sostuvo que la detención psiquiátrica es sin duda, una privación de libertad que, de acuerdo con la Constitución rusa, es legal solamente a raíz de una decisión judicial.

6. Los tutores no pueden decidir enviar a una persona bajo su custodia a una institución de asistencia social. Tal internamiento ahora requiere el consentimiento de la persona que planea ir a la institución (artículo 41 de la Ley de atención psiquiátrica), y si esa persona carece de la capacidad funcional para decidir, la autoridad local debe tomar una decisión.

En la actualidad, un tutor o el gobierno local puede enviar a la persona a una institución de asistencia social sobre la base del informe psiquiátrico, haciendo caso omiso de los deseos de la persona bajo tutela.

“Junto a la disposición que permite no constituir la tutela si se hubiese otorgado un poder en previsión de la pérdida de capacidad, los cambios en relación con la guarda de hecho son un reflejo del nuevo modelo de protección de la persona... Es por ello mismo que incluye un nuevo instrumento de protección, la asistencia, dirigido al mayor de edad que lo necesita para cuidar de su persona o bienes debido a la disminución no incapacitante de sus facultades físicas o psíquicas. Se parte así de una concepción de la protección de la persona que no se vincula necesariamente a la falta de capacidad sino que incluye instrumentos que basándose en el libre desarrollo de la personalidad sirven para proteger a esas personas en situaciones como la vejez, la enfermedad psíquica o la discapacidad. Este instrumento puede ser muy útil también para determinados colectivos especialmente vulnerables pero para los cuales la incapacitación y la aplicación de un régimen de tutela o curatela resultan desproporcionadas, como las personas afectadas por un retraso mental leve u otras para las que por el tipo de disminución que sufren los instrumentos tradicionales no son apropiados para atender sus necesidades. En línea con las directrices de la recomendación de 28 de febrero de 1999 de Comité de Ministros del Consejo de Europa y con los precedentes existentes en diferentes ordenamientos jurídicos del entorno de Cataluña se considera más adecuado este modelo de protección paralelo a la tutela o curatela. Además, esta tendencia es la misma que inspira la Convención sobre los derechos de las personas con discapacidad.”

Además, en relación a España, el Parlamento, por Ley de 25 de marzo de 2009, daba al Gobierno el mandato de remitir a las cortes generales un Proyecto de reforma de la legislación reguladora de los procedimientos de incapacitación judicial, que con la denominación de procedimiento de modificación de la capacidad de obrar se adaptaran a las disposiciones de la Convención en el plazo de seis meses, que ha sido incumplido ⁽²⁰⁾.

Para concluir, destacamos la **Observación General del Comité para la Eliminación de Todas las formas de**

²⁰ Al respecto, dice TORCUATO RECOVER que “los que hemos podido conocer de las posiciones que el Ministerio de Justicia tiene respecto del Proyecto..... se dice que las organizaciones sociales estamos ofreciendo y planteando un cambio de legislación excesivo que va más allá de lo que dice el artículo 12. En absoluto podemos asumir ese planteamiento, lo que nosotros pretendemos no puede satisfacer los planteamientos realizados con el artículo 12 con una mera modificación que mantenga la terminología o/e incluso modificando la terminología, mantenga el espíritu de lo que viene estableciendo el Código Civil. Observatorio Estatal de la Discapacidad, Jornada sobre capacidad jurídica, Diciembre 2010

Discriminación contra las Personas con Discapacidad, sobre la necesidad de interpretar el artículo I.2, Inciso B) In fine de la Convención Interamericana para la Eliminación de Todas las formas de Discriminación contra las Personas con Discapacidad, en el marco del artículo 12 de la Convención de Naciones Unidas sobre los Derechos de las Personas con Discapacidad”, en su reunión extraordinaria de 4 y 5 de Mayo de 2011 en El Salvador⁽²¹⁾

“Que la entrada en vigor de la Convención de la ONU a partir del 3 mayo del 2008 implica el cambio del paradigma de la sustitución de la voluntad (que caracteriza al modelo de protección de la mayoría de los Códigos Civiles de Latinoamérica) al nuevo paradigma basado en la toma de decisiones con apoyos y salvaguardas del artículo 12 de la Convención sobre los Derechos de las Personas con Discapacidad (ONU);

Que el artículo 12 de la Convención sobre reconocimiento de la personalidad jurídica, y de la capacidad jurídica y de obrar reviste un carácter central en la estructura del tratado, por su valor instrumental para el disfrute de los derechos humanos de las personas con discapacidad y su significación en el proceso de transformación de la legislación interna (de fondo y de forma, civil y penal) y que la mayoría de los países miembros de la OEA han suscripto la Convención de Naciones Unidas;

Por este motivo, y en el marco del artículo 4.1 inciso a) y b) citado y con la finalidad de aplicar adecuadamente la Convención una de las primeras medidas que deben adoptar los Estados es el necesario examen a fondo de la legislación y de las políticas nacionales locales, a la luz del instrumento ratificado, que habrá de considerarse no sólo artículo por artículo sino principalmente en su significado global como *corpus iuris* del derecho internacional, teniendo como guía sus propósitos (artículo 1 de la Convención citada) y sus principios generales (artículo 3), siempre en el marco de una concepción integral de los derechos humanos –civiles y políticos, económicos, sociales y culturales- reconociendo su interdependencia e indivisibilidad (Preámbulo de la Convención).

De lo afirmado se sigue que, salvo en aquellos casos en que los derechos y principios del tratado ya estén protegidos por el Derecho interno, el Estado Parte tiene la obligación de introducir los

²¹ http://pablorosales.com.ar/es/wp-content/uploads/2011/05/CEDDIS_RES-1- I-E-11 - Observacion-general-sobre-articulo-I-2b -de-la-Convenion-OEA-art-12-Res-ONU.dot_.pdf

cambios necesarios para garantizar su conformidad con la Convención de la ONU., en los planos normativo y operativo. Pues no basta con reformar la legislación sino que es preciso acompañarla con medidas en el plano judicial, administrativo, educativo, financiero y social, entre otros.

Por otra parte, el artículo 16 del Pacto Internacional de Derechos Civiles y Políticos –con anterioridad a la nueva Convención- reconoce “para todos” la personalidad jurídica, pero fue necesario un nuevo tratado específico referido a las personas con discapacidad con una disposición precisa (artículo 12) sobre tan trascendente cuestión, debido a la falta de efectividad y a la invisibilidad de las personas con discapacidad en el sistema de derechos humanos y en la sociedad.

El artículo 12 reafirma que las personas con discapacidad tienen derecho en todas partes al reconocimiento de su capacidad jurídica, en sus dos sentidos, es decir como capacidad goce y como capacidad de ejercicio. Los Estados Parte reconocen la personalidad jurídica de las personas con discapacidad, así como su capacidad jurídica y de obrar en igualdad de condiciones con los demás en todos los ámbitos de su vida. En los párrafos 3 y 4 los Estados se comprometen a proporcionar a las personas con discapacidad el apoyo o asistencia que puedan necesitar para ejercer su capacidad jurídica, así como salvaguardias adecuadas y efectivas para evitar abusos.

En contraposición al respeto al derecho humano a la capacidad jurídica de las personas con discapacidad se halla el “asistencialismo” –reconocido como uno de los más arraigados obstáculos para implementar la Convención- que se caracteriza por la acción de quienes asumen la representación de otros a los que no consultan ni hacen partícipes, los “sustituyen”, siempre con “las mejores intenciones”, asumiendo que pueden decidir sobre sus deseos, elecciones y necesidades.

Sin embargo, la lectura conjunta de la definición de discapacidad y la obligación de proporcionar apoyos conduce a la conclusión de que la redacción del artículo 12 incluye a todas las personas con discapacidad.

Desde esta aseveración el artículo I.2 inciso b) in fine de la Convención Interamericana para la Eliminación de Todas las

Formas de Discriminación contra las Personas con Discapacidad de la O.E.A necesita ser reinterpretado a la luz del nuevo paradigma del artículo 12 citado. No se trata solo de analizar la perspectiva de evaluar la legislación interna de cada Estado Parte en lo que respecta a la interdicción y curatela, sino también analizar, más allá de cuestiones jurídicas, las implicaciones prácticas de estas medidas estatales.

RESOLUCIÓN

En cuanto al mandato de naturaleza jurídica el Comité resuelve

1. Instar a los Estados partes a que efectúen un estudio comparativo entre su legislación interna y el Derecho nacional de los demás Estados parte en la Convención Interamericana, en lo que respecta a las disposiciones sobre la capacidad jurídica de la persona con discapacidad, a fin de asegurarse que efectivamente mantienen una regulación acorde con sus necesidades desde todos los estratos sociales, y con la realidad institucional del país, pero en el marco del artículo 12 de la Convención de la ONU.

En cuanto al mandato de naturaleza práctica el Comité resuelve:

2. Solicitar al Secretario General de la OEA disponer, a través de sus instancias jurídicas pertinentes, la revisión del artículo I.2 inciso b) in fine de la Convención Interamericana para la Eliminación de Todas las Formas de Discriminación contra las Personas con Discapacidad, con el objeto de armonizarlo con el artículo 12 de la Convención sobre los derechos de la persona con discapacidad de las Naciones Unidas, recomendando lo más conveniente, sea su inaplicación práctica, o su derogación

3. Instar a los Estados parte de la Convención Interamericana a tomar medidas, en consonancia con el artículo 12 de la Convención de Naciones Unidas, para garantizar el reconocimiento de la capacidad jurídica universal, incluyendo a todas las personas con discapacidad, independientemente de su tipo y grado de discapacidad, y en consecuencia con ello, iniciar en el más breve plazo un proceso de sustitución de la práctica de la interdicción, curatela o cualquier otra forma de representación, que afecte la capacidad jurídica de las personas con discapacidad, a favor de la práctica de la toma de decisiones con apoyo.

Lo anterior significa tomar acciones en la siguiente dirección:

1. Capacitar a la población en general, con especial énfasis en los operadores del sistema judicial, sobre el nuevo paradigma vigente de la capacidad jurídica de todas las personas con discapacidad, incluso aquellas con discapacidades severas, mediante el recurso a sistemas de apoyo para la toma de decisiones.

2. Tomar medidas urgentes, de orden normativo, para asegurar que el sistema judicial no permita la aprobación de nuevos casos de interdicción, y para impulsar el desarrollo gradual de los sistemas de apoyo para la toma de decisiones así como para la regulación e implementación de instituciones y mecanismos de salvaguarda para prevenir los abusos

3. Tomar medidas para facilitar el proceso de revisión de los casos de interdicción de personas con discapacidad, con el objeto de adecuarse al nuevo paradigma, con especial énfasis en aquellos que se presenten dudas sobre la existencia de abusos, manipulación de intereses, o abusos.

4. Informar a este Comité acerca de las medidas tomadas y los avances que se vaya logrando en este proceso“

V-PRONUNCIAMIENTOS JUDICIALES

Diversas sentencias invocan o hacen referencia a la Convención.

En el ámbito europeo, se suele destacar la Sentencia del Tribunal europeo de Derechos Humanos, de 30 de abril de 2009, como la primera en su ámbito que hace referencia a la Convención.

En Italia, el decreto de 9 de Abril del Tribunal de Catanzaro se pronuncia sobre ella “*amministrazione di sostegno*“ y la Convención, una vez ratificada por el estado italiano el 3 de Marzo de 2009 ⁽²²⁾

²² El texto completo puede consultarse en la web www.altalex.com

En Argentina, la Cámara Nacional de Apelaciones en lo Civil de la capital federal, se pronuncia el 29 de Marzo de 2010 sobre la exigencia de testigos para la firma de documentación hace referencia a la Convención ⁽²³⁾.

En Colombia, la Sala Plena de la Corte Constitucional, se pronuncia el 21 de Abril de 2010 sobre la Convención, diciendo que “tanto la Convención que se revisa como la generalidad de las medidas a cuya implementación se comprometen los Estados partes, tienen el carácter de acciones afirmativas ⁽²⁴⁾”

En España, el Tribunal Supremo, en sentencia de 29 de Abril de 2009 analiza las reglas interpretativas de la legislación vigente en materia de incapacitación.

La sentencia de 27 de abril de 2010 del juzgado 15 de las Palmas de Gran Canaria se pronuncia sobre el derecho al sufragio y sobre la figura del curador.

²³ El texto completo puede consultarse en <http://el-observatorio.org/wp-content/uploads/2010/08/SENTENCIA-ARGENTINA-SOBRE-REQUISITOS-EXTRAS-EN-CONTRATO-DE-PRESTAMO-Y-DISCRIMINACION-CON-UN-BREVE-COMENTARIO.pdf>

Trascribimos el comentario de Cristóbal Fábrega:

“No podemos estar de acuerdo con dicha solución si bien la sentencia es interesante en cuanto tiene en cuenta la Convención de 2006, derecho interno español y argentino. Si observamos la CONUDHPD 2006 el que acompañaba al actor era lo que llamamos un apoyo voluntario o informal, persona de su confianza que bastaría para dar a la otra parte garantías suficientes de que entendía la información que se le daba. Estamos ante un invidente que mantiene todas sus facultades intelectuales y que solo necesita a alguien de su confianza que le lea lo que consta escrito en el contrato para que el valore si ello coincide con la información que se le ha dado verbalmente y firme dicho documento. Las garantías que la empresa necesita se dan con esa mera actitud con la cual se apoya y reafirma la capacidad del solicitante del préstamo.

Por ello difiero de la sentencia. Creo que existe discriminación en la exigencia de los dos testigos por que coloca a la persona con discapacidad sensorial en una situación distinta al resto de los ciudadanos no discapacitados sin que dicha diferencia se encuentre justificada una vez existe el apoyo necesario. Podría afectar la diferencia de acceso al préstamo al artículo 12-5º de la CONUDHPD en cuanto establece un mecanismo añadido como consecuencia de la discapacidad (se le aplica a todas las personas con discapacidad que no puedan leer y a las personas analfabetas) con independencia de las circunstancias concretas del caso lo que supone una barrera diferenciadora que, en el caso concreto en el que, dadas las circunstancias, podía haberse obviado, constituye un requisito añadido carente de justificación que entiendo discriminatorio. El mismo puede estar justificado por los protocolos de empresa o por la ley nacional, pero estos deben ser interpretados y aplicados de acuerdo con la convención y en este caso bastaba el apoyo de confianza y voluntario que la persona con discapacidad había aportado”.

²⁴ Texto completo en www.corteconstitucional.gov.co

La del juzgado número 8 de Gijón de 13 de Octubre de 2009 acude a la tutela parcial. ⁽²⁵⁾

La de 11 de Febrero de 2011 de la Audiencia Provincial de Guipúzcoa se pronuncia sobre el derecho de sufragio, contraer matrimonio y disponer de sus bienes mortis causa, entre otras cuestiones.

Más que el contenido de las citadas sentencias, destaca la existencias ya de pronunciamientos concretos que hacen el esfuerzo necesario de plantear la adaptación o no, y sobre todo, el cómo hacerlo .

En este ámbito merece ser destacada la labor del Ministerio Fiscal en España.

Por su trascendencia, son destacables el contenido de las Instrucciones de la Fiscalía General del Estado 4/2008 sobre el control y vigilancia por el Ministerio Fiscal de las tutelas de personas discapaces 4/2009 sobre la organización de las secciones de lo civil y del régimen especializado en materia de protección de personas con discapacidad y tutelas, y 3/2010 sobre la necesaria fundamentación individualizada de las medidas de protección o apoyo en los procedimientos sobre determinación de la capacidad de las personas, habiéndose editado un manual de buenas prácticas que según palabras de Carlos Ganzenmüller “tiende a recoger lo que nosotros consideramos adecuado de nuestra legislación, de nuestra jurisprudencia, para introducirlo en la Convención y que podamos cumplirla desde este grado mínimo en espera de una legislación adecuada. Eso es lo que nos gustaría a todos los operadores jurídicos”.

Llegados a este punto, tras este repaso de la actualidad en torno a un aspecto clave de la Convención, como es la capacidad, retorno a la pregunta inicial, si estamos como muchos aseguran en el mismo sitio que hace cinco años o si se han dado pasos que hagan creer que ese muro grueso que encierra a las personas con discapacidad se van abriendo huecos.

²⁵ Sobre esta sentencia es recomendable la lectura de la ponencia de Carlos Ganzenmüller, fiscal del Tribunal Supremo y miembro del Foro Justicia y Discapacidad, en las Jornada sobre capacidad jurídica y discapacidad del Observatorio Estatal de la Discapacidad, de Diciembre de 2010

Creo sinceramente que en este muro grueso se van abriendo huecos, que hay atisbos de luz, de esperanza.

Pero no estamos ante un reto, sino sobre todo ante una responsabilidad que no admite demora.

ANEXO

DECLARACIONES Y RESERVAS

De entre ellas, destacar:

Australia.

Momento de la ratificación.

Declaración.

Australia reconoce que las personas con discapacidad tienen capacidad jurídica en igualdad de condiciones con las demás en todos los aspectos de la vida.

Australia declara su entendimiento de que la Convención permite por completo los apoyos o la sustitución en la toma de decisiones en nombre de una persona solamente cuando tales decisiones sean necesarias, como último recurso y sujeto a las salvaguardias.

Australia reconoce que toda persona con discapacidad tiene derecho a que se respete su integridad física y psíquica en igualdad de condiciones con los demás.

Australia declara su entendimiento de que la Convención permite la asistencia obligatoria o el tratamiento de las personas, incluidas las medidas adoptadas para el tratamiento de la discapacidad mental, cuando ese tratamiento sea necesario, como último recurso y sujeto a las salvaguardias.

Australia reconoce los derechos de las personas con discapacidad a la libertad de movimiento, a la libertad para elegir su residencia y a una nacionalidad, en igualdad de condiciones con los demás .

Australia además declara su entendimiento de que la convención no crea el derecho de toda persona a entrar o permanecer en un país en el que no es nacional, o se pueda incidir en los requisitos de salud de Australia por los extranjeros que intentan entrar o permanecer en Australia, donde estos requisitos se basan en criterios legítimos, objetivos y razonables.

CANADA.

Declaración y reserva.

El Canadá reconoce la presunción de que las personas con discapacidad tienen capacidad jurídica en igualdad de condiciones con los demás en todos los aspectos de la vida.

Canadá declara su entendimiento de que el artículo 12 permite los mecanismos de apoyo y sustitución de toma de decisiones en circunstancias apropiadas y de conformidad con la ley.

En la medida en el artículo 12 puede interpretarse como una exigencia de eliminación de todos los mecanismos de sustitución en la toma de decisiones Canadá se reserva el derecho de continuar usándolos en circunstancias apropiadas y con las garantías adecuadas y efectivas.

Con respecto al artículo 12.4 Canadá se reserva el derecho de no someter estas medidas a un a revisión periódica por una autoridad independiente, cuando esas medidas ya está sujetas a revisión o apelación.

EGIPTO

Declaración interpretativa hecha en el momento de la firma .

La república Árabe de Egipto declara que su interpretación del artículo 12 de la Convención Internacional sobre la protección y promoción de los derechos de las personas con discapacidad, que declara el reconocimiento de de las personas con discapacidad en igualdad de condiciones con los demás ante la ley, con relación al concepto de capacidad jurídica tratado en el apartado 2 de dicho artículo, es que las personas con discapacidad tienen capacidad para adquirir derechos y asumir responsabilidades, pero no la capacidad para ejercerla (actuar) bajo la legislación egipcia .

FRANCIA

Declaración.

Con respecto al artículo 29 de la Convención, el ejercicio del derecho al voto es un componente de la capacidad jurídica que no puede ser restringido sino en las condiciones y de conformidad con las modalidades previstas en el artículo 12 de la Convención.

MEXICO

Declaración interpretativa.

El Estado mexicano reitera su compromiso de crear condiciones que permitan a todos los individuos desarrollar de manera integral el ejercicio de sus derechos y libertades plenamente y sin discriminación.

En consecuencia, afirmando su absoluta determinación de proteger los derechos y la dignidad de las personas con discapacidad los estados Mexicanos interpretan el párrafo 2 del artículo 12 de la convención en el sentido de que en caso de conflicto entre dicho párrafo y la legislación nacional la disposición que confiere la mayor protección jurídica al tiempo que garantizan la dignidad y garantizar la integridad física, psíquica y emocional de las personas y la protección de la integridad de sus bienes se aplicará en estricta conformidad con el principio pro homine.

REPUBLICA ARABE DE SIRIA.

En el momento de la firma .

Entendimiento.

Nuestra firma de la presente Convención no implica en modo alguno reconocimiento de Israel o la entrada en relaciones con Israel, en cualquier forma y manera, en conexión con la Convención.

Hemos firmado hoy sobre la base del entendimiento que figura en la carta de fecha 5 de diciembre de 2006, dirigida por el representante permanente de Iraq acreditado ante las Naciones Unidas, en su calidad de presidente del grupo de estados árabes durante ese mes, al presidente del comité, que contiene la interpretación del grupo de estados árabes relativa al artículo 12 relativo a la interpretación del concepto de capacidad jurídica.

REINO UNIDO DE GRAN BRETAÑA Y NORTE DE IRLANDA.

Reservas.

Igual reconocimiento ante la ley -Convención artículo 12.4

Las disposiciones del Reino Unido, por el que el secretario de estado puede designar una persona para el ejercicio de derechos en relación a las demandas de seguridad social y los pagos en nombre de una persona que es en ese momento incapaz de actuar no están actualmente sometidas a la salvaguardia de una regular revisión, como exige el artículo 12.4 de la convención y el Reino Unido se reserva el derecho de aplicar dicho régimen .El Reino Unido está por lo tanto trabajando hacia un sistema proporcional de revisión .



Convención sobre los derechos de las personas con discapacidad

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Comité sobre los Derechos de las Personas con Discapacidad

Sexto período de sesiones

19 a 23 de septiembre de 2011

Examen de los informes presentados por los Estados partes en virtud del artículo 35 de la Convención

Observaciones finales del Comité sobre los Derechos de las Personas con Discapacidad

España

1. El Comité examinó el informe inicial de España (CRPD/C/ESP/1) en sus sesiones 56ª y 57ª (véase CRPD/C/6/SR.3 y SR.4), celebradas el 20 de septiembre de 2011, y aprobó las siguientes observaciones finales en su 62ª sesión, celebrada el 23 de septiembre de 2011.

I. Introducción

2. El Comité acoge con beneplácito el informe inicial de España, que fue el primer Estado que presentó su informe inicial al Comité. El Comité encomia al Estado parte por sus respuestas escritas a la lista de cuestiones planteadas por el Comité (CRPD/C/ESP/Q/1/Add.1) y por sus completas respuestas a las preguntas formuladas durante el diálogo.

3. El Comité felicita al Estado parte por su delegación, que incluía entre sus miembros representantes de varios ministerios, entre ellos muchos representantes de alto nivel, así como dos personas con discapacidad. El Comité expresa su agradecimiento por el caluroso y fructífero diálogo establecido entre la delegación y los miembros del Comité.

II. Aspectos positivos

4. El Comité congratula al Estado parte por los progresos hechos en muchos sectores relacionados con los derechos de las personas con discapacidad, en particular la aprobación de la Ley N° 26/2011, de 1º de agosto de 2011, sobre la adaptación de las normas a la Convención, la modificación de reglamentos y de varias leyes en respuesta a la Convención, y la adopción de importantes medidas positivas en los sectores de la salud, la vivienda y el empleo y en otras esferas.

5. El Comité toma nota con satisfacción de la Ley N° 51/2003 sobre la igualdad de oportunidades, la no discriminación y la "accesibilidad universal" para las personas con discapacidad, así como de las disposiciones para su aplicación, en particular los reales decretos que establecen las normas básicas de accesibilidad.
6. El Comité felicita al Estado parte por el establecimiento de un mecanismo de supervisión independiente en cumplimiento del artículo 33, párrafo 2, de la Convención.
7. El Comité acoge con beneplácito la adopción por el Estado parte del III Plan de Acción para las Personas con Discapacidad, que aborda la discapacidad teniendo en cuenta el género, así como la Estrategia Global de Acción para el Empleo de las Personas con Discapacidad, 2008-2012, incluido su primer plan de acción, que abarca el período 2008-2010.
8. El Comité elogia al Estado parte por la adopción de su Estrategia a largo plazo para las personas con discapacidad (2012-2020), que incluye objetivos a corto plazo y a plazo medio.
9. El Comité felicita al Estado parte por el alto porcentaje (78,35%) de matriculación de niños con discapacidad en el sistema de educación tradicional y por los esfuerzos hechos para mantener la financiación de los programas para las personas con discapacidad en tiempos de crisis económica. A este respecto, España está dando un ejemplo muy importante de cumplimiento de la finalidad del artículo 4, párrafo 2, de la Convención. El Comité acoge también con beneplácito el compromiso del Estado parte de evitar la reducción de la asistencia social.
10. El Comité es consciente de los esfuerzos hechos por el Estado parte para reforzar su compromiso con respecto a la cooperación internacional asignando fondos para un desarrollo que tenga en cuenta la discapacidad.

III. Principales motivos de preocupación y recomendaciones

A. Principios generales y obligaciones (artículos 1 y 4)

11. El Comité toma nota de la aprobación de la Ley N° 26/2011, que introduce el concepto de las personas con discapacidad, definido en la Convención, y amplía la protección de esas personas. Sin embargo, le preocupa que no todas las personas con discapacidad estén protegidas por la ley.
12. **El Comité insta al Estado parte a que vele por que todas las personas con discapacidad gocen de protección contra la discriminación y tengan igualdad de oportunidades independientemente de su nivel de discapacidad.**
13. El Comité acoge con beneplácito la Ley N° 49/2007, de 26 de diciembre de 2007, que establece la Oficina Permanente Especializada para hacer frente a las infracciones e imponer sanciones en las esferas de la igualdad de oportunidades, la no discriminación y la accesibilidad universal de las personas con discapacidad. Sin embargo, está inquieto por la lentitud del desarrollo y la falta de promoción de este sistema de arbitraje en el plano de las comunidades autónomas, por la falta de información sobre el número de sanciones y por el hecho de que el Estado parte no informa sobre las medidas tomadas para dar cumplimiento a esa ley. Preocupa al Comité la eficacia general del sistema.
14. **El Comité recomienda al Estado parte que dé a conocer mejor entre las personas con discapacidad el sistema de arbitraje, que aumente la asistencia jurídica gratuita y que vele por la reglamentación de las infracciones y de las sanciones en las comunidades autónomas.**

15. El Comité deplora la falta de información sobre la eficaz participación de las personas con discapacidad y de sus representantes en las organizaciones que los representan a nivel regional en los procesos de elaboración de las disposiciones legislativas, de las políticas y de la adopción de decisiones y en los procesos de evaluación de su aplicación, así como la falta de información sobre la participación de los niños con discapacidades en todos los niveles.

16. El Comité recomienda al Estado parte que adopte medidas específicas para asegurar la participación activa de las personas con discapacidad en los procesos públicos de adopción de decisiones a nivel regional, así como para incluir a niños con discapacidad en todos los niveles.

17. El Comité toma nota de la Ley N° 2/2010, de 3 de marzo de 2010, sobre la salud sexual y reproductiva, que despenaliza la interrupción voluntaria del embarazo, permite que se ponga fin al embarazo durante las primeras 14 semanas e incluye dos casos específicos en los que se amplían los plazos para el aborto si el feto tiene una discapacidad: hasta las 22 semanas de gestación cuando exista un "riesgo de graves anomalías en el feto", y después de 22 semanas de gestación cuando, entre otras cosas, "se detecte en el feto una enfermedad extremadamente grave e incurable". El Comité también toma nota de las explicaciones del mantenimiento de esta distinción dadas por el Estado parte.

18. El Comité recomienda al Estado parte que suprima la distinción hecha en la Ley N° 2/2010 en cuanto al plazo dentro del cual la ley permite que se interrumpa un embarazo por motivos de discapacidad exclusivamente.

B. Derechos específicos (artículos 5 a 30)

Igualdad y no discriminación (artículo 5)

19. El Comité acoge con satisfacción las modificaciones introducidas por la Ley N° 26/2011, por las que se suprime la necesidad de disponer de un certificado de discapacidad para presentar a un órgano judicial una denuncia de discriminación por discapacidad. Sin embargo, lamenta la falta de información sobre los casos de discriminación, y le inquieta que las personas con discapacidad sigan estando marginadas. El Comité expresa su preocupación por la falta de información sobre un ajuste razonable. También le preocupa que, en la práctica, la discapacidad afecte a la patria potestad de los padres sobre sus hijos o a la guarda de los hijos por sus padres, y que su protección jurídica contra la discriminación por motivos de discapacidad no sea jurídicamente exigible en casos de discriminación por razón de discapacidad percibida o de asociación con una persona con una discapacidad.

20. El Comité insta al Estado parte a que amplíe la protección de la discriminación por motivos de discapacidad para que abarque expresamente la discapacidad múltiple, la discapacidad percibida y la asociación con una persona con una discapacidad, y a que vele por que se proteja contra la denegación de un ajuste razonable, como forma de discriminación, independientemente del grado de discapacidad. Además, se debe proporcionar orientación, sensibilización y formación para que todas las partes interesadas, incluidas las personas con discapacidad, comprendan mejor el concepto de ajuste razonable y la prevención de la discriminación.

Mujeres con discapacidad (artículo 6)

21. El Comité está preocupado por el hecho de que los programas y políticas públicos sobre la prevención de la violencia de género no tengan suficientemente en cuenta la

situación de las mujeres con discapacidad. Inquieta también al Comité que las políticas en materia de empleo no incluyan una amplia perspectiva de género y que el desempleo, la inactividad y los ritmos de formación sean mucho peores en el caso de las mujeres con discapacidad que en el de los hombres con discapacidad.

22. El Comité recomienda al Estado parte que:

a) Vele por que se tenga más en cuenta a las mujeres con discapacidad en los programas y políticas públicos sobre la prevención de la violencia de género, particularmente para asegurar el acceso de las mujeres con discapacidad a un sistema de respuesta eficaz e integrado;

b) Tenga en cuenta las cuestiones relacionadas con el género en las políticas de empleo, e incluya particularmente medidas específicas para las mujeres con discapacidad;

c) Elabore y desarrolle estrategias, políticas y programas, especialmente en los sectores de la educación, el empleo, la salud y la seguridad social, para promover la autonomía y la plena participación de las mujeres y de las niñas con discapacidad en la sociedad, así como para combatir la violencia contra ellas.

Niños y niñas con discapacidad (artículo 7)

23. El Comité está particularmente preocupado por las tasas de malos tratos de los niños con discapacidad, que según se informa son más altas que las de otros niños. El Comité también expresa inquietud por la falta de pronta identificación de los niños con discapacidad y por la falta de intervención de las familias y de apoyo prestado con conocimiento de causa a los niños con discapacidad, lo que pone en peligro su pleno desarrollo y su capacidad de expresar sus opiniones, así como por la falta de recursos disponibles y de una administración pública coordinada en los servicios sociales, de salud y de educación, entre otros.

24. El Comité recomienda al Estado parte que:

a) Redoble sus esfuerzos por promover y proteger los derechos de los niños con discapacidad y emprenda investigaciones sobre la violencia contra los niños con discapacidad, adoptando medidas para erradicar esa violación de sus derechos;

b) Adopte políticas y programas que aseguren el derecho de los niños con discapacidad a expresar sus propias opiniones;

c) Desarrolle políticas públicas coordinadas que dispongan de recursos suficientes para garantizar un acceso integrador a unos servicios de asistencia que incluyan servicios terapéuticos, de rehabilitación y de habilitación prestados con conocimiento de causa, así como a unos cuidados que abarquen las necesidades en las esferas de la salud y de la educación y la necesidades psicosociales de los niños con discapacidad, en particular durante la primera infancia.

Toma de conciencia (artículo 8)

25. El Comité encomia las muchas medidas adoptadas por el Estado parte para aplicar la Convención. Sin embargo, observa que es preciso hacer más para aumentar, en la sociedad, en los medios de información y entre las personas con discapacidad, la sensibilización en lo que concierne a los derechos de las personas con discapacidad.

26. El Comité insta al Estado parte a que tome medidas proactivas para mejorar el conocimiento de la Convención y de su Protocolo Facultativo en todos los niveles, particularmente en la judicatura y la abogacía, los partidos políticos, los funcionarios

parlamentarios y gubernamentales, la sociedad civil, los medios de información y las personas con discapacidad, así como entre el público en general.

Accesibilidad (artículo 9)

27. El Comité toma nota de que la Ley N° 26/2011 introduce modificaciones que acortarán los plazos para cumplir los requisitos de accesibilidad a las instalaciones y los servicios públicos, así como en lo que se refiere a los bienes y servicios a disposición del público. Sin embargo, sigue preocupado por el poco cumplimiento de esos requisitos, particularmente en los niveles regional y local, en el sector privado y en relación con las instalaciones y los servicios existentes. El Comité es consciente de las situaciones de discriminación que sufren los pasajeros con discapacidad en las aerolíneas, en particular las denegaciones de embarque. El Comité recuerda al Estado parte que el artículo 9 de la Convención exige a los Estados que garanticen el acceso a la información y a las comunicaciones.

28. El Comité recomienda que se proporcionen lo antes posible recursos financieros y humanos suficientes para aplicar la legislación sobre la accesibilidad, así como para promover y vigilar su cumplimiento, mediante la adopción de medidas nacionales y la cooperación internacional.

Derecho a la vida (artículo 10)

29. El Comité toma nota con satisfacción de que la Ley N° 26/2011 modifica la reglamentación incluyendo disposiciones que reflejan el derecho a la accesibilidad cuando se consiente con conocimiento de causa en recibir tratamiento médico. Sin embargo, deplora que los tutores que representan a personas con discapacidad consideradas "legalmente incapacitadas" puedan legalmente consentir en que se terminen o se suspendan el tratamiento médico, la nutrición u otros medios de sustentación de la vida de esas personas. El Comité desea recordar al Estado parte que el derecho a la vida es absoluto y que la sustitución en la adopción de decisiones en lo que atañe a la terminación o el retiro de medios de sustentación de la vida es incompatible con ese derecho.

30. El Comité solicita al Estado parte que vele por que se obtenga el consentimiento, otorgado con conocimiento de causa, de todas las personas con discapacidad en todas las cuestiones relativas al tratamiento médico, especialmente la retirada del tratamiento, de la nutrición o de otros medios de sustentación de la vida.

Situaciones de riesgo y emergencias humanitarias (artículo 11)

31. Inquieta al Comité la insuficiencia de protocolos específicos para las personas con discapacidad en situaciones de emergencia.

32. El Comité insta al Estado parte a que revise sus leyes y políticas en materia de situaciones de emergencia con el fin de incluir disposiciones que garanticen la seguridad y la protección de las personas con discapacidad.

Igual reconocimiento como persona ante la ley (artículo 12)

33. El Comité observa que la Ley N° 26/2011 establece un plazo de un año desde su entrada en vigor para la presentación de un proyecto de ley que regule el alcance y la interpretación del artículo 12 de la Convención. Preocupa al Comité que no se hayan tomado medidas para reemplazar la sustitución en la adopción de decisiones por la asistencia para la toma de decisiones en el ejercicio de la capacidad jurídica.

34. El Comité recomienda al Estado parte que revise las leyes que regulan la guarda y la tutela y que tome medidas para adoptar leyes y políticas por las que se

reemplacen los regímenes de sustitución en la adopción de decisiones por una asistencia para la toma de decisiones que respete la autonomía, la voluntad y las preferencias de la persona. Se recomienda, además, que se proporcione formación sobre esta cuestión a todos los funcionarios públicos y otros interesados pertinentes.

Libertad y seguridad de la persona (artículo 14)

35. El Comité toma nota del régimen jurídico que permite el internamiento de las personas con discapacidad, incluidas las personas con discapacidad intelectual y psicosocial ("enfermedad mental"), en establecimientos especiales. Le preocupa que, según se informa, se tienda a recurrir a medidas urgentes de internamiento que contienen solo salvaguardias *ex post facto* para las personas afectadas. Le inquietan igualmente los malos tratos de que, según se informa, son objeto las personas con discapacidad internadas en centros residenciales o en hospitales psiquiátricos.

36. **El Comité recomienda al Estado parte que revise sus disposiciones legislativas que autorizan la privación de libertad por motivos de discapacidad, incluidas las discapacidades mentales, psicológicas o intelectuales; que derogue las disposiciones que autorizan el internamiento forzoso a causa de una incapacidad manifiesta o diagnosticada, y que adopte medidas para que los servicios médicos, incluyendo todos los servicios relacionados con la salud mental, se basen en el consentimiento otorgado con conocimiento de causa por el interesado.**

Protección de la integridad personal (artículo 17)

37. El Comité expresa su inquietud por el hecho de que las personas con discapacidad cuya personalidad jurídica no se reconoce puedan ser sometidas a esterilización sin su consentimiento, otorgado libremente y con conocimiento de causa.

38. **El Comité insta al Estado parte a que suprima la administración de tratamiento médico, en particular la esterilización, sin el consentimiento, pleno y otorgado con conocimiento de causa, del paciente, y a que vele por que la legislación nacional respete especialmente los derechos reconocidos a las mujeres en los artículos 23 y 25 de la Convención.**

Derecho a vivir de forma independiente y a ser incluido en la comunidad (artículo 19)

39. Preocupa al Comité la falta de recursos y de servicios que garanticen el derecho a vivir de forma independiente y a ser incluido en la comunidad, en particular en las zonas rurales. Le inquieta además que la elección de residencia de las personas con discapacidad se vea limitada por la disponibilidad de los servicios necesarios, así como el hecho de que, según se informa, quienes viven en establecimientos residenciales no tienen otra alternativa que ese internamiento. Finalmente, preocupa al Comité la vinculación entre, por una parte, el derecho al disfrute de servicios sociales y, por otra, un grado específico de discapacidad.

40. **El Comité alienta al Estado parte a que vele por que se proporcione una financiación adecuada para que las personas con discapacidad puedan, de forma efectiva, disfrutar de la libertad de elegir su residencia en pie de igualdad con los demás, tener acceso a toda una serie de servicios comunitarios en su domicilio o en residencias y a otros servicios para la vida cotidiana, incluida la asistencia personal, y disfrutar así de un ajuste razonable a fin de integrarse mejor en sus comunidades.**

41. Preocupa al Comité que la Ley de promoción de la autonomía personal limite los recursos disponibles para contratar asistentes personales a solo las personas que tienen discapacidad del tercer nivel, y solo para la educación y el trabajo.

42. **El Comité alienta al Estado parte a ampliar los recursos para asistentes personales a todas las personas con discapacidad, en función de sus necesidades.**

Educación (artículo 24)

43. El Comité ve con beneplácito que los estudios de los alumnos con necesidades educativas especiales se rijan por el principio de la inclusión; que esté prohibida la discriminación en la educación, y que la mayoría de los niños con discapacidad estén integrados en el sistema educativo normal. El Comité expresa su satisfacción por la Ley orgánica N° 2/2006, sobre la educación, que obliga a las autoridades educativas a proporcionar profesores especializados, profesionales capacitados y los materiales y recursos necesarios, así como por las leyes que obligan a las escuelas a introducir los ajustes y las diversificaciones necesarias en los programas para los alumnos con discapacidades. No obstante, preocupa al Comité la aplicación de esas leyes en la práctica, habida cuenta de que, según se informa, hay casos en que no se ha proporcionado a los alumnos un acomodo razonable, en que continúan la segregación y la exclusión, en que se han aducido argumentos económicos para justificar la discriminación y en que se ha matriculado a niños en programas especiales de educación contra la voluntad de sus padres. El Comité observa con preocupación que los padres que rechazan la inclusión de sus hijos con discapacidad en programas especiales de educación no tienen ninguna posibilidad de apelar, y que su única alternativa es educarlos por su cuenta o pagar por la inclusión razonable de sus hijos en el sistema tradicional de educación.

44. **El Comité reitera que la denegación de un acomodo razonable de los alumnos constituye discriminación y que la obligación de proporcionar un acomodo razonable a los alumnos es de aplicación inmediata y no está sujeta a la realización progresiva. El Comité recomienda al Estado parte que:**

a) **Redoble sus esfuerzos por proporcionar a los alumnos un acomodo razonable en la educación, asignando recursos financieros y humanos suficientes para aplicar el derecho a la educación integradora, prestando especial atención a la evaluación de la disponibilidad de profesores con calificaciones especializadas y velando por que los departamentos de educación de las comunidades autónomas comprendan las obligaciones que les impone el Convenio y actúen de conformidad con las disposiciones de este;**

b) **Vele por que las decisiones de colocar a los niños con discapacidad en escuelas especiales o en clases especiales, o para ofrecerles un plan de estudios reducido, se adopten en consulta con los padres;**

c) **Vele por que los padres de niños con discapacidad no estén obligados a pagar por la educación o por las medidas encaminadas a proporcionar a los alumnos un acomodo razonable en las escuelas tradicionales;**

d) **Vele por que las decisiones sobre la colocación de los niños en marcos segregados puedan ser objeto de apelación rápida y eficazmente.**

Derecho al trabajo (artículo 27)

45. Pese a la existencia de una serie de disposiciones destinadas a mantener empleadas a las personas con discapacidad, el Comité está inquieto por la baja tasa general de empleo de las personas con discapacidad.

46. **El Comité recomienda al Estado parte que elabore programas abiertos y avanzados para aumentar las oportunidades de empleo de las mujeres y los hombres con discapacidad.**

Participación en la vida política y pública (artículo 29)

47. Preocupa al Comité que se pueda restringir el derecho al voto de las personas con discapacidad intelectual o psicosocial si la persona interesada ha sido privada de su capacidad jurídica o ha sido internada en una institución. Le inquieta además que la privación de ese derecho parezca ser la regla y no la excepción. El Comité lamenta la falta de información sobre el rigor de las normas en materia de prueba, sobre los motivos requeridos y sobre los criterios aplicados por los jueces para privar a las personas de su derecho de voto. El Comité observa con preocupación el número de personas con discapacidad a las que se ha denegado el derecho de voto.

48. **El Comité recomienda que se revise toda la legislación pertinente para que todas las personas con discapacidad, independientemente de su deficiencia, de su condición jurídica o de su lugar de residencia, tengan derecho a votar y a participar en la vida pública en pie de igualdad con los demás. El Comité pide al Estado parte que modifique el artículo 3 de la Ley orgánica N° 5/1985, que autoriza a los jueces a denegar el derecho de voto en virtud de decisiones adoptadas en cada caso particular. La modificación debe hacer que todas las personas con discapacidad tengan derecho a votar. Además, se recomienda que todas las personas con discapacidad que sean elegidas para desempeñar un cargo público dispongan de toda la asistencia necesaria, incluso asistentes personales.**

C. Obligaciones específicas (artículos 31 a 33)**Recopilación de datos y estadísticas (artículo 31)**

49. El Comité lamenta la escasez de datos desglosados sobre las personas con discapacidad. El Comité recuerda que esa información es indispensable para comprender la situación, en el Estado parte, de grupos concretos de personas con discapacidad que tengan diferentes grados de vulnerabilidad; para elaborar leyes, políticas y programas adaptados a la situación de esas personas, y para evaluar la aplicación de la Convención.

50. **El Comité recomienda al Estado parte que sistematice la recopilación, el análisis y la difusión de datos desglosados por sexo, edad y discapacidad; que desarrolle la capacidad a este respecto, y que prepare indicadores que tengan en cuenta el género para contribuir a la elaboración de disposiciones legislativas, a la formulación de políticas y al reforzamiento institucional a fin de supervisar los progresos realizados en la aplicación de las diversas disposiciones de la Convención y para preparar informes al respecto.**

51. El Comité deplora que la situación de los niños con discapacidad no se refleje en los datos sobre la protección de los niños.

52. **El Comité recomienda al Estado parte que sistemáticamente recopile, analice y difunda datos desglosados por sexo, edad y discapacidad sobre los malos tratos y la violencia de que se haga objeto a los niños.**

Seguimiento y difusión

53. El Comité pide al Estado que aplique las recomendaciones formuladas por el Comité en las presentes observaciones finales. El Comité recomienda al Estado parte que transmita las observaciones finales, para su examen y la adopción de medidas, a los miembros del Gobierno y del Parlamento, a los funcionarios de los ministerios competentes y a los miembros de los grupos profesionales pertinentes, como los profesionales de la educación, de la medicina y del derecho, así como a las autoridades locales y a los medios de información, utilizando las estrategias de comunicación social modernas.

54. El Comité alienta enérgicamente al Estado parte a involucrar a las organizaciones de la sociedad civil, en particular las organizaciones de personas con discapacidad, en la preparación de su segundo informe periódico.

55. El Comité pide al Estado parte que dé amplia difusión a las presentes observaciones finales, en particular entre las organizaciones no gubernamentales y entre las organizaciones representantes de las personas con discapacidad, así como entre los propios discapacitados y sus familiares, en formas accesibles.

Próximo informe

56. El Comité pide al Estado parte que presente su segundo informe periódico a más tardar el 3 de diciembre de 2015 y que incluya en él información sobre la aplicación de las presentes observaciones finales.

Committee on the Rights of Persons with Disabilities



6th session (19-23 September 2011)


Note: Schedules are subject to change without notice. * **Postponement of Adoption of List of issues of China**

Please note: the Committee's 6th session will take place in Palais des Nations, Geneva

Provisional Agenda and Programme of Work: CRPD/C/6/1	A C E F S
Opening statement	E

All participants in Committee sessions will require accreditation to the session to have access to the conference venue, except individuals who are already in possession of UN badges. To obtain accreditation, please fill out the **accreditation form** ([pdf](#) and [Word](#)), sign and send it by fax to 0041-22-917 9008, or by e-mail to crpd@ohchr.org. In order to ensure the accreditation of participants, all requests for accreditation should reach OHCHR by **14 September 2011**, at the latest. Accreditation will enable participants to obtain a badge from the UN Security Unit (Precise location to be specified in February 2011).

State Party examined	Timetable	State Party report and Core document	List of issues and Written replies	Information from Other Sources	Delegation lists and statements	Concluding observations
 SPAIN	Adoption Of Concluding Observations	Initial report CRPD/C/ESP/1 A C E F S HRI/CORE/ESP/2010 A C E F S	CRPD/C/ESP/Q/1 A C E F S CRPD/C/ESP/Q/1/Add.1 S	Comité Español de Representantes de Personas Con Discapacidad E - S	List Statement	CRPD/C/ESP/CO/1 A C E F R S
 CHINA	Private meeting Adoption of List of Issues * ADOPTION OF LIST OF ISSUES OF CHINA HAS BEEN POSTPONED TO A LATER SESSION	Initial reports CRPD/C/CHN/1 A C E F S (Word) CRPD/C/CHN-HKG/1 A C E F S (Word) CRPD/C/CHN-MAC/1 A C E F S (Word)	CRPD/C/CHN/Q/1 A C E F S	Enable Disability Studies Institute C - E Enable Disability Studies Institute Observation Global Initiative To End All Corporal Punishment Of Children Hong Kong Human Rights Commission Hong-Kong Joint Council C - E Hong-Kong Human Rights Monitor		

 <p>PERU</p>	<p>Private meeting Adoption of List of Issues</p>	<p>Initial report CRPD/C/PER/1 <u>A C E F S</u> (Word)</p>	<p>CRPD/C/PER/Q/1 <u>A C E F S</u></p>	<p><u>CONFENADIP</u> <u>-Confederación</u> <u>Nacional de</u> <u>personas con</u> <u>discapacidad</u> <u>del Peru</u> <u>Summary -</u> <u>Informe</u></p> <p>CONFENADIP -Confederación Nacional de personas con discapacidad del Peru - Summary <u>E-S</u></p> <p><u>Global</u> <u>Initiative To</u> <u>End All</u> <u>Corporal</u> <u>Punishment Of</u> <u>Children</u></p> <p><u>Human Rights</u> <u>Watch</u></p>		
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Ignacio Campoy Cervera

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Ignacio Campoy Cervera es profesor Titular de Universidad en la Universidad Carlos III de Madrid.

Licenciado en Derecho por la Universidad Autónoma de Madrid y Doctor en Derecho por la Universidad Carlos III de Madrid (Sobresaliente cum laude por unanimidad y Premio Extraordinario de Doctorado: Programa en Derecho: Programa de derechos fundamentales).

Responsable del Área de Filosofía del Derecho de la Universidad Carlos III de Madrid desde octubre de 2005.

Sus principales líneas de investigación versan sobre los derechos de los niños, los derechos de las personas con discapacidad, el concepto y fundamento de los derechos humanos, la historia de los derechos humanos, la Filosofía Política, la Igualdad y la No Discriminación, la Filosofía del Derecho y las relaciones entre los fascismos, el Estado de Derecho y los derechos fundamentales.

LA CONVENCIÓN SOBRE LOS DERECHOS DE LAS
PERSONAS CON DISCAPACIDAD DE NACIONES
UNIDAS

EDUCACIÓN INCLUSIVA

Getafe, 15-16 de diciembre de 2011

Ignacio Campoy Cervera
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Universidad Carlos III de Madrid

OBJETIVOS

Objetivos principales:

.- aclarar el significado,

.- la fundamentación

.- y las implicaciones del derecho a la educación inclusiva

METODOLOGÍA

Análisis desde la perspectiva filosófico jurídica:

- Del **concepto** de educación inclusiva a la luz de la evolución de los derechos de las personas con discapacidad
- De su **fundamentación**, partiendo de la especial vulnerabilidad de los niños con discapacidad (como ejemplifican algunos datos de la realidad), que tiene sus raíces en el mantenimiento de unos mitos perjudiciales para los niños con discapacidad, frente a los que se ha de actuar desde los derechos humanos y los valores que los fundamentan
- De los aspectos básicos de su reconocimiento y protección como **derecho**

El concepto de educación inclusiva

La educación inclusiva supone:

- que **todos** los niños **accedan** en igualdad de condiciones a la escuela ordinaria
- que en la escuela ordinaria **todos** los niños reciban una **educación de calidad**. Lo que implica:
 - que la educación esté **centrada en el niño**
 - que se realicen los **ajustes razonables** que sean necesarios para atender a las diferentes necesidades educativas de los distintos niños

El concepto de educación inclusiva

La educación inclusiva significa superar el modelo de “prescindencia” de la discapacidad, vinculado a la no educación de los niños con discapacidad o, en todo caso, a una educación segregada

El concepto de educación inclusiva

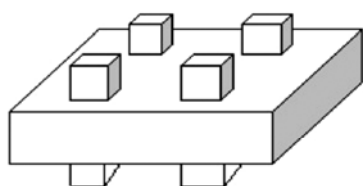
La educación inclusiva significa superar el modelo médico de la discapacidad, vinculado a una educación segregada o, en todo caso, una educación integrada

El concepto de educación inclusiva

La educación inclusiva es el resultado del modelo social de la discapacidad articulado desde el respeto a los derechos humanos

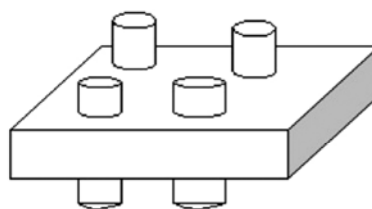
El concepto de educación inclusiva

Educación Especial



Niño especial
Clavos cuadrados para agujeros cuadrados
Profesores especiales
Colegios especiales

Educación "Normal"

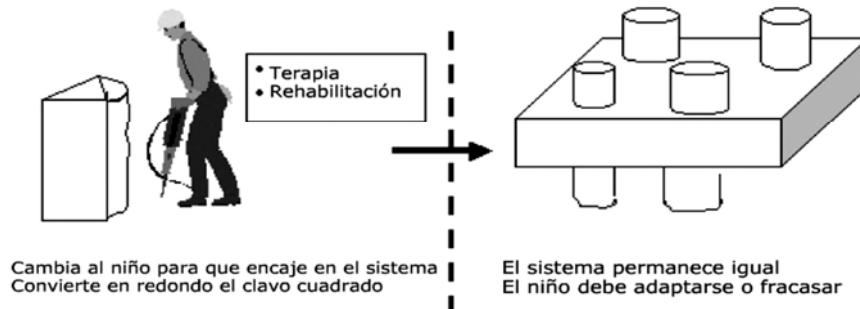


Niño 'normal'
Clavos redondos para agujeros redondos
Profesores 'normales'
Colegios 'normales'

Fuente: El impacto de la
Convención internacional sobre
los derechos de las personas
con discapacidad en la
legislación educativa española,
M.J. Alonso e I de Aracoz, Cermi

El concepto de educación inclusiva

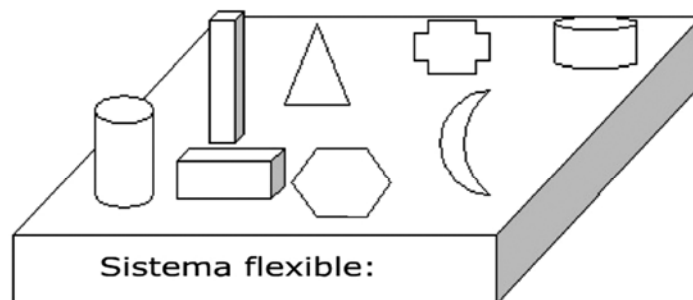
Educación Integrada



Fuente: El impacto de la Convención internacional sobre los derechos de las personas con discapacidad en la legislación educativa española, M.J. Alonso e I de Arazo, Cermi

El concepto de educación inclusiva

Educación Inclusiva



Los niños son diferentes.
Todos los niños pueden aprender.
Existen distintas capacidades, grupos étnicos,
tallas, edades, entornos familiares y géneros.
El sistema cambia para adaptarse al niño.

Fuente: El impacto de la Convención internacional sobre los derechos de las personas con discapacidad en la legislación educativa española, M.J. Alonso e I de Arazo, Cermi

La fundamentación de la educación inclusiva

La realidad: la vulnerabilidad de los niños con discapacidad

Los grupos especialmente vulnerables están formados por individuos, identificables por ciertas características personales, que se encuentran en una situación de especial indefensión en la sociedad, lo que lleva a su discriminación y exclusión social

- Los niños con discapacidad sufren, cuando menos, una doble exclusión social
- La importancia de los mitos en la discriminación de los grupos vulnerables
- La necesidad de superar los mitos y de reconocer y proteger derechos

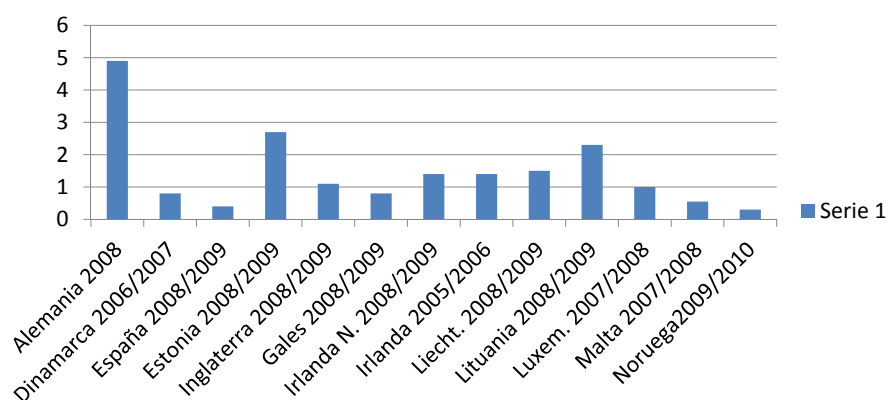
La fundamentación de la educación inclusiva

Algunos datos de la discriminación en el ejercicio del derecho a la educación:

- 75 millones de niños en edad de cursar la enseñanza primaria no están escolarizados
- Más de la mitad de los niños no escolarizados son niñas
- Siete de cada 10 de los niños no escolarizados viven en el África subsahariana o en Asia meridional y occidental
- Los niños con discapacidades son un tercio del total de niños sin escolarizar

Fuente: UNESCO

La fundamentación de la educación inclusiva



La fundamentación de la educación inclusiva

Es necesario terminar con los mitos según los cuales:

- Los niños con discapacidades no pueden recibir una educación de calidad, porque sus deficiencias se lo impiden
- La educación inclusiva atrasa el nivel educativo de los niños sin discapacidades
- La educación inclusiva es más costosa que la situación actual, con la coexistencia de los sistemas educativos ordinario y especial

La fundamentación de la educación inclusiva

La educación inclusiva tiene su fundamentación en los valores de la Ética pública de la Modernidad:

- .- Libertad

- .- Igualdad

- .- Solidaridad

La fundamentación de la educación inclusiva

El valor esencial es el de la libertad

Se entiende que la **libertad** de la persona es la que necesita para poder diseñar sus propios planes de vida y para poder actuar para la consecución de su efectiva realización, lo que supondrá el libre desarrollo de su propia personalidad

De esta manera, hay que entender que el deber de reconocer, respetar y proteger los **derechos humanos** se deriva de ese deber de reconocer, respetar y proteger que cada persona desarrolle, conforme a su voluntad, su propia concepción de lo que constituye su vida humana digna, sus propios planes de vida

La fundamentación de la educación inclusiva

El valor **igualdad** permite entender que esos derechos humanos se han de reconocer **para todos** los individuos de la sociedad, que han de poder ejercerlos en igualdad de condiciones para la consecución del libre desarrollo de sus propias personalidades

La fundamentación de la educación inclusiva

El valor **solidaridad** permite incorporar dimensiones novedosas y esenciales. Es conforme a este valor que se ha de entender que el **objetivo último común** de toda la sociedad es que el **mayor número de personas posible alcance al máximo nivel posible el libre desarrollo de sus diferentes personalidades**

La fundamentación de la educación inclusiva

Implicaciones del desarrollo normativo del valor solidaridad:

- La **importancia de la colectividad** para la construcción y para el desarrollo de nuestros propios planes de vida
- La posibilidad de exigir **sacrificios individuales** para la satisfacción de planes de vida de **otros individuos**
- La posibilidad de exigir **sacrificios individuales por** la satisfacción de los objetivos e intereses de **la colectividad** en su conjunto
- La importancia necesaria de contar con la **participación de todos** en todos los ámbitos de la vida social, política y jurídica

La fundamentación de la educación inclusiva

La educación inclusiva es necesaria:

- Para el adecuado desarrollo evolutivo y educativo del **niño con discapacidad**
- Para el adecuado desarrollo evolutivo y educativo del **niño sin discapacidad** que comparte la experiencia educativa con el niño con discapacidad
- Para la construcción de una **sociedad** más justa. Donde se respete el libre desarrollo de la propia personalidad de cada uno de sus miembros, su dignidad y sus derechos humanos

Algunos aspectos básicos del reconocimiento y protección del derecho a la educación inclusiva

La educación inclusiva es un derecho humano

- Los niños son titulares del derecho (último reconocimiento en el art. 24 CDPD)
- El ejercicio del derecho puede ser realizado por el propio niño o por sus padres (terceras personas competentes) con la debida participación del niño

Algunos aspectos básicos del reconocimiento y protección del derecho a la educación inclusiva

El ejercicio del derecho a la educación por los padres

- El **derecho** es de los **niños**
- La adecuada satisfacción del derecho exige el cumplimiento de **deberes** de los **padres**, de los que son titulares por su responsabilidad e idoneidad
- Esos deberes de los padres exigen el reconocimiento de potestades traducibles en **derechos "secundarios"**
- Esos derechos "secundarios" de los padres tienen correlativos **deberes "secundarios"** de los hijos y del Estado
- El Estado tiene el **deber** de dar satisfacción directa al derecho de los niños ha recibir una educación inclusiva y de calidad; el **deber** de dar satisfacción a los derechos "secundarios" de los padres; y un **deber** general de control y protección del derecho a la educación de todos los niños

Algunos aspectos básicos del reconocimiento y protección del derecho a la educación inclusiva

La educación inclusiva exige:

- La **participación activa** de los propios los niños (con y sin discapacidades), los profesores, los padres, los poderes públicos (especialmente las instituciones educativas) y el conjunto de la comunidad
- La **adaptación de los centros de educación ordinarios** a las nuevas exigencias de proporcionar una educación inclusiva de calidad a **todos** los alumnos (adaptaciones curriculares, planes de estudio, aulas, materiales, etc.)
- La **transformación de los centros de educación especial en centros de recursos** que sirvan para proporcionar conocimientos especializados y apoyo a todas las personas implicadas en la educación inclusiva, de forma especial ayudando a la adaptación de los centros de educación ordinarios en centros de educación inclusiva



<http://usuarios.discapnet.es/ajimenez>

Muchas gracias

Thank you very much

THE UNITED NATIONS CONVENTION ON THE
RIGHTS OF PERSONS WITH DISABILITIES

INCLUSIVE EDUCATION

Getafe, 15-16 December 2011

Ignacio Campoy Cervera
Lecturer with tenure in the Philosophy of Law
“Bartolomé de las Casas” Institute of Human Rights
Carlos III University of Madrid

OBJECTIVES

Principal objectives:

- .- to explain the meaning,
- .- the rationale
- .- and the legal implications of inclusive education

METHOD

Analysis from the perspective of legal philosophy:

- of the **concept** of inclusive education in the light of the evolving rights of persons with disabilities
- of its **rationale**, based on the particular vulnerability of children with disabilities (illustrated by some current data), which is rooted in the persistence of myths and prejudices about children with disabilities which must be countered through human rights and the values on which they are founded
- of the basic aspects of recognition and protection of this **right**

The concept of inclusive education

Inclusive education is based on the assumption that:

- **all** children can **access** regular schooling under equal conditions
- in regular schools **all** children are given a **quality education**.
This implies:
 - that the education is **child-centred**
 - that any necessary **reasonable accommodation** is made to respond to the different educational needs of different children

The concept of inclusive education

Inclusive education seeks to overcome the “non-participatory” model of disability, which implies not educating children with disabilities, or possibly placing them in segregated education

The concept of inclusive education

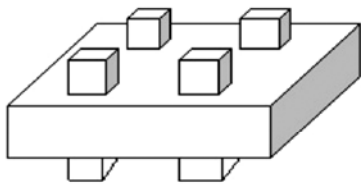
Inclusive education seeks to overcome the medical model of disability, which implies segregated education, or at any rate integrated education

The concept of inclusive education

Inclusive education is the result of a social model of disability, embedded in respect for human rights

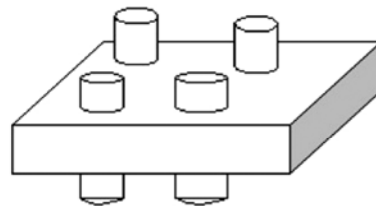
The concept of inclusive education

Special education



Special child
Square pegs for square holes
Special teachers
Special schools

'Normal' education

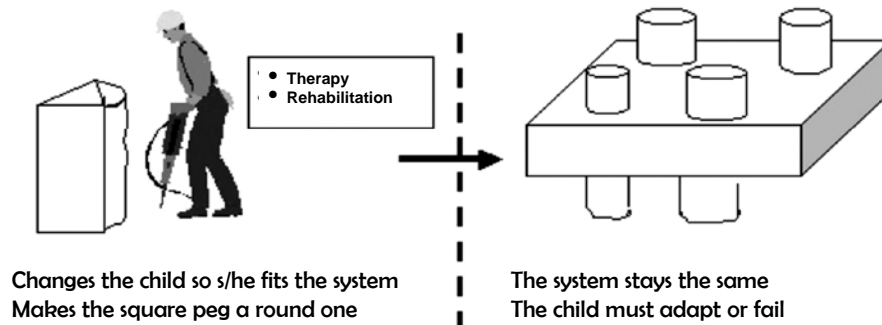


'Normal' child
Round pegs for round holes
'Normal' teachers
'Normal' schools

Source: El impacto de la Convención internacional sobre los derechos de las personas con discapacidad en la legislación educativa española, M.J. Alonso and I de Araoz, Cermi

The concept of inclusive education

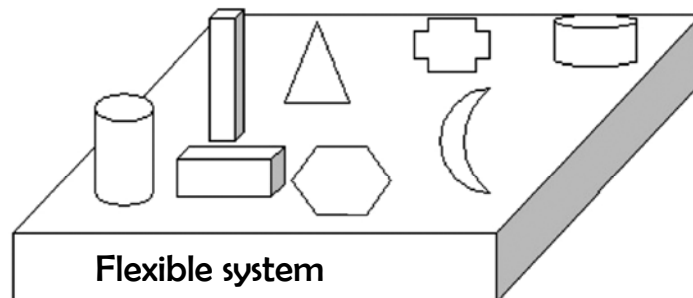
Integrated education



Source: El impacto de la Convención internacional sobre los derechos de las personas con discapacidad en la legislación educativa española, M.J. Alonso and I de Araoz, Cermi

The concept of inclusive education

Inclusive education



Children are different.
All children can learn.
There are different abilities, ethnic groups, sizes,
ages, family environments and genders.
The system adapts in response to the child.

Source: El impacto de la Convención internacional sobre los derechos de las personas con discapacidad en la legislación educativa española, M.J. Alonso and I de Araoz, Cermi

The rationale for inclusive education

The facts: vulnerability of children with disabilities

Vulnerable groups are composed of individuals identified by certain personal characteristics who are particularly unable to defend themselves within society, resulting in discrimination and social exclusion

- .- Children with disabilities suffer from social exclusion in at least two ways
- .- The role of myths in discrimination against vulnerable groups
- .- The need to overcome the myths and to recognise and protect rights

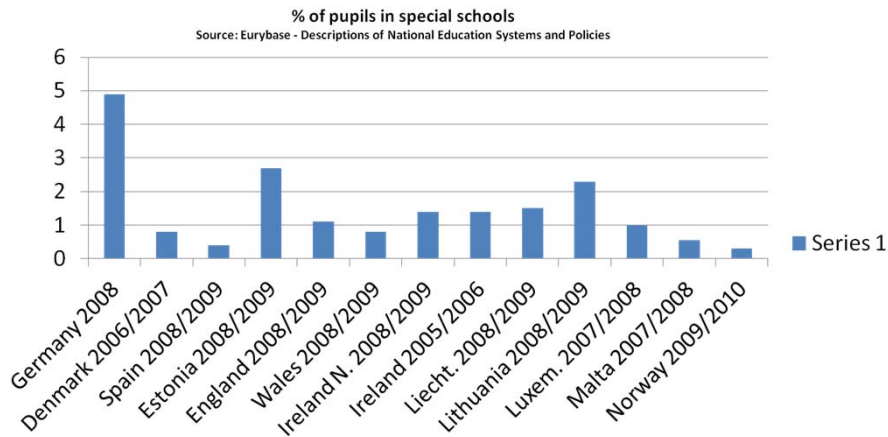
The rationale for inclusive education

Some data about discrimination in the exercise of the right to education:

- .- 75 million children of primary school age are not in school
- .- More than half the children not in school are girls
- .- Seven in ten of the children not in school live in sub-Saharan Africa or in Southern and Eastern Asia
- .- Children with disabilities account for a third of the children who are not being given an education

Source: UNESCO

The rationale for inclusive education



The rationale for inclusive education

It is time to do away with myths claiming that:

- .- Children with disabilities cannot be given a quality education as their impairments prevent them from learning
- .- Inclusive education holds back education standards among children without disabilities
- .- Inclusive education is more expensive than the current system, where the regular and special systems exist side by side

The rationale for inclusive education

Inclusive education is founded in the values of public ethics in the Modern era:

- .- Liberty

- .- Equality

- .- Solidarity

The rationale for inclusive education

The key value here is liberty

Individuals are understood to need **liberty** in order to be able to make their own plans for life and to be in a position to put these into practice, which is predicated upon the free development of one's own personality

Accordingly, we must conclude that the duty to recognise, respect and protect **human rights** derives from this duty to recognise, respect and protect the ability of each to develop, in accordance with their own will, their own conception of what constitutes a life in dignity – their own life plans

The rationale for inclusive education

Equality is the value which enables us to see that these human rights must be recognised **for all** individuals in society, who must be able to exercise them equally in order to achieve free personal development

The rationale for inclusive education

Solidarity is the value that enables us to incorporate new and essential dimensions. By accepting this value, we understand that the **ultimate common objective** for society as a whole is for the **largest possible number of people to achieve free personal development to the greatest possible degree**

The rationale for inclusive education

Implications of the development in law of the value of solidarity:

- The **importance of the collective** in enabling us to build and develop our own life plans
- The possibility of requiring **individual sacrifices** so that the life plans of **other individuals** may be satisfied
- The possibility of requiring **individual sacrifices** to satisfy the objectives and interests of the entire **collective**
- The vital importance of relying on the **participation of all** in all spheres of social, political and legal life

The rationale for inclusive education

Inclusive education is necessary:

- for the adequate development and education of **children with disabilities**
- for the adequate development and education of **children without disabilities** who share the education experience with children with disabilities
- for the construction of a **fairer society**, where the free personal development, dignity and human rights of every member are respected

Some basics about recognition and protection of the right to inclusive education

Inclusive education is a human right

- The holder of the right is the child (final acknowledgment in Art. 24 CRPD)
- The right may be exercised by the child, or by his/her parents (competent third parties) with the child's due participation

Some basics about recognition and protection of the right to inclusive education

Exercise of the right to education by parents

- It is the **child's right**
- Proper satisfaction of the right requires the **parents** to fulfil **duties** in which they are invested by dint of their responsibility and suitability
- These parental duties require the recognition of powers that can be translated into "**secondary rights**"
- These "secondary" rights held by the parents correlate with "**secondary**" **duties** on the part of the child and the State
- The State has the **duty** to satisfy the direct right of the child to receive an inclusive education of quality; the **duty** to satisfy the parents' "secondary" rights; and a general **duty** to monitor and protect the right of all children to an education

Some basics about recognition and protection of the right to inclusive education

Inclusive education requires:

- The **active participation** of the children themselves (with and without disabilities), the teachers, the parents, the public agencies (especially the educational institutions) and the community as a whole
- The **adaptation of regular schools** to meet the new demands of providing an inclusive education of quality to **all** pupils (adaptation of the curriculum, timetable, classrooms, materials, etc.)
- The **conversion of special schools into resource centres** for imparting specialist knowledge and support to everyone involved in inclusive education, with a special format to help regular schools function as places of inclusive education



We are all different but we all have the same rights.

<http://usuarios.discapnet.es/ajimenez>

Muchas gracias

Thank you very much

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SITUACION PROFESIONAL ACTUAL: Profesora Titular de Derecho Civil de la Universidad de Granada.- España.

ACTIVIDADES DE CARÁCTER CIÉNTIFICO O PROFESIONAL RELACIONADAS CON LA DISCAPACIDAD:

Patrona de la Fundación "Derecho y Discapacidad" (Publicado en el BOE 29 de junio de 2010 siendo Presidente D. Luis Cayo Pérez Bueno y Secretario Rafael de Lorenzo García.

Una de sus líneas de trabajo e investigación relacionada con el Derecho de la Persona, ha sido la Discapacidad. En concreto, entre sus publicaciones, conferencias y cursos destaca:

* Elaboración de la Legislación sobre Discapacidad, en la Colección Códigos Básicos, Editorial Thomson- Aranzadi. 1ª Edición, 2005.

* Coordinadora del Libro "Régimen Jurídico de las personas con discapacidad en España y en la Unión Europea".- Editorial: Comares, 2006.

* Conferencia "Retos Y Oportunidades de las personas con discapacidad" en el I Congreso Sobre Personas Con Discapacidad Física: Ciudadanía Activa Y Calidad De Vida (Fekoor). Bilbao, Mayo 2006.

* "Regulación específica de la discapacidad en el Ordenamiento local y en los Derecho Forales" en "Tratado sobre Discapacidad" dirigido por Rafael de Lorenzo García (Fundación ONCE) y Luis Cayo Pérez Bueno CERMI, Editorial Thomson-Aranzadi, Año, 2007.

* Participación en el Foro de Expertos sobre la Reforma del Procedimiento de Modificación de la Capacidad, celebrado el 20 de noviembre de 2007 en el Real Patronato de Discapacidad (Ministerio de Trabajo y Asuntos Sociales) Madrid.

* "La responsabilidad civil de las personas con discapacidad psíquica y mental". VIII Congreso Nacional sobre la responsabilidad civil y seguridad vial. Editorial Dykinson, Año, 2008.

* "La responsabilidad civil en el ámbito de la discapacidad" en la obra colectiva "Hacia un Derecho de la Discapacidad. (Estudios en Homenaje al Profesor Rafael de Lorenzo)" Editorial Thomson-Aranzadi, Año, 2009, Páginas, 525-545.

* Directora, entre otros Cursos del "Experto sobre Discapacidad (1ª Edición) (10/E/011). Propuesto por el Departamento de Derecho Civil de la Universidad de Granada. Fecha: octubre 2010 hasta abril de 2011.

* Directora del Master sobre Discapacidad y Dependencia (1ª Edición) propuesto por la Escuela de Posgrado de la Universidad de Granada. Fecha: octubre 2009/abril 2011.



*Seminario "La Convención
sobre los Derechos de las
Personas con Discapacidad
de Naciones Unidas"*

*Getafe (Madrid),
15-16 Diciembre 2011*

ACCESIBILIDAD

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I.- INTRODUCCIÓN

CONCEPTO y ENTORNOS DE LA ACCESIBILIDAD UNIVERSAL:

" La condición que deben cumplir los entornos, procesos, bienes, productos y servicios, así como los objetos o instrumentos, herramientas y dispositivos, para ser comprensibles, utilizables y practicables por todas las personas en condiciones de seguridad y comodidad y de la forma más autónoma y natural posible"

Se completa con el **art. 9.1 CDPD**: "A fin de que las personas con discapacidad **puedan vivir de forma independiente y participar plenamente** en todos los aspectos de la vida, los Estados partes adoptarán medidas pertinentes para asegurar el acceso de las personas con discapacidad, en igualdad de condiciones con las demás, al entorno físico, el transporte, la información y las comunicaciones, incluidos los sistemas y las tecnologías de la información y las comunicaciones, y a otros servicios o instalaciones de uso público, tanto en zonas urbanas como rurales"

II.- LA ACCESIBILIDAD UNIVERSAL Y EL MODELO SOCIAL DE DISCAPACIDAD

1. **Reconocimiento en el ordenamiento jurídico español en la Ley 51/2003 de Igualdad de Oportunidades, No Discriminación y Accesibilidad Universal de las personas con discapacidad (LIONDAU).**

MODELO SOCIAL / MODELO REHABILITADOR

Actitud integradora / Actitud protectora

Discapacidad: radica en la sociedad / Discapacidad: es un atributo personal

Transformar la sociedad / Cambiar la política de atención a la salud.

ACCESIBILIDAD -----> MODELO SOCIAL

La integración plena y activa de las personas con discapacidad, y su participación directa en todos los aspectos que afectan a sus propias vidas requiere su inclusión plena en la sociedad y conseguir la igualdad de oportunidades.

Para alcanzarla será necesario **la accesibilidad universal**, el diseño para todos, la transversalidad de las políticas, abarcando todas las áreas de la sociedad y de las actuaciones públicas.

II.- LA ACCESIBILIDAD UNIVERSAL Y EL MODELO SOCIAL DE DISCAPACIDAD (2)

2.- Configuración en la Convención sobre los Derechos de las Personas con Discapacidad (CDPD) de 2006 (entrada en vigor en España el 3 mayo 2008)

“La Convención debe ser **leída, interpretada y aplicada** siempre desde el prisma de la no discriminación. Antes de leer este instrumento, debemos “ponernos las gafas de la no discriminación” y ajustar esta visión a cada derecho en concreto o a cada norma en concreto que se esté analizando” (Agustina Palacios)

* La Accesibilidad como faceta del Principio de Igualdad: No accesibilidad implica discriminación.

Discriminación por motivos de discapacidad: “cualquier distinción, exclusión o restricción por motivos de discapacidad que tenga el propósito o el efecto de obstaculizar o dejar sin efecto el reconocimiento, goce o ejercicio, en igualdad de condiciones, de todos los derechos humanos y libertades fundamentales en los ámbitos político, económico, social, cultural, civil o de otro tipo. Incluye todas las formas de discriminación, entre ellas, la denegación de ajustes razonables” (art. 2 CDPD)

II.- LA ACCESIBILIDAD UNIVERSAL Y EL MODELO SOCIAL DE DISCAPACIDAD (3)

* Enfoque transversal: La Accesibilidad como principio (art. 3, f) y como derecho subjetivo (art. 9)

“ A fin de que las personas con discapacidad **puedan vivir en forma independiente y participar plenamente** en todos los aspectos de la vida, los Estados Partes adoptarán medidas pertinentes para **asegurar el acceso** de las personas con discapacidad, **en igualdad de condiciones** con las demás...”

* La Accesibilidad como medio de prevención de la discapacidad.

“Reconociendo la importancia de la accesibilidad al entorno físico, social, económico y cultural, a la salud y la educación y a la información y las comunicaciones, para que las personas con discapacidad **puedan gozar plenamente de todos los derechos humanos y sus libertades fundamentales**” (Preámbulo, v).

La ausencia de accesibilidad genera discapacidad.

Garantizando la accesibilidad se suprimen las causas sociales que concurren en la discapacidad conforme al Modelo Social.

III.- MECANISMOS JURÍDICO-SOCIALES PARA HACER EFECTIVA LA ACCESIBILIDAD

La accesibilidad universal (A TODOS LOS ENTORNOS Y PARA TODOS) es una **obligación normativa** establecida por las legislaciones de promoción y protección de los derechos de las personas con discapacidad.

1.- **EL DISEÑO PARA TODOS - UNIVERSAL:** "el diseño de productos, entornos, programas y servicios que puedan utilizar todas las personas, en la mayor medida posible, sin necesidad de adaptación ni diseño especializado". Se aclara que este diseño universal "no excluirá las ayudas técnicas para grupos particulares de personas con discapacidad, cuando se necesiten" (art. 2)

Es un concepto que va más allá de la simple accesibilidad con respecto a los edificios.

Es una ESTRATEGIA, una FILOSOFÍA, un MODUS VIVENDI : contribuye a la prevención y la eliminación de obstáculos para la integración plena.

III.- MECANISMOS JURÍDICO-SOCIALES PARA HACER EFECTIVA LA ACCESIBILIDAD (2)

2.- LOS AJUSTES RAZONABLES:

"las modificaciones y adaptaciones necesarias y adecuadas que no impongan una carga desproporcionada o indebida, cuando se requieran en un caso particular, para garantizar a las personas con discapacidad el goce o ejercicio, en igualdad de condiciones con las demás, de todos los derechos humanos"

Elementos constitutivos: (Pérez Bueno)

- 1.- Conducta positiva de actuación de transformación del entorno (**elemento fáctico de cambio**)
- 2.- La transformación ha de dirigirse a adaptar y hacer corresponder ese entorno a las necesidades específicas de las personas con discapacidad, en todas las situaciones concretas en que estas puedan hallarse, proporcionándoles una solución (**elemento de individualización y satisfacción de las particularidades**);
- 3.- Surge en aquellos casos no alcanzados por las obligaciones generales de protección de los derechos de las personas con discapacidad (**elemento de subsidiariedad**);

4.- Estas adecuaciones no han de comportar una carga desproporcionada para el sujeto obligado (**elemento del carácter razonable**);

"Para determinar si una carga es o no proporcionada se tendrán en cuenta los costes de la medida, los efectos discriminatorios que suponga para las personas con discapacidad su no adopción, la estructura y características de la persona, entidad u organización que ha de ponerla en práctica y la posibilidad que tenga de obtener financiación oficial o cualquier otra ayuda" (art.7 LIONDAU)

5.- En todo caso su finalidad es la de facilitar la accesibilidad o la participación de las personas con discapacidad en análogo grado que los demás miembros de la comunidad (**elemento de garantía del derecho a la igualdad**).

* **Son una medida específica – particular para alcanzar la Accesibilidad.**

* **El incumplimiento de la obligación es discriminación (art. 2)**

* **Son garantía y límite a los derechos de las personas con discapacidad**

IV.- MECANISMOS DE GARANTÍA Y PROTECCIÓN DE LA ACCESIBILIDAD.

1. - MECANISMO PREVISTO EN LA CDPD: Presentación de un informe al **Comité sobre los Derechos de las Personas con Discapacidad** (Art. 34).

El Comité hará las sugerencias y las recomendaciones oportunas respecto a los informes (Art. 36)

2.- Garantías generales por discriminación previstas en la LIONDAU: Régimen de infracciones y sanciones (Ley 49/2007).

3.- Mecanismos de control:

Defensor del Pueblo,
Defensor de las Personas con Discapacidad,
Consejo Nacional de la Discapacidad,
.....

4. - Mecanismo Extrajudicial: Sistema arbitral para personas con discapacidad (RD 1417/2006).

5.- .- Mecanismos Judiciales:

Jurisdicción civil, penal y contenciosa-administrativa.

El recurso de amparo ante el Tribunal Constitucional: art. 53.2 Constitución Española de 1978.

V.- CONCLUSIONES

Concienciación, formación

Normativa, normas técnicas y guías.

Promoción de la investigación, innovación y calidad.

Planes y programas

Promoción de la participación

Coordinar la diversidad de los sectores implicados y la complejidad de las interrelaciones precisas para la plena accesibilidad

Coordinar la dispersión competencial y administrativa, apoyada en la desestructuración y diversificación del poder público competente para organizar los cambios precisos.



Seminario "La Convención sobre los Derechos de las Personas con Discapacidad de Naciones Unidas"

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*Seminar "The United Nations
Convention on the Rights of
Persons with Disabilities"*

*Getafe (Madrid),
15-16 December 2011*

ACCESSIBILITY

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I - INTRODUCTION

CONCEPT AND BACKGROUND TO UNIVERSAL ACCESSIBILITY:

"The condition that must be met by environments, processes, goods, products and services, as well as devices or instruments, tools and mechanisms, to ensure that they can be understood, used and applied safely, conveniently, and as autonomously and naturally as possible, by everyone"

Complemented by **Article 9(1) CDPD**: "To enable persons with disabilities **to live independently and participate fully in all aspects of life**, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas."

II - UNIVERSAL ACCESSIBILITY AND THE SOCIAL MODEL OF DISABILITY

1. **Recognised in Spanish law through Act 51/2003 on Equality of Opportunity, Non-Discrimination and Universal Accessibility for Persons with Disabilities (LIONDAU)**

SOCIAL MODEL / REHABILITATION MODEL

Integration mind set / **Protective mind set**

Disability is rooted in society / Disability is a personal attribute

Transform society / Change health care policy

ACCESSIBILITY -----> **SOCIAL MODEL**

The full, active integration of persons with disabilities, and their direct participation in all aspects affecting their own lives, require their full inclusion in society and provision of equal opportunities.

Achieving this calls for **universal accessibility**, i.e. universal design and policy mainstreaming, reaching every area of society and public life.

II - UNIVERSAL ACCESSIBILITY AND THE SOCIAL MODEL OF DISABILITY (2)

2.- Design of the Convention on the Rights of Persons with Disabilities (CRPD) of 2006 (entered into force in Spain on 3 May 2008)

The Convention should always be **read, interpreted and applied** from the perspective of non-discrimination. Before reading this instrument, we should "put on our non-discrimination glasses" and adjust our vision for each specific right or rule that we are analysing" (Agustina Palacios)

* Accessibility as a facet of the Equality Principle:
non-accessibility implies discrimination.

Discrimination on the basis of disability: "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation"
(Art. 2 CDPD)

II - UNIVERSAL ACCESSIBILITY AND THE SOCIAL MODEL OF DISABILITY (3)

* Cross-cutting focus: accessibility as a principle (Art. 3 (f)) and as a subjective right (Art. 9)

“ To enable persons with disabilities **to live independently and participate fully** in all aspects of life, States Parties shall take appropriate measures to **ensure** to persons with disabilities **access, on an equal basis** with others...”

* Accessibility as a means of preventing disability

“Recognizing the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to **fully enjoy all human rights and fundamental freedoms**” (Preamble, v).

The absence of accessibility generates disability.

Ensuring accessibility eliminates the social factors which, according to the social model, combine to create disability.

III – MECHANISMS IN SOCIAL LEGISLATION FOR MAKING ACCESSIBILITY EFFECTIVE

Universal accessibility (FOR EVERYONE TO ALL ENVIRONMENTS) is a legal obligation established by laws enacted to promote and protect the rights of persons with disabilities.

1 - **UNIVERSAL DESIGN:** "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". The provision specifies that this universal design "shall not exclude assistive devices for particular groups of persons with disabilities where this is needed" (Art. 2)

This is a concept that goes beyond simple access to buildings.

It is a STRATEGY, a PHILOSOPHY, a MODUS VIVENDI: it helps to prevent and eliminate obstacles to full integration.

III - MECHANISMS IN SOCIAL LEGISLATION FOR MAKING ACCESSIBILITY EFFECTIVE (2)

2 - REASONABLE ACCOMMODATION: "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"

Constituent factors: (Pérez Bueno)

- 1.- Positive behaviour to transform the environment (factor: **creating facts on the ground**)
- 2.- This transformation must aim to adapt and match the environment to the specific needs of persons with disabilities, in all the specific situations they may find themselves in, offering them a solution (factor: **personalising and satisfying particular needs**);
- 3.- There will be cases beyond the reach of general obligations to protect the rights of persons with disabilities (factor: **subsidiarity**);

4.- The accommodation should not incur a disproportionate burden for the subject under obligation (factor: **reasonable nature**);

"In determining whether a burden is disproportionate or not, account will be taken of the costs of the measure, the discriminatory effects that its non-adoption can be assumed to have for persons with disabilities, the structure and characteristics of the person, entity or organisation who must apply it, and the possibility of obtaining official funding or other assistance" (Art.7 LIONDAU)

5.- The aim, whatever the case, is to facilitate accessibility for or participation by persons with disabilities concordant with that enjoyed by the other members of the community (factor: **ensuring the right to equality**).

* **These are specific measures – with the particular aim of achieving accessibility.**

* **Failure to comply with the obligation is discrimination (Art. 2)**

* **They guarantee and delineate the rights of persons with disabilities**

IV - MECHANISMS TO GUARANTEE AND PROTECT ACCESSIBILITY

1 – MECHANISM PROVIDED FOR IN THE CRPD: Presentation of a report to the **Committee on the Rights of Persons with Disabilities** (Art. 34).

The Committee will make appropriate proposals and recommendations in response to reports (Art. 36)

2 – General guarantees against discrimination provided for in LIONDAU: **system of offences and penalties** (Act 49/2007)

3 – **Mechanisms for scrutiny:**
Ombudsperson,
Defender of Persons with Disabilities,
National Council on Disability,

4 – Extra-judicial mechanism:
Arbitration system for persons with disabilities (Royal Decree 1417/2006)

5 – Judicial mechanisms:
Civil, criminal and administrative courts
Appeal before the Constitutional Court: Art. 53(2) of the Spanish Constitution of 1978

V- CONCLUSIONS

Awareness raising, training

Laws, technical rules and guidelines

Promotion of research, innovation and quality

Plans and programmes

Promotion of participation

Coordination for diversity of sectors concerned and complexity of specific interrelationships for full accessibility

Coordination for broadly spread competences and administrative roles, based on deconstruction and diversification of public agencies competent to organise specific changes



Seminar "The United Nations Convention on the Rights of Persons with Disabilities"

*Getafe (Madrid),
15-16 December 2011*

ACCESSIBILITY

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Seminario “La Convención sobre los Derechos de las Personas con Discapacidad de Naciones Unidas”

Getafe (Madrid), 15-16 de diciembre 2011

ACCESIBILIDAD

Esperanza Alcázar Martínez
Profesora Titular de la Universidad de Granada
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I - INTRODUCCIÓN:

Concepto de Accesibilidad Universal.

Entornos a los que se aplica: edificación y urbanismo, servicios de información y comunicación, transporte, servicios e instalaciones abiertos al público (ocio, consumo...)

II - LA ACCESIBILIDAD UNIVERSAL EN EL MODELO SOCIAL DE DISCAPACIDAD

1. Reconocimiento en el ordenamiento jurídico español en la Ley 1/2003 de Igualdad de Oportunidades, No Discriminación y Accesibilidad Universal de las personas con discapacidad (LIONDAU).
2. Configuración en la Convención sobre los Derechos de las Personas con Discapacidad (CDPD) de 2006 (entrada en vigor en España el 3 de mayo de 2008):

La Accesibilidad como faceta del Principio de Igualdad: No accesibilidad implica discriminación.

La Accesibilidad como principio y como derecho subjetivo: Enfoque transversal.

La Accesibilidad como medio de prevención de la discapacidad.

III - MECANISMOS JURÍDICOS-SOCIALES PARA HACER EFECTIVA LA ACCESIBILIDAD

- 1.- El diseño para todos.
- 2.- Los ajustes razonables.

I - MECANISMOS DE GARANTÍA DE LA PROTECCIÓN DE LA ACCESIBILIDAD

1. Mecanismo previsto en la CDPD: Comité sobre los Derechos de las Personas con Discapacidad (Art. 34).
2. Garantías generales por discriminación previstas en la LIONDAU: Régimen de infracciones y sanciones (Ley 49/2007).
3. Mecanismos de control: Defensor del Pueblo, Defensor de las Personas con Discapacidad, Consejo Nacional de la Discapacidad,
4. Mecanismo Extrajudicial: Sistema arbitral para personas con discapacidad (RD 1417/2006).
 - . Mecanismos Judiciales: jurisdicción civil, penal y contenciosa-administrativa. El recurso de amparo ante el Tribunal Constitucional.

- CONCLUSIONES

Concienciación, formación

Normativa, normas técnicas y guías.

Promoción de la investigación, innovación y calidad.

Planes y programas

Promoción de la participación

Coordinar la diversidad de los sectores implicados y la complejidad de las interrelaciones precisas para la plena accesibilidad

Coordinar la dispersión competencial y administrativa, apoyada en la desestructuración y diversificación del poder público competente para organizar los cambios precisos.

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Eilionóir Flynn

Dr Eilionóir Flynn

Eilionóir is the Senior Research Fellow at the Centre for Disability Law and Policy, National University of Ireland Galway. Her interest in disability law stemmed from a broader interest in social justice and a recognition of the invisibility of people with disabilities at the time in broader human rights discourse. Her current passions in this field include assisted and supported decision-making, rights-enforcement mechanisms and access to justice. She obtained her PhD in 2010 from University College Cork, and her thesis explored the potential of a right to advocacy to improve access to justice for people with disabilities, based on international human rights norms. She has recently published her first book on National Disability Strategies with Cambridge University Press.

Access to Justice – UN CRPD and EU Law



Dr. Eiliónóir Flynn
Centre for Disability Law and Policy
National University of Ireland Galway

Overview

- ⊗ What do people with disabilities require to ensure effective access to justice?
- ⊗ Article 13, Convention on the Rights of Persons with Disabilities
- ⊗ EU Law on access to justice: accessibility, participation and administration of justice
- ⊗ Next steps: division of competencies

Effective Access to Justice

"Access to justice" is a broad concept, encompassing people's effective access to the systems, procedures, information, and locations used in the administration of justice. People who feel wronged or mistreated in some way usually turn to their country's justice system. In addition, people may be called upon to participate in the justice system, for example, as witnesses or as jurors in a trial. Unfortunately people with disabilities have often been denied fair and equal treatment before courts, tribunals, and other bodies that make up the justice system in their country because they have faced barriers to their access. Such barriers not only limit the ability of people with disabilities to use the justice system, but also limit their contributions to the administration of justice.

The ability to access justice is of critical importance in the enjoyment of all other human rights. For example, a person with a disability who feels that she or he has been denied the right to work may wish to turn to the justice system to seek a remedy. However, if the justice system fails to accommodate their physical, communication, or other disability-related needs, and/or expressly discriminates against her or him, then clearly denial of access to the justice system also results in denial of protection of the right to work. Similarly, a person with a disability who has been the victim of a crime may wish to report the crime to the police and press charges against the offender. However, if he or she is denied physical access to the police station, clear communication with the police, or access to information that is understandable, then that person may not be able fully to exercise her or his rights as a victim. These examples demonstrate that human rights are **indivisible, interdependent, and interconnected**.

Janet Lord, et al, Human Rights Yes! Action and Advocacy on the Rights of Persons with Disabilities (2009)

Three key components

- ⊗ Substantive justice which concerns itself with an assessment of the rights claims that are available to those who seek a remedy
- ⊗ Procedural aspects which focus on the opportunities and barriers to getting ones claim into court (or other dispute resolution forum)
- ⊗ Symbolic component of access to justice which steps outside of doctrinal law and asks to what extent a particular legal regime promotes citizens' belonging and empowerment

Substantive Justice

- ⊗ People with disabilities have a right to an effective remedy where they have been discriminated against on the basis of disability
- ⊗ Realms of employment, access to goods and services (including transport, education, social services, etc.), general equality/human rights claims
- ⊗ Presupposition: people with disabilities are recognised as persons before the law and entitled to make a claim in their own right

A Just Outcome?

In Re Marion (1992)

For the above reasons, which look to the risks involved in the decision, particularly in relation to the threshold question of competence and in relation to the consequences of a wrong assessment, our conclusion is that the decision to sterilise a minor in circumstances such as the present falls outside the ordinary scope of parental powers and therefore outside the scope of the powers, rights and duties of a guardian under section 63E(1) of the Family Law Act. This is not a case where sterilisation is an incidental result of surgery performed to cure a disease or correct some malfunction. Court authorisation in the present case is required.

Sinnott (2001)

I wish to emphasise that this is not a case in which the law has no remedy for the Plaintiff on the fraught and moving question of what is to be done for him in the future. This is a case where, in my view, the Plaintiff is not entitled to succeed in the single, limited avenue which, to the exclusion of all others, was pursued on his behalf. In particular, recent statutory provisions have effected a revolution in educational legislation which will undoubtedly be explored by some person with grievances about educational services, but this has not been done here. Similarly, the Court retains its wide jurisdiction to ascertain and enforce the rights of individuals, whatever their origin in law or in the Constitution.

Procedural Justice

- ⊗ Barriers getting claim into court include:
- ⊗ Physical, structural (legal process),
- ⊗ Communicative/language barriers,
- ⊗ Information and advice barriers
- ⊗ Prohibitive cost, uncertain outcomes
- ⊗ Finding the 'right' plaintiff
- ⊗ Court/tribunal setting not appropriate

Some people with disabilities face insurmountable obstacles to accessing justice. The authors of this text have visited institutions in countries which have ratified the Convention where there are obvious abuses taking place against people with mental health problems or intellectual disabilities. A benevolent human rights lawyer visiting such institutions may be in the frustrating position of not being able to do anything if the person with disabilities lacks the capacity to instruct a lawyer. In some countries, the director or staff member of the institution is also the guardian, a situation which creates an obvious conflict of interests.

Bartlett, Lewis and Thorold, *Mental Disability and the European Convention on Human Rights* (2007)

Symbolic Justice

- ⊗ Involvement of civil society (and DPOs) in bringing about a just society for PWD
- ⊗ Participation of PWD in all aspects of the justice system: witnesses, lawyers, judges
- ⊗ Role of the academy in promoting symbolic justice?

In my time doing social justice work, I have found that disability is something most people know very little about—and that includes seasoned, fierce and well-respected community organizers and activists. People usually think of disability as an individual flaw or problem, rather than as something partly created by the world we live in. It is rare that people think about disability as a political experience or as encompassing a community full of rich histories, cultures and legacies.

Mia Mingus, *Challenging the Framework: Disability Justice*
(2010)

Article 13 CRPD

- ⊗ 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
- ⊗ 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Negotiation: Third Session

Article 5: Obligations in relation to remedies

Each State Party to this Convention undertakes: To ensure that any person or class of persons whose rights or freedoms recognized in the Convention are violated shall have an effective remedy, whether the violation has been committed by persons or entities acting in an official capacity or by private persons or entities; To ensure that any person claiming such a remedy shall have his or her right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, including as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination; and To ensure that the competent authorities shall enforce such remedies when granted. States Parties recognize that access to effective remedies may require the provision of free legal assistance to persons with disabilities and the modification or flexible application of existing laws and practice regulating matters of procedure and evidence.

Negotiation: Fourth Session

- ❖ Draft Article 9: Recognition as a Person before the Law
- ❖ States Parties shall: recognise persons with disabilities as individuals with rights before the law equal to all other persons;
- ❖ ensure that persons with disabilities who experience difficulty in asserting their rights, in understanding information, and in communicating, have access to assistance to understand information presented to them and to express their decisions, choices and preferences, as well as to enter into binding agreements or contracts, to sign documents, and act as witnesses; ³⁴

Negotiation: Fifth Session

- ⊗ During the discussion of draft article 9, considerable support was expressed for the inclusion in the convention of language that would guarantee persons with disabilities access to justice. Most delegations supported the inclusion of the language in a separate article. A number of delegations met informally to elaborate a proposal to include, as draft article 9 bis, the following: “States parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, facilitating their effective role as direct and indirect participants in all legal proceedings, including the investigative and other preliminary stages.”

EU Law: Art 21, CFR & 78/2000

- ⊗ Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, **disability**, age or sexual orientation shall be prohibited.
- ⊗ In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided

Employment Discrimination and Access to Justice

- ⊗ Article 9(1) of the Employment Equality Directive
- ⊗ *“Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them...”*

Art 47, Charter Fundamental Rights

- ⊗ Right to an effective remedy and to a fair trial
- ⊗ Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
- ⊗ Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
- ⊗ Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

EU Disability Strategy 2010-2020

- ⊗ Areas for action: accessibility, equality, participation, education (including training of judiciary, legal professionals, etc.)
- ⊗ *There is not much quantitative Europe-wide information about rights such as equal recognition before the law (Article 12) and access to justice (Article 13), but there are clear indications that this is a key problem area.*
- ⊗ *There is evidence that judicial buildings are still barely accessible and that justice personnel are not properly trained to provide an appropriate service and to cover the needs of people with disabilities (this is particularly true for women with disabilities). Round-table panellists at the Conference of State Parties to the UNCRPD in September 2009 underlined the importance of equal legal rights and access to justice. These problem areas have also been identified as priorities by the High Level Group on Disability. The area of legal rights and access to justice is therefore of key importance in the new strategy*

Next steps: Division of Competencies

EU

- ⊗ Substantive: remedies beyond employment context – accessibility legislation?
- ⊗ Procedural: ensure ECJ processes accessible
- ⊗ Symbolic: Affirming the inclusion and empowerment of PWD

Member States

- ⊗ Substantive: remedies in all aspects of discrimination, equality, human rights
- ⊗ Procedural: all procedures of justice – from reporting/investigative stages to post-trial procedures accessible
- ⊗ Symbolic: Encouraging involvement of PWD in ensuring a 'just' society

Resources

- ⊗ http://fra.europa.eu/fraWebsite/research/projects/proj_essingjustice_en.htm
- ⊗ <http://sites.google.com/site/womenenabled/access-to-justice>
- ⊗ <http://www1.umn.edu/humanrts/edumat/hreduseries/TB6/index2.html>
- ⊗ <http://www.un.org/disabilities/default.asp?id=1423>

Alexander Hoefmans

ALEXANDER HOEFMANS



Alexander Hoefmans holds a law degree from Ghent University and holds both a postgraduate degree in international relations and conflict management (Catholic University of Leuven) and in Eastern European studies (Ghent University and Catholic University of Leuven). He obtained his degrees magna cum laude.

He is working as a Human Rights Advisor at the Belgian Ministry of Justice and in that capacity primarily deals with the negotiation of international human rights treaties or instruments, their implementation at national level as well as the reporting procedures before the UN and Council of Europe committees. He is also involved in the setting up of various national independent committees in the field of human rights (children's rights, prevention of torture, national human rights commission). He is a national liaison officer to the European Commission against Racism and Intolerance of the Council of Europe as well as to the Fundamental Rights Agency of the European Union. He is also Co-Agent of the Belgian government to the European Court of Human Rights and deals in this capacity with the Belgian case law before the European Court. Last year he presided over the Working group on Fundamental Rights of the Council of Ministers during the Belgian EU Presidency This Working group has been dealing, among others, with the EU accession to the European Convention on Human Rights since January 2010. He was also part of the Presidency team responsible for the negotiations on the CRPD Code of Code and the ratification of the CRPD by the EU.

He joined the Research group on Fundamental Rights and Constitutionalism at the Free University of Brussels in 2008 as a freelance researcher. His main areas of interest are the internal fundamental rights policy of the European Union, the case law of the European Court of Human Rights, human rights and counter-terrorism measures, national and regional monitoring mechanisms and more recently the United Nations Convention on the Rights of Persons with Disabilities.

Implementation and Monitoring of the UN CRPD at State and EU Level

Obligations and Challenges

ERA – EFC Seminar
Madrid, 15-16 December 2011

Alexander HOEFMANS
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	Country	Convention Signature Date	Protocol Signature Date	Convention Ratification Date	Protocol Ratification Date
1.	Austria	30-3-2007	30-3-2007	26-9-2008	26-9-2008
2.	Belgium	30-3-2007	30-3-2007	2-7-2009	2-7-2009
3.	Bulgaria	27-9-2007	18-12-2008		
4.	Croatia	30-3-2007	30-3-2007	15-8-2007	15-8-2007
5.	Cyprus	30-3-2007	30-3-2007	27-6-2011	27-6-2011
6.	Czech Republic	30-3-2007	30-3-2007	28-9-2009	
7.	Denmark	30-3-2007		24-7-2009	
8.	Estonia	25-9-2007			
9.	Finland	30-3-2007	30-3-2007		
10.	France	30-3-2007	23-9-2008	18-2-2010	18-2-2010
11.	Germany	30-3-2007	30-3-2007	24-2-2009	24-2-2009
12.	Greece	30-3-2007	27-9-2010		
13.	Hungary	30-3-2007	30-3-2007	20-7-2007	20-7-2007
14.	Ireland	30-3-2007			
15.	Italy	30-3-2007	30-3-2007	15-5-2009	15-5-2009

16.	Latvia	18-7-2008	22-1-2010	1-3-2010	31-8-2010
17.	Lithuania	30-3-2007	30-3-2007	18-8-2010	18-8-2010
18.	Luxembourg	30-3-2007	30-3-2007	26-9-2011	26-9-2011
19.	Malta	30-3-2007	30-3-2007		
20.	Netherlands	30-3-2007			
21.	Poland	30-3-2007			
22.	Portugal	30-3-2007	30-3-2007	23-9-2009	23-9-2009
23.	Romania	26-9-2007	25-9-2008	31-1-2011	
24.	Slovakia	26-9-2007	26-9-2007	26-5-2010	26-5-2010
25.	Slovenia	30-3-2007	30-3-2007	24-4-2008	24-4-2008
26.	Spain	30-3-2007	30-3-2007	3-12-2007	3-12-2007
27.	Sweden	30-3-2007	30-3-2007	15-12-2008	15-12-2008
28.	United Kingdom of Great Britain and Northern Ireland	30-3-2007	26-2-2009	8-6-2009	7-8-2009
	(Source: UN Enable)			19 (+1)	16 (+1)

1. Transcending the legalistic approach of human rights

- Classic objectives and ingredients

...but

- Personifying human rights

→ *a functional and pragmatic approach*

→ *proliferation of human rights instruments?*

- Paradigm shifts

→ *conceptual*

→ *structural*

2. Obligations to facilitate implementation and monitoring

- Structural framework of implementation and monitoring
- Goals:
 - organise yourself internally as efficiently and transparently as possible for effective implementation
 - creating visibility and involvement for PWD and representative organisations in their relations with government
- Attention for all actors concerned:
 - 33, §1 political and administrative level
 - 33, §2 independent monitoring framework
 - 33, §3 civil society

Article 33 (1) CRPD: Focal Point

- *"States Parties, in accordance with their system of organisation shall designate one or more focal points within government for matters relating to the implementation present Convention[...]"*
- Double purpose:
 - *legitimate place on the political agenda*
 - *administrative tool to advance the rights of PWD*
- Mapping exercises, mainstreaming, national action plans,...
- Applying the human rights approach?

Article 33 (1) CRPD: Focal Point Trends

- **Austria:** Federal Ministry of Labour, Social Affairs and Consumer Protection (BMASK);
- **Belgium:** Directorate-General for Strategy and Research of the Ministry of Social Affairs;
- **Czech Republic :** Ministry of Labour and Social Affairs;
- **Denmark:** Ministry of Social Affairs;
- **France:** /
- **Germany:** Federal Ministry for Labour and Social Affairs (BMAS);
- **Hungary:** Ministry of National Resources;
- **Italy:** Directorate-General for Inclusion, Social Rights and Social Responsibility of the Ministry of Labour and Social Policies;
- **Latvia:** Ministry of Welfare;
- **Lithuania:** Ministry of Social Security and Labour;
- **Portugal:** /
- **Romania:** Directorate-General for the Protection of Persons with Disabilities of the Ministry of Labor, Family and Social Protection (DGPPH);
- **Slovenia:** Directorate for Persons with Disabilities of the Ministry of Labour, Family and Social Affairs;
- **Spain:** Directorate-General for the Coordination of Sectoral Policies on Disability of the Ministry of Health, Social Policy and Equality;
- **Sweden:** Family and Social Services Division of the Ministry of Health and Social Affairs;
- **United Kingdom:** Office for Disability Issues (cross-governmental body).

(source: OHCHR study on the Implementation of the CRPD in Europe, November 2011)

Article 33 (1) CRPD: Coordination Mechanism

- *"[The States Parties] ... shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels."*
- Double purpose:
 - *internal dimension*
 - *external dimension*
- Role may depend on the nature of the State system
- Joined-up governance?

Article 33 (1) CRPD: Coordination Mechanism Trends

- **Focal point = Coordination mechanism:** Austria, Belgium (partially), Czech Republic, Italy, Romania, United Kingdom
- **Separate Coordination mechanism:** Denmark, France (no information on focal point), Germany, Spain, Sweden
- **Advisory bodies:**
 - no coordination mechanism: Latvia, Portugal, Slovakia
 - supplementing focal points and coordination mechanism: Austria, Czech Republic, Romania

(source: OHCHR study on the Implementation of the CRPD in Europe, November 2011)

3. Obligations to facilitate monitoring

- *“States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, **a framework, including one or more independent mechanisms**, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.”*

Article 33 (2) CRPD : Independent Mechanisms

- Taking into account the Paris Principles:
 - *Independence*
 - *Pluralism*
 - *Mandate*
- National human rights institutions v. separate independent mechanisms
- Interaction with focal points, coordination mechanisms and civil society

Article 33 (2) CRPD: Monitoring Framework Trends

- **National Human Rights Institution:** Denmark, Germany, United Kingdom (+ Scotland and Northern Ireland)
- **Ombudsman:** Latvia, Lithuania, Denmark,
- **Equality body:** Belgium, UK (Northern Ireland)
- **Other institutions:**
 - **new:** Austria (Independent Monitoring Committee), Italy (National Observatory on the Situation of Persons with Disabilities), Slovenia (Council for Persons with Disabilities)
 - **existing:** Spain (Committee of Representatives of People with Disabilities), Hungary (National Council of Disability), Lithuania (Council for Disability Affairs)
- **Framework:** United Kingdom, Lithuania

(source: OHCHR study on the Implementation of the CRPD in Europe, November 2011)

4. CRPD ratification by the EU

- ... Participation of the European Community in the negotiations
- ... The European Community signs the CRPD on 30th March 2007
- ... Council Decision of 26 November 2009 concerning the conclusion by the EC of the CRPD
- ... Conclusion of the Code of conduct on 15 December 2010
- ... Depositing the instruments of formal confirmation on 23 December 2010
- ... CRPD enters into force on 22 January 2011
- ... Future: conclusion of the Optional Protocol?

Implementation and Monitoring challenges at EU level

- Precedent since Lisbon Treaty
- EU as a "State Party" on equal footing?
 - *Council decision of 26 November 2009*
 - *Annex II*
 - *Appendix*
 - *Code of Conduct*
- Challenges to:
 - *Implementing the CRPD*
 - *Monitoring the CRPD*

Article 33 (1) CRPD applied to the EU – functioning

- Designation within “government” for implementation purposes
 - *the Commission as focal point*
 - *coordination mechanism?*
 - *Disability High Level Group?*

- Applying the Code of Conduct
 - *reporting procedure*
 - *common positions before CRPD bodies*
 - *EU member of the CRPD Committee*

Article 33 (2) CRPD applied to the EU – framework

- Maintain, strengthen, designate or establish

- Single institution v. framework

- Potential actors
 - *the Fundamental Rights Agency*
 - *the European Ombudsman*
 - *the Court of Justice of the EU*
 - *the European Parliament (Petitions Committee)*
 - *the European associations representing PWD*
 - *the European Commission*

CRPD and the EU – a driver for change?

- New dynamic to the Union's disability rights agenda?

 - formally: no change in transfer of competences, nor in division of competences

 - practically: internal and external dynamic

 - 1) *internal leverage*

 - 2) *external driver for change*

 - 3) *global player*

 - 4) *network of networks*

- Applying the human rights approach?

COUNCIL

Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities

(2010/C 340/08)

Recalling that Articles 3 and 4 of Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities⁽¹⁾, provide for the need to agree on a Code of Conduct before the deposition of the instrument of formal confirmation on behalf of the Union,

Recalling that pursuant to the aforementioned Articles of Decision 2010/48/EC, the Code of Conduct will set out detailed arrangements for the implementation of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter 'the Convention') by the Union, including for the Commission's role as focal point for the implementation of the Convention on behalf of the Union; for the representation of the Union at meetings of the bodies created by the Convention; for the representation of the Union's position at such meetings; as well as for the close cooperation at such meetings, in particular as far as the questions of monitoring, reporting and voting arrangements are concerned,

In addition, the provisions in this Code of Conduct which deal with matters of coordination between the Council, the Member States and the Commission are to be considered as part of the coordination mechanism mentioned in Article 33.1 of the Convention,

Bearing in mind the requirement of unity of the international representation of the Union and its Member States in accordance with the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) and the case-law of the Court of Justice of the European Union also at the stage of implementation of international obligations,

THE COUNCIL, THE MEMBER STATES AND THE COMMISSION AGREE ON THE FOLLOWING CODE OF CONDUCT:

NATURE AND SCOPE OF THE CODE

1. (a) This Code of Conduct sets out the arrangements between the Council, the Member States and the Commission on cooperation on various aspects of the implementation of the Convention, adopted by the United Nations General Assembly in New York on 13 December 2006.

Without prejudice to a general duty of close cooperation, the Code will apply to preparation of and participation in meetings of the bodies created by the Convention.

- (b) The Code lays down the details of the function of focal point.

DIVISION OF TASKS BASED ON COMPETENCE

2. The Union institutions and the Member States will ensure close cooperation in the implementation of the Convention, bearing in mind the principles of sincere cooperation, subsidiarity and the need to respect the different competences of the Union institutions and the Member States as established by the Treaties, and bearing in mind that the scope and exercise of the Union's competence are, by their nature, subject to continuous development.
3. On matters falling within the competence of the Member States, the Member States will aim at elaborating coordinated positions whenever it is deemed appropriate.
4. On matters falling within the Union's exclusive competence, the Union will aim at elaborating Union positions, in particular in relation to:
 - (a) the compatibility of State aid with the internal market (Article 108 TFEU, ex Article 88 EC);
 - (b) the common custom tariff (Article 31 TFEU, ex Article 26 EC);
 - (c) its own public administration (Article 336 TFEU, ex Article 283 EC);
 - (d) any other matter to the extent that provisions of the Convention or legal instruments adopted in implementation thereof affect or alter common rules previously established by the Union in accordance with Article 3(2) of the TFEU.

5. On matters falling within shared competence and on matters where the Union coordinates, supports and/or supplements the actions of the Member States, the Union and the Member States will aim at elaborating common positions, in particular in relation to:

- (a) legislative acts included in the Appendix to the Declaration of Competence annexed to Decision 2010/48/EC or new acts or policy measures taken within the sphere of:

— action to combat discrimination on the ground of disability (Article 19 TFEU, ex Article 13 EC),

⁽¹⁾ OJ L 23, 27.1.2010, p. 35.

- free movement of goods, persons, services and capital (Articles 28-32, 34-37 TFEU, ex Articles 23-31 EC, and Articles 45-66 TFEU, ex Articles 39-60 EC),
 - agriculture (Articles 42-43 TFEU, ex Articles 36-37 EC),
 - transport by rail, road, sea and air transport (Article 91 TFEU, ex Article 71 EC and Article 100 TFEU, ex Article 80 EC),
 - taxation (Article 113 TFEU, ex Article 93 EC),
 - internal market (Articles 114-115 TFEU, ex Articles 94-95 EC),
 - equal pay for male and female workers (Article 157 TFEU, ex Article 141 EC),
 - trans-European network policy (Articles 170-172 TFEU, ex Articles 154-156 EC),
 - statistics (Articles 337-338 TFEU, ex Articles 284-285 EC);
- (b) Union legal acts or policy measures, where there is close and substantial connection with the implementation of the Convention, and taken within the sphere of:
- employment (Articles 145-150 TFEU, ex Articles 125-130 EC),
 - development of quality of education and implementation of a vocational training policy (Articles 165-166 TFEU, ex Articles 149-150 EC),
 - economic and social cohesion (Articles 174-178 TFEU, ex Articles 158-162 EC),
 - development cooperation (Articles 208-211 TFEU, ex Articles 177-181 EC), and
 - cooperation with industrialised countries (Article 212 TFEU, ex Article 181a EC).

ESTABLISHING OF POSITIONS

6. All positions of the Union and its Member States referred to in paragraphs 3, 4 and 5 will be duly coordinated:

- (a) In matters referred to in paragraph 3, the Presidency may convene, at its own initiative or at the request of the Commission or a Member State, coordination meetings (which may consist of an electronic coordination in urgent cases) of the Member States and the Commission within the competent Council Working Group before and during each meeting referred to in paragraph 1.

Coordinated positions will be expressed by the Presidency or if necessary by a Member State as appointed by the Presidency or by the Commission with the agreement of all Member States present.

- (b) In matters referred to in paragraph 4, coordination meetings of the Commission and the Member States within the competent Council Working Group will be convened at the Presidency's own initiative or at the request of the Commission or a Member State before and during each meeting referred to in paragraph 1, with possible reference to the Disability High Level Group in its area of competence. These coordination meetings may consist of an electronic coordination in urgent cases.

Union positions will be expressed by the Commission.

- (c) In matters referred to in paragraph 5, coordination meetings of the Commission and the Member States within the competent Council Working Group, will be convened at the Presidency's own initiative or at the request of the Commission or a Member State before and during each meeting referred to in paragraph 1, with possible reference to the Disability High Level Group in its area of competence. These coordination meetings may consist of an electronic coordination in urgent cases.

The Commission and the Member States in coordination meetings within the competent Council Working Group will decide who will deliver any statement to be made on behalf of the Union and its Member States in cases where the respective competences are inextricably linked.

Common positions will be presented by the Commission when the preponderance of the matter concerned lies within the competence of the Union, and by the Presidency or a Member State when the preponderance of the matter concerned lies within the competence of the Member States.

For the purposes of establishing positions regarding points (a), (b) and (c), the following arrangements will apply:

- (i) in Brussels, within the competent Council Working Group, as early as possible ahead of the start of the meetings referred to in paragraph 1.

On receipt of the agenda of the meetings referred to in paragraph 1, the Commission will send to the Council Secretariat for circulation to the Member States an indication of the agenda items on which it is intended that statements are made and whether these statements should be made by the Commission and/or the Presidency.

The Council Secretariat will circulate those draft statements received from the Presidency (in relation to paragraph 3) and from the Commission (in relation to paragraphs 4 and 5) for circulation to the Member States and the Commission at least one week before the coordination meeting. The Council Secretariat will ensure that the draft statements are transmitted to the competent Council Working Group promptly;

- (ii) without prejudice to local arrangements for Union coordination, on-the-spot (in New York or Geneva⁽¹⁾), particularly at the beginning and, if necessary, at the end of the meetings referred to in paragraph 1, with further coordination meetings being called whenever necessary throughout the series of meetings.

In cases where no position can be reached including for reasons relating to disagreement on the repartition of competences between the Union and its Member States, the matter will be referred without undue delay to the competent Council Working Group and/or, when applicable, other Council bodies. If no agreement can be reached in these bodies, the matter will be referred to the Permanent Representatives Committee (Coreper). However, in cases where meetings of the competent working group and, when applicable, of the relevant other Council bodies cannot be convened in time, the matter will be directly referred to Coreper, which will decide on the position on the basis of the voting rules laid down in the relevant EU Treaty dealing with the subject matter under consideration;

- (iii) the 'competent Council Working Group' will be determined by the Presidency. The Presidency will also take due care to inform and liaise in good time with all Council Working Groups that have a significant interest in the matter under consideration, including the Tax Working Group where the matter includes tax elements. At the request of a Member State or the Commission, the Presidency should refer any matter being discussed under this Code to other significantly interested working groups for consideration.

SPEAKING IN CASES OF AGREED COORDINATED, UNION OR COMMON POSITIONS

7. Without prejudice to the speaking arrangements referred to in paragraph 6, a Member State or the Commission may take the floor, after due coordination to support and/or develop the coordinated position, the Union position or the common position.

⁽¹⁾ Or at the place where the meeting is held, if elsewhere than New York or Geneva.

VOTING IN CASES OF AGREED COORDINATED, UNION OR COMMON POSITIONS

8. (a) Subject to paragraph 6, and in accordance with Article 44.4 of the Convention, the Commission, on behalf of the Union, will exercise the Union's voting rights on the basis of Union or common positions reached in the coordination process on matters referred to in paragraph 4, and in paragraph 5 when the preponderance of the matter concerned lies within the competence of the Union. It may be agreed that in cases where the Union is not represented, the Member States will exercise their voting rights on those matters, on the basis of Union and/or common positions.
- (b) Subject to paragraph 6, and in accordance with Article 44.4 of the Convention, the Member States will exercise their voting rights on matters referred to in paragraph 3, and in paragraph 5 when the preponderance of the matter concerned lies within the competence of the Member States on the basis of coordinated or common positions reached in the coordination process.
- (c) This paragraph does not apply to the right of Member States to vote pursuant to Article 34 of the Convention.

SPEAKING AND VOTING IN CASES OF NO COORDINATED, UNION OR COMMON POSITIONS

9. Where no agreement between the Commission and the Member States is reached in accordance with paragraph 6, Member States may speak and vote on matters falling clearly within their competence on condition that the position is coherent with Union policies and in conformity with Union law. The Commission may speak and vote on matters falling clearly within the Union's competence to the extent necessary to defend the Union acquis.

NOMINATIONS

10. Without prejudice to the right of Member States to nominate candidates for experts in accordance with Article 34.5 of the Convention and the right to vote in accordance with Article 34.5 of the Convention, the Union may nominate a candidate on the basis of a Commission proposal to be agreed upon by consensus by the Member States within the competent Council Working Group for an expert to the Committee on the Rights of Persons with Disabilities, on behalf of the Union. This procedure shall apply also to re-nomination of Union candidates.

The Union nominee shall be a citizen of the Union, holding the nationality of one of the Member States pursuant to paragraph 1 of Article 20 of the TFEU.

FOCAL POINT

11. In accordance with Article 3 of Decision 2010/48/EC and Article 33.1 of the Convention:

- (a) in respect of matters falling within the Union competence referred to in paragraphs 4 and 5, and without prejudice to the respective competences of the Member States, the Commission shall be a focal point for matters related to the implementation of the Convention;
- (b) the Member States will notify to the Commission their focal points;
- (c) on receipt of a notification from the United Nations or any other State Party to the Convention, whenever the matter falls under shared competence, as referred to in paragraph 5, the Commission or a Member State's focal point will inform, as appropriate, the other focal points referred to in subparagraphs (a) and (b);
- (d) where necessary the Commission will convene, on its own initiative or at the request of a Member State's focal point, a coordination meeting with the focal points of the Member States.

MONITORING AND REPORTING

12. (a) Reports of the Union and its Member States will cover their respective competences referred to in paragraphs 3, 4 and 5 and shall be complementary.
- (b) In matters referred to in paragraphs 3 and 5 (where the preponderance of the matter lies within the competence of the Member States), Member States will prepare their own reports in accordance with Article 35 of the Convention.
 - (c) In respect of matters falling within the Union competence, referred to in paragraphs 4 and 5 (where the preponderance of the matter lies within the competence of the EU), the Commission will prepare

the Union report, and will agree, where necessary, with Member States on the information they shall provide to enable it to do so. The Union report shall address the matters governed by the Convention falling within the precise provisions of each act adopted by the Union that appears in the Appendix to the Declaration of Competence attached as Annex II to Decision 2010/48/EC.

- (d) In line with the duty of close cooperation, Member States and the Commission will, before submission to the Committee on the Rights of Persons with Disabilities, provide to each other, for information and on a confidential basis, reports referred to in subparagraphs (b) and (c).
 - (e) Each Member State is responsible for its own examination by the Committee on the Rights of Persons with Disabilities. The Commission, as the Union's focal point, is responsible for the Union examination. Member States may request the Commission to provide an expert to become a part of their delegations, and the Commission may request Member States to provide experts, for its delegation.
 - (f) The Commission will inform and consult Member States during the preparation of its oral presentation of the report before the Committee on the Rights of Persons with Disabilities. Similarly, Member States will inform and consult the Commission during the preparation of their national oral presentation.
13. The Commission will propose in due course an appropriate framework for one or several independent mechanisms in accordance with Article 33.2 of the Convention and on the involvement of civil society, in accordance with Article 33.3 of the Convention, taking into account all relevant Union institutions, bodies, offices or agencies.

REVIEW OF ARRANGEMENT

14. At the request of the Council, a Member State or the Commission, the arrangement will be reviewed, taking account of experience gained during its operation.

ANNEX

Policy objective for the Union and its Member States relating to the implementation of the Convention

Without prejudice to paragraph 13 of the Code of Conduct and with a view to appropriate monitoring and reporting, the Union and its Member States will, where and to the extent necessary, strengthen and coordinate capacities at both national and Union levels to collect and analyse appropriate information including comparable statistical and research data, in compliance with legal safeguards and data protection rules.

CONSEJO

Código de conducta entre el Consejo, los Estados miembros y la Comisión por el que se establecen disposiciones internas para la aplicación por la Unión Europea de la Convención de las Naciones Unidas sobre los derechos de las personas con discapacidad y para la representación de la Unión Europea en dicha Convención

(2010/C 340/08)

Recordando que en los artículos 3 y 4 de la Decisión 2010/48/CE del Consejo, de 26 de noviembre de 2009, relativa a la celebración, por parte de la Comunidad Europea, de la Convención de las Naciones Unidas sobre los derechos de las personas con discapacidad ⁽¹⁾, se establece que es necesario convenir en un código de conducta antes de que se deposite el instrumento de confirmación oficial en nombre de la Comunidad.

Recordando que en virtud de los artículos antes citados de la Decisión 2010/48/CE, el código de conducta establecerá disposiciones detalladas para la aplicación de la Convención de las Naciones Unidas sobre los derechos de las personas con discapacidad (en lo sucesivo «la Convención») por la Unión, incluida la función centralizadora de la Comisión para la aplicación de la Convención en nombre de la Unión, para la representación de la Unión en las reuniones de los órganos creados por la Convención, para la representación de la posición de la Unión en dichas reuniones, así como para que se mantenga una estrecha colaboración en esas reuniones, en lo que se refiere, en particular, a las disposiciones en materia de control, información y votación.

Además, cabe considerar que las disposiciones del presente código de conducta, que trata temas referentes a la coordinación entre el Consejo, los Estados miembros y la Comisión, forman parte del mecanismo de coordinación mencionado en el artículo 33.1 de la Convención.

Teniendo en cuenta la obligación de unidad de la representación internacional de la Unión y de sus Estados miembros, de conformidad con el Tratado de la Unión Europea (TUE) y el Tratado de Funcionamiento de la Unión Europea (TFUE) y la jurisprudencia del Tribunal de Justicia de la Unión Europea, también en la fase de aplicación de las obligaciones internacionales;

EL CONSEJO, LOS ESTADOS MIEMBROS Y LA COMISIÓN CONVIENEN EN EL SIGUIENTE CÓDIGO DE CONDUCTA:

NATURALEZA Y ÁMBITO DE APLICACIÓN DEL CÓDIGO

1. a) El presente código de conducta establece acuerdos entre el Consejo, los Estados miembros y la Comisión sobre cooperación en relación con diferentes aspectos de la aplicación de la Convención, adoptada por la Asamblea General de las Naciones Unidas en Nueva York el 13 de diciembre de 2006.

Sin perjuicio de la obligación general de cooperar estrechamente, el código se aplicará a la preparación y participación de las reuniones de los órganos creados por la Convención.

b) El código estipula los pormenores de la función centralizadora.

DIVISIÓN DE TAREAS SEGÚN LAS COMPETENCIAS

2. Las instituciones de la Unión y los Estados miembros mantendrán una estrecha cooperación en la aplicación de la Convención, teniendo en cuenta los principios de cooperación leal, subsidiariedad y necesidad de respeto de las diferentes competencias de las instituciones de la Unión y de los Estados miembros establecidas en los Tratados, y teniendo en cuenta que tanto el ámbito de aplicación como el ejercicio de las competencias de la Unión están, por naturaleza, en continua evolución.

3. Por lo que respecta a asuntos que son competencia de los Estados miembros, los Estados miembros procurarán elaborar posiciones coordinadas, siempre que lo consideren apropiado.

4. Por lo que respecta a asuntos que son exclusivamente competencia de la Unión, la Unión procurará elaborar posiciones de la Unión, en particular en relación con:

a) la compatibilidad de las ayudas otorgadas por los Estados con el mercado interior (artículo 108 TFUE, antiguo artículo 88 TCE);

b) el arancel aduanero común (artículo 31 TFUE, antiguo artículo 26 TCE);

c) su propia administración pública (artículo 336 TFUE, antiguo artículo 283 TCE);

d) cualquier otro asunto en la medida en que las disposiciones de la Convención o los instrumentos jurídicos adoptados en aplicación de la misma afecten o alteren a normas comunes previamente establecidas por la Unión, de conformidad con el artículo 3, apartado 2, TFUE.

5. Por lo que respecta a asuntos que son de competencia compartida y a asuntos para los que la Unión coordina, apoya o complementa las acciones de los Estados miembros, la Unión y los Estados miembros procurarán elaborar posiciones comunes, en particular en relación con:

a) actos legislativos que figuran en el apéndice de la declaración de competencias que figura en el anexo de la Decisión 2010/48/CE o nuevos actos o medidas de orientación adoptados en el ámbito de:

— acciones para luchar contra la discriminación por motivos de discapacidad (artículo 19 TFUE, antiguo artículo 13 TCE),

⁽¹⁾ DO L 23 de 27.1.2010, p. 35.

- libre circulación de mercancías, personas, servicios y capitales (artículos 28-32, 34-37 TFUE, antiguos artículos 23-31 TCE, y artículos 45-66 TFUE, antiguos artículos 39-60 TCE),
 - agricultura (artículos 42-43 TFUE, antiguos artículos 36-37 TCE),
 - transporte por ferrocarril, carretera, y navegación marítima y aérea (artículo 91 TFUE, antiguo artículo 71 TCE, y artículo 100 TFUE, antiguo artículo 80 TCE),
 - fiscalidad (artículo 113 TFUE, antiguo artículo 93 TCE),
 - mercado interior (artículos 114-115 TFUE, antiguos artículos 94-95 TCE),
 - igualdad de retribución entre trabajadores y trabajadoras (artículo 157 TFUE, antiguo artículo 141 TCE),
 - política relativa a las redes transeuropeas (artículos 170-172 TFUE, antiguos artículos 154-156 TCE),
 - estadísticas (artículos 337-338 TFUE, antiguos artículos 284-285 TCE);
- b) actos jurídicos o medidas de orientación de la Unión, cuando están en estrecha y sustancial relación con la aplicación de la Convención, y se adoptan en el ámbito de:
- empleo (artículos 145-150 TFUE, antiguos artículos 125-130 TCE),
 - desarrollo de una educación de calidad y aplicación de una política de formación profesional (artículos 165-166 TFUE, antiguos artículos 149-150 TCE),
 - cohesión económica y social (artículos 174-178 TFUE, antiguos artículos 158-162 TCE),
 - cooperación para el desarrollo (artículos 208-211 TFUE, antiguos artículos 177-181 TCE) y
 - cooperación con los países industrializados (artículo 212 TFUE, antiguo artículo 181 bis TCE).

ESTABLECIMIENTO DE LAS POSICIONES

6. Todas las posiciones de la Unión y de sus Estados miembros mencionadas en los puntos 3, 4 y 5 se coordinarán debidamente.
- a) Para los asuntos citados en el punto 3, la Presidencia podrá convocar, por iniciativa propia o a petición de la Comisión o de un Estado miembro, reuniones de coordinación (que en casos de urgencia podrán consistir en una coordinación electrónica) de los Estados miembros y de la Comisión en el marco del grupo competente del Consejo, antes y durante cada una de las reuniones mencionadas en el punto 1.

Las posiciones coordinadas serán expresadas por la Presidencia o, si fuera necesario, por un Estado miembro designado por la Presidencia o por la Comisión, con el acuerdo de todos los Estados miembros presentes.

- b) En relación con los asuntos mencionados en el punto 4, se convocarán reuniones de coordinación de la Comisión y de los Estados miembros en el marco del grupo competente del Consejo, por iniciativa de la Presidencia o a petición de la Comisión o de un Estado miembro antes y durante cada una de las reuniones mencionadas en el punto 1, con la posibilidad de consultar al Grupo de Alto Nivel en materia de discapacidad en su ámbito de competencias. En casos de urgencia estas reuniones de coordinación podrán consistir en una coordinación electrónica.

Las posiciones de la Unión serán expresadas por la Comisión.

- c) En relación con los asuntos mencionados en el punto 5, se convocarán reuniones de coordinación de la Comisión y de los Estados miembros en el marco del grupo competente del Consejo, por iniciativa de la Presidencia o a petición de la Comisión o de un Estado miembro antes y durante cada una de las reuniones mencionadas en el apartado 1, con la posibilidad de consultar al Grupo de Alto Nivel en materia de discapacidad en su ámbito de competencias. En casos de urgencia estas reuniones de coordinación podrán consistir en una coordinación electrónica.

En las reuniones de coordinación en el marco del grupo competente del Consejo, la Comisión y los Estados miembros decidirán quién presentará las declaraciones que deban realizarse en nombre de la Unión y de sus Estados miembros, cuando las competencias respectivas sean imposibles de deslindar.

Corresponderá a la Comisión presentar las posiciones comunes cuando la materia de que se trate sea de competencia preponderantemente de la Unión, y a la Presidencia o a un Estado miembro cuando la materia de que se trate sea preponderantemente competencia de los Estados miembros.

A efectos de establecer las posiciones relativas a las letras a), b) y c), se aplicarán las siguientes disposiciones:

- i) en Bruselas, dentro del grupo competente del Consejo, con la mayor antelación posible al inicio de la reunión mencionada en el punto 1.

A la recepción del orden del día de la reunión contemplada en el punto 1, la Comisión remitirá a la Secretaría del Consejo para su distribución a los Estados miembros una indicación de los puntos del orden del día sobre los que se tiene la intención de realizar una declaración, y si la presentación de estas declaraciones corresponde a la Comisión y/o a la Presidencia.

La Secretaría del Consejo distribuirá los proyectos de declaraciones recibidos de la Presidencia (en relación con el punto 3) y de la Comisión (en relación con los puntos 4 y 5) a los Estados miembros y a la Comisión, a más tardar una semana antes de la reunión de coordinación. La Secretaría del Consejo se asegurará de que los proyectos de declaración sean transmitidos al grupo competente del Consejo inmediatamente;

- ii) sin perjuicio de los acuerdos locales de coordinación de la Unión, *in situ* [en Nueva York o en Ginebra ⁽¹⁾], en particular al principio y, si fuera necesario, al final de las reuniones contempladas en el punto 1, con la convocatoria de nuevas reuniones de coordinación siempre que sea necesario a lo largo de toda la serie de reuniones.

Cuando no pueda alcanzarse una posición debido, entre otras cosas, a un desacuerdo sobre el reparto de competencias entre la Unión y sus Estados miembros, el asunto se remitirá sin demora al grupo competente del Consejo o, si procede, a otros órganos del Consejo. Si no puede alcanzarse un acuerdo en estos órganos, el asunto se remitirá al Comité de Representantes Permanentes (Coreper). No obstante, cuando no puedan convocarse a tiempo las reuniones del grupo competente del Consejo y, cuando proceda, de los otros órganos pertinentes del Consejo, el asunto se remitirá directamente al Coreper, el cual decidirá sobre la posición basándose en las reglas de votación establecidas en el Tratado de la UE correspondiente que trate el asunto en consideración;

- iii) la Presidencia decidirá cuál es el «grupo competente del Consejo». La Presidencia procurará asimismo informar y contactar a su debido tiempo con todos los grupos del Consejo que tengan un claro interés en el asunto en cuestión, y en particular con el Grupo sobre cuestiones fiscales, cuando el asunto incluya elementos relativos a la fiscalidad. A petición de un Estado miembro o de la Comisión, la Presidencia deberá remitir para su consideración cualquier asunto que sea objeto de debate con arreglo al presente código a los demás grupos que tengan un claro interés al respecto.

INTERVENCIÓN EN CASO DE QUE SE HAYAN ACORDADO POSICIONES COORDINADAS, DE LA UNIÓN O COMUNES

7. Sin perjuicios de los acuerdos de intervención mencionados en el punto 6, un Estado miembro o la Comisión podrá tomar la palabra, tras la debida coordinación, para apoyar y/o desarrollar la posición coordinada, la posición de la Unión o la posición común.

VOTACIÓN EN CASO DE QUE SE HAYAN ACORDADO POSICIONES COORDINADAS, DE LA UNIÓN O COMUNES

8. a) A reserva de lo dispuesto en el punto 6, y de conformidad con el artículo 44.4 de la Convención, la Comisión,

en nombre de la Unión, ejercerá el derecho de voto de la Unión sobre la base de posiciones de la Unión o comunes alcanzadas en el proceso de coordinación respecto de las materias a que se refiere el punto 4, y el punto 5 cuando la materia de que se trate sea de competencia preponderantemente de la Unión. Podrá acordarse que, en caso de que la Unión no esté representada, los Estados miembros ejerzan sus derechos de voto respecto de las citadas materias sobre la base de posiciones de la Unión y/o comunes.

- b) A reserva de lo dispuesto en el punto 6, y de conformidad con el artículo 44.4 de la Convención, los Estados miembros ejercerán sus derechos de voto, sobre la base de posiciones coordinadas o comunes alcanzadas en el proceso de coordinación, respecto de las materias a que se refiere el punto 3, y el punto 5 cuando la materia de que se trate sea de competencia preponderantemente de los Estados miembros.
- c) El presente punto no se aplicará al derecho de los Estados miembros a votar con arreglo al artículo 34 de la Convención.

INTEVENCIÓN Y VOTACIÓN EN CASO DE QUE NO SE HAYAN ACORDADO POSICIONES COORDINADAS, DE LA UNIÓN O COMUNES

9. En caso de que no se logre un acuerdo entre la Comisión y los Estados miembros con arreglo al punto 6, los Estados miembros tendrán voz y voto sobre las materias que entran claramente en el ámbito de su competencia a condición de que su posición sea coherente con las políticas de la Unión y se ajuste al Derecho de la Unión. La Comisión podrá tomar la palabra y votar en asuntos que sean claramente de competencia de la Unión en la medida necesaria para defender el acervo de la Unión.

NOMBRAMIENTOS

10. Sin perjuicio del derecho de los Estados miembros a designar candidatos para los puestos de expertos de conformidad con el artículo 34.5 de la Convención y del derecho de voto, de conformidad con el artículo 34.5 de la Convención, la Unión podrá nombrar un candidato para el puesto de experto en el Comité de los derechos de las personas con discapacidad, en nombre de la Unión, sobre la base de una propuesta de la Comisión que deberá ser aprobada por consenso por los Estados miembros dentro del grupo competente del Consejo. Este procedimiento también se aplicará en caso de que se prorrogue el mandato de los candidatos de la Unión.

La persona nombrada por la Unión será un ciudadano de la Unión que posea la nacionalidad de uno de los Estados miembros con arreglo al artículo 20, apartado 1, TFUE.

⁽¹⁾ O en el lugar en el que se celebre la reunión, si es distinto de Nueva York o Ginebra.

PUNTO DE CONTACTO

11. De conformidad con el artículo 3 de la Decisión 2010/48/CE y del artículo 33.1 de la Convención:

- a) Con respecto a los asuntos que sean competencia de la Unión mencionados en los puntos 4 y 5, y sin perjuicio de las competencias respectivas de los Estados miembros, la Comisión centralizará las cuestiones relativas a la aplicación de la Convención.
- b) Los Estados miembros notificarán a la Comisión sus puntos de contacto.
- c) A la recepción de una notificación de las Naciones Unidas o de cualquier Estado parte de la Convención, siempre que el asunto sea de competencia compartida, como se contempla en el punto 5, la Comisión o el punto de contacto de un Estado miembro informará, cuando proceda, a los demás puntos de contacto mencionados en las letras a) y b).
- d) Cuando sea necesario la Comisión convocará, por propia iniciativa o a petición de un punto de contacto de un Estado miembro, una reunión de coordinación con los puntos de contacto de los Estados miembros.

SEGUIMIENTO Y ELABORACIÓN DE INFORMES

12. a) Los informes de la Unión y de sus Estados miembros tratarán sus respectivas competencias, mencionadas en los puntos 3, 4 y 5, y serán complementarios.

- b) Respecto de las materias a que se refieren los puntos 3 y 5 (cuando la materia de que se trate sea de competencia preponderantemente de los Estados miembros) los Estados miembros prepararán sus propios informes con arreglo al artículo 35 de la Convención.
- c) Respecto de las materias que son competencia de la Unión, a que se refieren los puntos 4 y 5 (cuando la materia de que se trate sea de competencia preponderantemente de la Unión), la Comisión preparará el informe de la Unión y convendrán, cuando sea necesario,

con los Estados miembros la información que tiene que aportar para poder hacerlo. El informe de la Unión abordará los asuntos regidos por la Convención cubiertos por las disposiciones precisas de cada acto adoptado por la Unión que figura en el apéndice de la declaración de competencias que figura en el anexo II de la Decisión 2010/48/CE.

- d) En consonancia con la obligación general de cooperar estrechamente, los Estados miembros y la Comisión se transmitirán recíprocamente, antes de presentarlos al Comité sobre los derechos de las personas con discapacidad, los informes mencionados en las letras b) y c).
- e) Cada Estado miembro será responsable de su propio examen ante el Comité sobre los derechos de las personas con discapacidad. La Comisión, en tanto que punto de contacto de la Unión, será responsable del examen de la Unión. Los Estados miembros podrán pedir a la Comisión que designe un experto para que forme parte de sus delegaciones, y la Comisión podrá pedir a los Estados miembros que designen un experto para su delegación.
- f) La Comisión informará y consultará a los Estados miembros durante la preparación de su presentación oral del informe ante el Comité sobre los derechos de las personas con discapacidad. De forma similar, los Estados miembros informarán y consultarán a la Comisión durante la preparación de su presentación oral nacional.

13. La Comisión propondrá en su debido momento un marco apropiado para uno o varios mecanismos independientes, de conformidad con el artículo 32.2 de la Convención, y sobre la participación de la sociedad civil, de conformidad con el artículo 33.3 de la Convención, teniendo en cuenta todas las instituciones, órganos u organismos pertinentes de la Unión.

REVISIÓN DEL ACUERDO

14. A petición del Consejo, de un Estado miembro o de la Comisión, el acuerdo se revisará teniendo en cuenta la experiencia adquirida durante su aplicación.

ANEXO

Objetivo de la Unión y de sus Estados miembros en relación con la aplicación de la Convención

Sin perjuicio de lo dispuesto en el punto 13 del código de conducta y a fin de lograr un seguimiento y una información adecuados, la Unión y sus Estados miembros reforzarán y coordinarán sus capacidades, cuando sea necesario y en la medida de lo necesario, tanto a nivel nacional como de la Unión para recoger y analizar la información adecuada, en particular datos estadísticos y de investigación comparables, respetando las garantías jurídicas y las normas en materia de protección de datos.

I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

REGULATIONS

COUNCIL REGULATION (EC) No 168/2007

of 15 February 2007

establishing a European Union Agency for Fundamental Rights

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Having regard to the opinion of the Committee of the Regions,

Whereas:

(1) The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, which are common values to the Member States.

(2) The Charter of Fundamental Rights of the European Union ⁽²⁾, bearing in mind its status and scope, and the accompanying explanations, reflects the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community

Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the social charters adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights.

(3) The Community and its Member States must respect fundamental rights when implementing Community law.

(4) Greater knowledge of, and broader awareness of, fundamental rights issues in the Union are conducive to ensuring full respect of fundamental rights. It would contribute to the attainment of this objective to establish a Community agency whose tasks would be to provide information and data on fundamental rights matters. Moreover, developing effective institutions for the protection and promotion of human rights is a common value of the international and European societies, as expressed by Recommendation No R (97) 14 of the Committee of Ministers of the Council of Europe of 30 September 1997.

(5) The Representatives of the Member States, meeting within the European Council on 13 December 2003, agreed to build upon the existing European Monitoring Centre on Racism and Xenophobia established by Regulation (EC) No 1035/97 ⁽³⁾ and to extend its mandate to make it a Human Rights Agency. They also decided on that occasion that the seat of the Agency should remain in Vienna.

(6) The Commission agreed and indicated its intention of presenting a proposal to amend Regulation (EC) No 1035/97 in that respect. The Commission subsequently issued its Communication of 25 October 2004 on the Fundamental Rights Agency, on the basis of which a large public consultation was carried out.

⁽¹⁾ OJ C 88, 11.4.2006, p. 37.

⁽²⁾ OJ C 364, 18.12.2000, p. 1.

⁽³⁾ OJ L 151, 10.6.1997, p. 1. Regulation as amended by Regulation (EC) No 1652/2003 (OJ L 245, 29.9.2003, p. 33).

- (7) A European Union Agency for Fundamental Rights should accordingly be established, building upon the existing European Monitoring Centre on Racism and Xenophobia, to provide the relevant institutions and authorities of the Community and its Member States when implementing Community law with information, assistance and expertise on fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.
- (8) It is recognised that the Agency should act only within the scope of application of Community law.
- (9) The Agency should refer in its work to fundamental rights within the meaning of Article 6(2) of the Treaty on European Union, including the European Convention on Human Rights and Fundamental Freedoms, and as reflected in particular in the Charter of Fundamental Rights, bearing in mind its status and the accompanying explanations. The close connection to the Charter should be reflected in the name of the Agency.
- (10) As the Agency is to be built upon the existing European Monitoring Centre on Racism and Xenophobia, the work of the Agency should continue to cover the phenomena of racism, xenophobia and anti-Semitism, the protection of rights of persons belonging to minorities, as well as gender equality, as essential elements for the protection of fundamental rights.
- (11) The thematic areas of activity of the Agency should be laid down in the Multiannual Framework, thus defining the limits of the work of the Agency. Due to the political significance of the Multiannual Framework, it is important that the Council itself should adopt it, after consulting the European Parliament on the basis of a Commission proposal.
- (12) The Agency should collect objective, reliable and comparable information on the development of the situation of fundamental rights, analyse this information in terms of causes of disrespect, consequences and effects and examine examples of good practice in dealing with these matters.
- (13) The Agency should have the right to formulate opinions to the Union institutions and to the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission, without interference with the legislative and judicial procedures established in the Treaty. Nevertheless, the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned.
- (14) The Agency should present an annual report on fundamental rights issues covered by the areas of the Agency's activity, also highlighting examples of good practice. Furthermore, the Agency should produce thematic reports on topics of particular importance to the Union's policies.
- (15) The Agency should take measures to raise the awareness of the general public about their fundamental rights, and about possibilities and different mechanisms for enforcing them in general, without, however, dealing itself with individual complaints.
- (16) The Agency should work as closely as possible with all relevant Union institutions as well as the bodies, offices and agencies of the Community and the Union in order to avoid duplication, in particular as regards the future European Institute for Gender Equality.
- (17) Since cooperation with the Member States is an essential element for the successful performance of the tasks of the Agency, it should cooperate closely with the Member States through its different bodies, for the purpose of which the Member States should nominate National Liaison Officers, as primary contact points for the Agency in the Member States. The Agency should, in particular, communicate with the National Liaison Officers as regards reports and other documents drawn up by the Agency.
- (18) The Agency should collaborate closely with the Council of Europe. Such cooperation should guarantee that any overlap between the activities of the Agency and those of the Council of Europe is avoided, in particular by elaborating mechanisms to ensure complementarity and added value, such as the conclusion of a bilateral cooperation agreement and the participation of an independent person appointed by the Council of Europe in the management structures of the Agency with appropriately defined voting rights.
- (19) Recognising the important role of civil society in the protection of fundamental rights, the Agency should promote dialogue with civil society and work closely with non-governmental organisations and with institutions of civil society active in the field of fundamental rights. It should set up a cooperation network called the 'Fundamental Rights Platform' with a view to creating a structured and fruitful dialogue and close cooperation with all relevant stakeholders.

- (20) Given the particular functions of the Agency, each Member State should appoint one independent expert to the Management Board. Having regard to the principles relating to the status and functioning of national institutions for the protection and promotion of human rights (the Paris Principles), the composition of that Board should ensure the Agency's independence from both Community institutions and Member State governments and assemble the broadest possible expertise in the field of fundamental rights.
- (21) In order to ensure the high scientific quality of the work of the Agency, the Agency should avail itself of a Scientific Committee in order to guide its work by means of scientific objectivity.
- (22) The authorities appointing members of the Management Board, the Executive Board and the Scientific Committee should aim to achieve a balanced participation between women and men on these bodies. Particular attention should also be given to the balanced representation of women and men on the staff of the Agency.
- (23) Considering the significant role played by the European Parliament in the defence, mainstreaming and promotion of fundamental rights, it should be involved in the activities of the Agency, including the adoption of the Multiannual Framework for the Agency, and, given the exceptional nature and task of the Agency, the selection of the candidates proposed for the post of the Director of the Agency without setting a precedent for other Agencies.
- (24) The Agency should apply the relevant Community legislation concerning public access to documents as set out in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents⁽¹⁾, the protection of individuals with regard to the processing of personal data as set out in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data⁽²⁾, and concerning languages as set out in Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community⁽³⁾ and Regulation (EC) No 2965/94 of 28 November 1994 setting up a Translation Centre for bodies of the European Union⁽⁴⁾.
- (25) Commission Regulation (EC, Euratom) No 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities⁽⁵⁾ should apply to the Agency, as well as Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Antifraud Office (OLAF)⁽⁶⁾.
- (26) The Staff Regulations of officials of the European Communities, the Conditions of Employment of other servants of the European Communities and the rules adopted jointly by the European Community institutions for the purpose of applying these Staff Regulations and Conditions of Employment should apply to the staff and to the Director of the Agency, including their rules relating to the dismissal of the Director.
- (27) The Agency should have legal personality and succeed the European Monitoring Centre on Racism and Xenophobia as regards all legal obligations, financial commitments or liabilities carried out by the Centre or agreements made by the Centre as well as the employment contracts with the staff of the Centre.
- (28) The Agency should be open to the participation of candidate countries. Furthermore, the countries with which a Stabilisation and Association agreement has been concluded should be allowed to participate in the Agency, since this will enable the Union to support their efforts towards European integration by facilitating a gradual alignment of their legislation with Community law as well as the transfer of know-how and good practice, particularly in those areas of the *acquis* that will serve as a central reference point for the reform process in the Western Balkans.
- (29) The Agency should initiate the necessary evaluations of its activities in due time, on the basis of which the Agency's scope, tasks and working methods could be reviewed.

⁽¹⁾ OJ L 145, 31.5.2001, p. 43.

⁽²⁾ OJ L 8, 12.1.2001, p. 1.

⁽³⁾ OJ 17, 6.10.1958, p. 385/58. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

⁽⁴⁾ OJ L 314, 7.12.1994, p. 1. Regulation as last amended by Regulation (EC) No 1645/2003 (OJ L 245, 29.9.2003, p. 13).

⁽⁵⁾ OJ L 357, 31.12.2002, p. 72.

⁽⁶⁾ OJ L 136, 31.5.1999, p. 1.

- (30) Since the objectives of this Regulation, namely the provision of comparable and reliable information and data at European level in order to assist the Union institutions and the Member States in respecting fundamental rights, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (31) The contribution made by the Agency to ensuring full respect of fundamental rights in the framework of Community law is likely to help achieve the Community's objectives. With regard to the adoption of this Regulation, the Treaty does not provide for powers other than those set out in Article 308.
- (32) Nothing in this Regulation should be interpreted in such a way as to prejudice the question of whether the remit of the Agency may be extended to cover the areas of police cooperation and judicial cooperation in criminal matters.
- (33) As Regulation (EC) No 1035/97 would have to be substantially amended for the establishment of the Agency, it should be repealed in the interests of clarity,

HAS ADOPTED THIS REGULATION:

CHAPTER 1

SUBJECT MATTER, OBJECTIVE, SCOPE, TASKS AND AREAS OF ACTIVITY

Article 1

Subject matter

The European Union Agency for Fundamental Rights (the Agency) is hereby established.

Article 2

Objective

The objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate

courses of action within their respective spheres of competence to fully respect fundamental rights.

Article 3

Scope

1. The Agency shall carry out its tasks for the purpose of meeting the objective set in Article 2 within the competencies of the Community as laid down in the Treaty establishing the European Community.
2. The Agency shall refer in carrying out its tasks to fundamental rights as defined in Article 6(2) of the Treaty on European Union.
3. The Agency shall deal with fundamental-rights issues in the European Union and in its Member States when implementing Community law.

Article 4

Tasks

1. To meet the objective set in Article 2 and within its competences laid down in Article 3, the Agency shall:
 - (a) collect, record, analyse and disseminate relevant, objective, reliable and comparable information and data, including results from research and monitoring communicated to it by Member States, Union institutions as well as bodies, offices and agencies of the Community and the Union, research centres, national bodies, non-governmental organisations, third countries and international organisations and in particular by the competent bodies of the Council of Europe;
 - (b) develop methods and standards to improve the comparability, objectivity and reliability of data at European level, in cooperation with the Commission and the Member States;
 - (c) carry out, cooperate with or encourage scientific research and surveys, preparatory studies and feasibility studies, including, where appropriate and compatible with its priorities and its annual work programme, at the request of the European Parliament, the Council or the Commission;
 - (d) formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission;

- (e) publish an annual report on fundamental-rights issues covered by the areas of the Agency's activity, also highlighting examples of good practice;
- (f) publish thematic reports based on its analysis, research and surveys;
- (g) publish an annual report on its activities; and
- (h) develop a communication strategy and promote dialogue with civil society, in order to raise public awareness of fundamental rights and actively disseminate information about its work.

2. The conclusions, opinions and reports referred to in paragraph 1 may concern proposals from the Commission under Article 250 of the Treaty or positions taken by the institutions in the course of legislative procedures only where a request by the respective institution has been made in accordance with paragraph 1(d). They shall not deal with the legality of acts within the meaning of Article 230 of the Treaty or with the question of whether a Member State has failed to fulfil an obligation under the Treaty within the meaning of Article 226 of the Treaty.

Article 5

Areas of activity

1. The Council shall, acting on a proposal from the Commission and after consulting the European Parliament, adopt a Multiannual Framework for the Agency. When preparing its proposal, the Commission shall consult the Management Board.
2. The Framework shall:
 - (a) cover five years;
 - (b) determine the thematic areas of the Agency's activity, which must include the fight against racism, xenophobia and related intolerance;
 - (c) be in line with the Union's priorities, taking due account of the orientations resulting from European Parliament resolutions and Council conclusions in the field of fundamental rights;
 - (d) have due regard to the Agency's financial and human resources; and
 - (e) include provisions with a view to ensuring complementarity with the remit of other Community and Union bodies,

offices and agencies, as well as with the Council of Europe and other international organisations active in the field of fundamental rights.

3. The Agency shall carry out its tasks within the thematic areas determined by the Multiannual Framework. This shall be without prejudice to the responses of the Agency to requests from the European Parliament, the Council or the Commission under Article 4(1)(c) and (d) outside these thematic areas, provided its financial and human resources so permit.

4. The Agency shall carry out its tasks in the light of its Annual Work Programme and with due regard to the available financial and human resources.

CHAPTER 2

WORKING METHODS AND COOPERATION

Article 6

Working methods

1. In order to ensure the provision of objective, reliable and comparable information, the Agency shall, drawing on the expertise of a variety of organisations and bodies in each Member State and taking account of the need to involve national authorities in the collection of data:

- (a) set up and coordinate information networks and use existing networks;
- (b) organise meetings of external experts; and
- (c) whenever necessary, set up ad hoc working parties.

2. In pursuing its activities, the Agency shall, in order to achieve complementarity and guarantee the best possible use of resources, take account, where appropriate, of information collected and of activities undertaken, in particular by:

- (a) Union institutions and bodies, offices and agencies of the Community and the Union, and bodies, offices and agencies of the Member States;
- (b) the Council of Europe, by referring to the findings and activities of the Council of Europe's monitoring and control mechanisms and of the Council of Europe Commissioner for Human Rights; and
- (c) the Organisation for Security and Cooperation in Europe (OSCE), the United Nations and other international organisations.

3. The Agency may enter into contractual relations, in particular subcontracting arrangements, with other organisations, in order to accomplish any tasks which it may entrust to them. The Agency may also award grants to promote appropriate cooperation and joint ventures, in particular to national and international organisations as referred to in Articles 8 and 9.

Article 7

Relations with relevant Community bodies, offices and agencies

The Agency shall ensure appropriate coordination with relevant Community bodies, offices and agencies. The terms of cooperation shall be laid down in memoranda of understanding where appropriate.

Article 8

Cooperation with organisations at Member State and international level

1. In order to ensure close cooperation with Member States, each Member State shall nominate a government official as a National Liaison Officer, who shall be the main contact point for the Agency in the Member State. The National Liaison Officers may, *inter alia*, submit opinions on the draft Annual Work Programme to the Director prior to its submission to the Management Board. The Agency shall communicate to the National Liaison Officers all documents drawn up in accordance with Article 4(1)(a), (b), (c), (d), (e), (f), (g) and (h).

2. To help it carry out its tasks, the Agency shall cooperate with:

- (a) governmental organisations and public bodies competent in the field of fundamental rights in the Member States, including national human rights institutions; and
- (b) the Organisation for Security and Cooperation in Europe (OSCE), especially the Office for Democratic Institutions and Human Rights (ODIHR), the United Nations and other international organisations.

3. The administrative arrangements for cooperation pursuant to paragraph 2 shall comply with Community law and shall be adopted by the Management Board on the basis of the draft submitted by the Director after the Commission has delivered an opinion. Where the Commission expresses its disagreement with these arrangements the Management Board shall re-examine and adopt them, with amendments where necessary, by a two-thirds majority of all members.

Article 9

Cooperation with the Council of Europe

In order to avoid duplication and in order to ensure complementarity and added value, the Agency shall coordinate its activities with those of the Council of Europe, particularly with regard to its Annual Work Programme pursuant to Article 12(6)(a) and cooperation with civil society in accordance with Article 10. To that end, the Community shall, in accordance with the procedure provided for in Article 300 of the Treaty, enter into an agreement with the Council of Europe for the purpose of establishing close cooperation between the latter and the Agency. This agreement shall include the appointment of an independent person by the Council of Europe, to sit on the Agency's Management Board and on its Executive Board, in accordance with Articles 12 and 13.

Article 10

Cooperation with civil society; Fundamental Rights Platform

1. The Agency shall closely cooperate with non-governmental organisations and with institutions of civil society, active in the field of fundamental rights including the combating of racism and xenophobia at national, European or international level. To that end, the Agency shall establish a cooperation network (Fundamental Rights Platform), composed of non-governmental organisations dealing with human rights, trade unions and employer's organisations, relevant social and professional organisations, churches, religious, philosophical and non-confessional organisations, universities and other qualified experts of European and international bodies and organisations.

2. The Fundamental Rights Platform shall constitute a mechanism for the exchange of information and pooling of knowledge. It shall ensure close cooperation between the Agency and relevant stakeholders.

3. The Fundamental Rights Platform shall be open to all interested and qualified stakeholders in accordance with paragraph 1. The Agency may address the members of the Fundamental Rights Platform in accordance with specific needs related to areas identified as a priority for the Agency's work.

4. The Agency shall call upon the Fundamental Rights Platform in particular, to:

- (a) make suggestions to the Management Board on the Annual Work Programme to be adopted pursuant to Article 12(6)(a);
- (b) give feedback and suggest follow-up to the Management Board on the annual report provided for in Article 4(1)(e); and

(c) communicate outcomes and recommendations of conferences, seminars and meetings relevant to the work of the Agency to the Director and the Scientific Committee.

5. The Fundamental Rights Platform shall be coordinated under the authority of the Director.

CHAPTER 3

ORGANISATION

Article 11

Bodies of the Agency

The Agency shall comprise:

- (a) a Management Board;
- (b) an Executive Board;
- (c) a Scientific Committee; and
- (d) a Director.

Article 12

Management Board

1. The Management Board shall be composed of persons with appropriate experience in the management of public or private sector organisations and, in addition, knowledge in the field of fundamental rights, as follows:

- (a) one independent person appointed by each Member State, having high level responsibilities in an independent national human rights institution or other public or private sector organisation;
- (b) one independent person appointed by the Council of Europe; and
- (c) two representatives of the Commission.

2. Each member of the Management Board may be represented by an alternate member meeting the above requirements and appointed by the same procedure. The list of the members and alternate members of the Board shall be made public and shall be updated by the Agency on its web site.

3. The term of office of the members and alternate members of the Management Board shall be five years. It shall not be renewable.

4. Apart from normal replacement or death, the term of office of the member or the alternate member shall end only when he or she resigns. However, where a member or an alternate member no longer meets the criteria of independence, he or she shall forthwith inform the Commission and the Director of the Agency. The party concerned shall appoint a new member or a new alternate member for the remaining term of office. The party concerned shall also appoint a new member or a new alternate member for the remaining term of office, if the Management Board has established, based on a proposal of one third of its members or of the Commission, that the respective member or alternate member no longer meets the criteria of independence. Where the remaining term of office is less than two years, the mandate of the new member or alternate member may be extended for a full term of five years.

5. The Management Board shall elect its Chairperson and Vice-Chairperson and the other two members of the Executive Board referred to in Article 13(1) from its members appointed pursuant to paragraph 1(a) to serve for a two-and-a-half year term, which may be renewed once.

6. The Management Board shall ensure that the Agency performs the tasks entrusted to it. It shall be the Agency's planning and monitoring body. In particular, it shall:

- (a) adopt the Agency's Annual Work Programme in accordance with the Multiannual Framework, on the basis of the draft submitted by the Agency's Director after the Commission and the Scientific Committee have delivered an opinion. The Annual Work Programme shall be in accordance with the available financial and human resources and shall take into account the research and statistical work of the Community. The Annual Work Programme shall be transmitted to the European Parliament, the Council and the Commission;
- (b) adopt the annual reports referred to in Article 4(1)(e) and (g), comparing in the latter one, in particular, the results achieved with the objectives of the annual work programme; without prejudice to Article 14(5), the Scientific Committee shall be consulted before adoption of the report referred to in Article 4(1)(e); the reports shall be transmitted not later than 15 June to the European Parliament, the Council, the Commission, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions;
- (c) appoint and, if necessary, dismiss the Agency's Director;

- (d) adopt the Agency's annual draft and final budgets;
- (e) exercise the powers laid down in Article 24(2) in respect of the Director and disciplinary authority over the Director;
- (f) draw up an annual estimate of expenditure and revenue for the Agency and send it to the Commission, in accordance with Article 20(5);
- (g) adopt the Agency's rules of procedure on the basis of the draft submitted by the Director after the Commission, the Scientific Committee and the person mentioned in paragraph 1(b) have delivered an opinion;
- (h) adopt the financial rules applicable to the Agency on the basis of the draft submitted by the Director after the Commission has delivered an opinion, in accordance with Article 21(11);
- (i) adopt the necessary measures to implement the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, in accordance with Article 24(3);
- (j) adopt the arrangements on transparency and access to documents in accordance with Article 17(2);
- (k) appoint and revoke the members of the Scientific Committee in accordance with Article 14(1) and (3); and
- (l) establish that a member or an alternate member of the Management Board no longer meets the criteria of independence, in accordance with paragraph 4.

7. The Management Board may delegate its responsibilities to the Executive Board except for matters referred to in points (a), (b), (c), (d), (e), (g), (h), (k) and (l) of paragraph 6.

8. Decisions by the Management Board shall be taken by a simple majority of the votes cast, except as regards the decisions referred to in paragraph 5 and points (a), (b), (c), (d), (e), (g), (k) and (l) of paragraph 6, where a two-thirds majority of all members shall be required, and as regards the decisions referred to in Article 25(2), where the Management Board shall act by unanimity. Each member of the Management Board, or in his or her absence his or her alternate, shall have one vote. The Chairperson shall have the casting vote. The person appointed by the Council of Europe may vote on decisions referred to in points (a), (b) and (k) of paragraph 6.

9. The Chairperson shall convene the Board twice a year, without prejudice to extraordinary meetings. The Chairperson

shall convene extraordinary meetings on his or her own initiative or at the request of at least one third of the members of the Management Board.

10. The Chairperson or Vice-Chairperson of the Scientific Committee and the Director of the European Institute for Gender Equality may attend meetings of the Management Board as observers. The Directors of other relevant Community agencies and Union bodies as well as of other international bodies mentioned in Articles 8 and 9 may also attend as observers when invited by the Executive Board.

Article 13

Executive Board

1. The Management Board shall be assisted by an Executive Board. The Executive Board shall be made up of the Chairperson and the Vice-Chairperson of the Management Board, two other members of the Management Board elected by the Management Board in accordance with Article 12(5) and one of the representatives of the Commission in the Management Board. The person appointed by the Council of Europe in the Management Board may participate in the meetings of the Executive Board.

2. The Executive Board shall be convened by the Chairperson whenever necessary to prepare the decisions of the Management Board and to assist and advise the Director. It shall adopt its decisions by simple majority.

3. The Director shall take part in the meetings of the Executive Board, without voting rights.

Article 14

Scientific Committee

1. The Scientific Committee shall be composed of eleven independent persons, highly qualified in the field of fundamental rights. The Management Board shall appoint the members following a transparent call for applications and selection procedure after having consulted the competent committee of the European Parliament. The Management Board shall ensure even geographical representation. The members of the Management Board shall not be members of the Scientific Committee. The rules of procedure referred to in Article 12(6)(g) shall lay down the detailed conditions governing the appointment of the Scientific Committee.

2. The term of office of the members of the Scientific Committee shall be five years. It shall not be renewable.

3. The members of the Scientific Committee shall be independent. They may be replaced only at their own request, or in the event of their being permanently prevented from fulfilling their duties. However, where a member no longer meets the criteria of independence, he or she shall forthwith inform the Commission and the Director of the Agency. Alternatively the Management Board may declare, on a proposal of one third of its members or of the Commission, a lack of independence and revoke the person concerned. The Management Board shall appoint a new member for the remaining term of office in accordance with the procedure for ordinary members. Where the remaining term of office is less than two years, the mandate of the new member may be extended for a full term of five years. The list of members of the Scientific Committee shall be made public and shall be updated by the Agency on its web site.

4. The Scientific Committee shall elect its Chairperson and Vice-Chairperson for a term of office of one year.

5. The Scientific Committee shall be the guarantor of the scientific quality of the Agency's work, guiding the work to that effect. For that purpose, the Director shall involve the Scientific Committee as early as appropriate in the preparation of all documents drawn up in accordance with Article 4(1) (a), (b), (c), (d), (e), (f), and (h).

6. The Scientific Committee shall pronounce itself by two thirds majority. It shall be convened by its Chairperson four times per year. If necessary, the Chairperson shall launch a written procedure or shall convene extraordinary meetings on his or her own initiative or at the request of at least four members of the Scientific Committee.

Article 15

Director

1. The Agency shall be headed by a Director appointed by the Management Board in accordance with a cooperation (concertation) procedure provided for in paragraph 2.

The Director shall be appointed on the basis of his or her personal merit, experience in the field of fundamental rights and administrative and management skills.

2. This cooperation procedure shall be as follows:

(a) on the basis of a list drawn up by the Commission after a call for candidates and a transparent selection procedure, applicants will be asked before an appointment is made to address the Council and the competent European Parliament Committee and to reply to questions;

(b) the European Parliament and the Council of the European Union will then give their opinions and state their orders of preference;

(c) the Management Board will appoint the Director taking these opinions into account.

3. The Director's term of office shall be five years.

In the course of the nine months preceding the end of this period, the Commission shall undertake an evaluation. In this evaluation, the Commission shall assess in particular:

(a) the performance of the Director; and

(b) the Agency's duties and requirements in the coming years.

The Management Board, acting on a proposal from the Commission, taking account of the evaluation report, and only in those cases where it can be justified by the duties and the requirements of the Agency, may extend the term of office of the Director once for not more than three years.

The Management Board shall inform the European Parliament and the Council about its intention to extend the Director's mandate. Within a delay of one month before the Management Board formally takes its decision to extend this mandate, the Director may be asked to make a declaration before the competent committee of the European Parliament and to answer questions from its members.

If the term of office is not extended, the Director shall remain in office until the appointment of his/her successor.

4. The Director shall be responsible for:

(a) performance of the tasks referred to in Article 4 and in particular the preparation and publication of the documents drawn up in accordance with Article 4(1) (a), (b), (c), (d), (e), (f), (g) and (h) in cooperation with the Scientific Committee;

(b) preparation and implementation of the Agency's Annual Work Programme;

(c) all staff matters, and in particular the exercise in respect of staff of the powers laid down in Article 24(2);

(d) matters of day-to-day administration;

- (e) implementation of the Agency's budget, in accordance with Article 21;
- (f) implementation of effective monitoring and evaluation procedures relating to the performance of the Agency against its objectives according to professionally recognised standards. The Director shall report annually to the Management Board on the results of the monitoring system;
- (g) cooperation with National Liaison Officers; and
- (h) cooperation with civil society, including coordination of the Fundamental Rights Platform in accordance with Article 10.

5. The Director shall perform his/her tasks independently. He or she shall be accountable for the management of his/her activities to the Management Board and shall participate in its meetings without voting rights.

6. The Director may be called upon at any time by the European Parliament or by the Council to attend a hearing on any matter linked to the Agency's activities.

7. The Director may be dismissed by the Management Board before his or her term has expired, on the basis of a proposal of a third of its members or of the Commission.

CHAPTER 4

OPERATION

Article 16

Independence and public interests

1. The Agency shall fulfil its tasks in complete independence.
2. The members and alternate members of the Management Board, the members of the Scientific Committee and the Director shall undertake to act in the public interest. For this purpose, they shall make a statement of interests indicating either the absence of any interests which might be considered prejudicial to their independence or any direct or indirect interests which might be considered prejudicial to their independence. The statement shall be made in writing when taking office and shall be revised if changes occur with regard to the interests. It shall be published by the Agency on its website.

Article 17

Transparency and access to documents

1. The Agency shall develop good administrative practices in order to ensure the highest possible level of transparency concerning its activities.

Regulation (EC) No 1049/2001 shall apply to documents held by the Agency.

2. The Management Board shall, within six months of the commencement of the Agency's operation, adopt specific rules for the practical implementation of paragraph 1. These shall include, *inter alia*, rules on:

- (a) openness of meetings;
- (b) publication of the work of the agency, including the work of the Scientific Committee; and
- (c) arrangements to implement Regulation (EC) No 1049/2001.

3. Where the Agency takes decisions under Article 8 of Regulation (EC) No 1049/2001, a complaint may be lodged with the Ombudsman or an action may be brought in the Court of Justice of the European Communities, as provided by Articles 195 and 230 of the Treaty respectively.

Article 18

Data protection

Regulation (EC) No 45/2001 shall apply to the Agency.

Article 19

Review by the Ombudsman

The operations of the Agency shall be subject to the supervision of the Ombudsman in accordance with the provisions of Article 195 of the Treaty.

CHAPTER 5

FINANCIAL PROVISIONS

Article 20

Drawing up of the budget

1. Estimates of all the revenue and expenditure of the Agency shall be prepared for each financial year, corresponding to the calendar year, and shall be shown in the budget of the Agency.
2. The revenue and expenditure shown in the budget of the Agency shall be in balance.
3. The revenue of the Agency shall, without prejudice to other resources, comprise a subsidy from the Community, entered in the general budget of the European Union (Commission section).

This revenue may be complemented by:

- (a) payments received for services rendered in the framework of the implementation of tasks listed in Article 4; and

(b) financial contributions from the organisations or countries referred to in Articles 8, 9 and 28.

4. The expenditure of the Agency shall include staff remuneration, administrative and infrastructure costs and operating expenses.

5. Each year the Management Board, on the basis of a draft drawn up by the Director, shall produce an estimate of revenue and expenditure for the Agency for the following financial year. This estimate, which shall include a draft establishment plan, shall be transmitted by the Management Board to the Commission by 31 March at the latest.

6. The estimate shall be transmitted by the Commission to the European Parliament and the Council (hereinafter the budgetary authority) together with the preliminary draft budget of the European Union.

7. On the basis of the estimate, the Commission shall enter in the preliminary draft general budget of the European Union the estimates it considers necessary for the establishment plan and the amount of the subsidy to be charged to the general budget, which it shall place before the budgetary authority in accordance with Article 272 of the Treaty.

8. The budgetary authority shall authorise the appropriations for the subsidy to the Agency. The budgetary authority shall adopt the Agency's establishment plan.

9. The Agency's budget shall be adopted by the Management Board. It shall become final following the adoption of the general budget of the European Union. Where appropriate, it shall be adjusted accordingly.

10. The Management Board shall, as soon as possible, notify the budgetary authority of its intention to implement any project which may have significant financial implications for the funding of the Agency's budget, in particular any projects relating to property such as the rental or purchase of buildings. It shall inform the Commission thereof.

Where a branch of the budgetary authority has notified its intention to deliver an opinion, it shall forward its opinion to the Management Board within six weeks from the date of notification of the project.

Article 21

Implementation of the budget

1. The Director shall implement the Agency's budget.

2. By 1 March at the latest following each financial year, the Agency's accounting officer shall communicate the provisional accounts to the Commission's accounting officer, together with a report on the budgetary and financial management for that financial year. The Commission's accounting officer shall consolidate the provisional accounts of the institutions and decentralised bodies in accordance with Article 128 of Council Regulation (EC, Euratom) No 1605/2002⁽¹⁾ (the Financial Regulation).

3. Not later than 31 March following each financial year, the Commission's accounting officer shall transmit the Agency's provisional accounts to the Court of Auditors, together with a report on the budgetary and financial management for that financial year. The report on the budgetary and financial management for that financial year shall also be transmitted to the European Parliament and the Council.

4. On receipt of the Court of Auditors' observations on the Agency's provisional accounts, pursuant to Article 129 of the Financial Regulation, the Director shall draw up the Agency's final accounts under his own responsibility and forward them to the Management Board for an opinion.

5. The Management Board shall deliver an opinion on the Agency's final accounts.

6. The Director shall, not later than 1 July following each financial year, transmit the final accounts to the European Parliament, the Council, the Commission and the Court of Auditors, together with the Management Board's opinion.

7. The final accounts shall be published.

8. The Director shall send the Court of Auditors a reply to its observations not later than 30 September. He/she shall also send this reply to the Management Board.

9. The Director shall submit to the European Parliament, at the latter's request, any information required for the smooth application of the discharge procedure for the financial year in question, as laid down in Article 146(3) of the Financial Regulation.

10. The European Parliament, on a recommendation from the Council acting by a qualified majority, shall, before 30 April of year N + 2, give a discharge to the Director in respect of the implementation of the budget for year N.

⁽¹⁾ OJ L 248, 16.9.2002, p. 1. Regulation as last amended by Regulation (EC, Euratom) No 1995/2006 (OJ L 390, 30.12.2006, p. 1).

11. The financial rules applicable to the Agency shall be adopted by the Management Board after the Commission has been consulted. They may not depart from Regulation (EC, Euratom) No 2343/2002, unless specifically required for the Agency's operation and with the Commission's prior consent.

Article 22

Combating fraud

1. In order to combat fraud, corruption and other unlawful activities, the provisions of Regulation (EC) No 1073/1999 shall apply without restrictions to the Agency.

2. The Agency shall accede to the Inter-institutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF) ⁽¹⁾ and shall issue, without delay, the appropriate provisions applicable to its entire staff.

3. The decisions concerning funding and the implementing agreements and instruments resulting from them shall explicitly stipulate that the Court of Auditors and OLAF may carry out, if necessary, on-the-spot checks on the recipients of the Agency's funding and the staff responsible for allocating it.

CHAPTER 6

GENERAL PROVISIONS

Article 23

Legal status and location

1. The Agency shall have legal personality.

2. In each of the Member States, the Agency shall enjoy the most extensive legal capacity accorded to legal persons under their laws. In particular it may acquire and dispose of movable and immovable property and may be a party to legal proceedings.

3. The Agency shall be represented by its Director.

4. The Agency shall legally succeed the European Monitoring Centre on Racism and Xenophobia. It shall assume all the legal rights and obligations, financial commitments or liabilities of the Centre. Employment contracts concluded by the Centre before the adoption of this Regulation shall be honoured.

5. The seat of the Agency shall be Vienna.

Article 24

Staff

1. The Staff Regulations of officials of the European Communities, the Conditions of Employment of other servants of the European Communities and the rules adopted jointly by the European Community institutions for the purpose of applying these Staff Regulations and Conditions of Employment shall apply to the staff of the Agency and its Director.

2. In respect of its staff, the Agency shall exercise the powers conferred on the appointing authority by the Staff Regulations of officials of the European Communities and on the authority entitled to conclude contracts by the Conditions of Employment of other servants of the European Communities.

3. The Management Board shall, in agreement with the Commission, adopt the necessary implementing measures, in accordance with arrangements provided for in Article 110 of the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities.

4. The Management Board may adopt provisions to allow national experts from Member States to be employed on secondment at the Agency.

Article 25

Language arrangements

1. The provisions of Regulation No 1 of 15 April 1958 shall apply to the Agency.

2. The Management Board shall decide on the internal language arrangements for the Agency.

3. The translation services required for the functioning of the Agency shall be provided by the Translation Centre for the Bodies of the European Union.

Article 26

Privileges and immunities

The Protocol on the Privileges and Immunities of the European Communities shall apply to the Agency.

Article 27

Jurisdiction of the Court of Justice

1. The contractual liability of the Agency shall be governed by the law applicable to the contract in question.

The Court of Justice shall have jurisdiction pursuant to an arbitration clause contained in a contract concluded by the Agency.

⁽¹⁾ OJ L 136, 31.5.1999, p. 15.

2. In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by the Agency or its servants in the performance of their duties.

The Court of Justice shall have jurisdiction in disputes relating to compensation for any such damage.

3. The Court of Justice shall have jurisdiction in actions brought against the Agency under the conditions provided for in Articles 230 and 232 of the Treaty.

Article 28

Participation and scope in respect of candidate countries and countries with which a Stabilisation and Association Agreement has been concluded

1. The Agency shall be open to the participation of candidate countries as observers.

2. The participation and the respective modalities shall be determined by a decision of the relevant Association Council, taking into account the specific status of each country. The decision shall indicate in particular the nature, extent and manner in which these countries will participate in the Agency's work, within the framework set in Articles 4 and 5, including provisions relating to participation in initiatives undertaken by the Agency, to the financial contribution and to staff. The decision shall be in line with this Regulation and with the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities. The decision shall provide that the participating country may appoint an independent person fulfilling the qualifications for persons referred to in Article 12(1)(a) as observer to the Management Board without right to vote. Upon the decision of the Association Council the Agency may deal with fundamental rights issues within the scope of Article 3(1) in the respective country, to the extent necessary for the gradual alignment to Community law of the country concerned.

3. The Council, acting unanimously on a proposal by the Commission, may decide to invite a country with which a Stabilisation and Association Agreement has been concluded by the European Community to participate in the Agency as an observer. In that case, paragraph 2 shall apply accordingly.

CHAPTER 7

FINAL PROVISIONS

Article 29

Transitional arrangements

1. The term of office of the members of the Management Board of the European Monitoring Centre on Racism and Xenophobia (the Centre) shall terminate on 28 February 2007.

2. With regard to the appointment of the Management Board:

(a) the Commission shall take the necessary measures without delay after the entry into force of this Regulation to ensure that the Management Board established in accordance with Article 12 starts its work in due course;

(b) within four months from the date of entry into force of this Regulation the Member States shall notify the Commission of the names of the persons whom they have appointed as member and alternate member of the Management Board, in accordance with Article 12(1) and (2). After the expiry of this period, the Commission shall convene the Management Board, provided that at least 17 members have been appointed. In such a case and by way of derogation from Article 12(8), the decisions of the Management Board shall be taken by a two thirds majority of the votes of the appointed members. Once 23 members of the Management Board have been appointed, Article 12(8) shall apply;

(c) in the first meeting of the Management Board, after all appointments have been completed, the Commission shall choose by lot 15 members of the Management Board, whose duties are to end, by way of derogation from Article 12(4), upon expiry of the first three years of their term of office.

3. The parties concerned shall start the procedure for appointing a Director of the Agency as provided for in Article 15(1) without delay after the entry into force of this Regulation.

4. Pending the establishment of the Management Board in accordance with paragraph 2(b) and Article 12(1) and (2), the Commission shall convene an interim Management Board consisting of the persons, currently appointed by the Member States, the Council of Europe and the Commission to the Management Board of the Centre on the basis of Article 8 of Regulation (EC) No 1035/97.

The interim Management Board shall have the mandate to:

(a) issue an opinion on a proposal from the Commission concerning the text of the call for candidates for the post of Director in accordance with Article 15(1) in order to start the selection procedure;

(b) appoint, acting on a proposal from the Commission, an interim Director or extend the current term of the Director of the Centre for the shortest possible period, during the appointment procedure referred to in paragraph 3;

(c) adopt the Agency's budget for the year 2007 in accordance with Article 20(9) and a draft budget for year 2008 in accordance with Article 20(5); and

(d) adopt the annual report on the Centre's own activities for 2006, in accordance with Article 12(6)(b).

5. Until the first Multiannual Framework for the Agency has been adopted in accordance with Article 5(1), the Agency shall carry out its tasks in the thematic areas of the fight against racism, xenophobia and related intolerance referred to in Article 5(2)(b), without prejudice to the second sentence of Article 5(3).

Article 30

Evaluations

1. The Agency shall regularly carry out *ex ante* and *ex post* evaluations of its activities when these necessitate significant expenditure. The Director shall notify the Management Board of the results of these evaluations.

2. The Agency shall forward annually to the budgetary authority any information relevant to the outcome of the evaluation procedures.

3. Not later than 31 December 2011, the Agency shall commission an independent external evaluation of its achievements during the first five years of operations on the basis of terms of reference issued by the Management Board in agreement with the Commission. This evaluation shall:

- (a) take into account the tasks of the Agency, the working practices and impact of the Agency on the protection and promotion of fundamental rights;
- (b) assess the possible need to modify the Agency's tasks, scope, areas of activity or structure;
- (c) include an analysis of the synergy effects and the financial implications of any modification of the tasks; and
- (d) take into account the views of the stakeholders at both Community and national levels.

4. The Management Board, in agreement with the Commission, shall determine the timing and scope of

subsequent external evaluations, which shall be carried out periodically.

Article 31

Review

1. The Management Board shall examine the conclusions of the evaluations referred to in Article 30(3) and (4) and issue to the Commission such recommendations as may be necessary regarding changes in the Agency, its working practices and the scope of its mission. The Commission shall transmit the evaluation reports and recommendations to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions and make them public.

2. After having assessed the evaluation report and recommendations, the Commission may submit any proposals for amendments to this Regulation which it considers necessary.

Article 32

Commencement of the Agency's operation

The Agency shall become operational by 1 March 2007.

Article 33

Repeal

1. Regulation (EC) No 1035/97 is hereby repealed with effect from 1 March 2007.

2. References to the repealed Regulation shall be construed as references to this Regulation.

Article 34

Entry into force and application

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall apply with effect from 1 March 2007.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 15 February 2007.

For the Council
The President
W. SCHÄUBLE

I

(Actos adoptados en aplicación de los Tratados CE/Euratom cuya publicación es obligatoria)

REGLAMENTOS

REGLAMENTO (CE) Nº 168/2007 DEL CONSEJO

de 15 de febrero de 2007

por el que se crea una Agencia de los Derechos Fundamentales de la Unión Europea

EL CONSEJO DE LA UNIÓN EUROPEA,

Europa, así como la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas y del Tribunal Europeo de Derechos Humanos.

Visto el Tratado constitutivo de la Comunidad Europea y, en particular, su artículo 308,

(3) La Comunidad y sus Estados miembros deben respetar los derechos fundamentales al aplicar el Derecho comunitario.

Vista la propuesta de la Comisión,

(4) El respeto total y absoluto de los derechos fundamentales pasa por un mayor conocimiento y una más amplia concienciación en la Unión sobre las cuestiones relacionadas con los derechos fundamentales. La creación de una agencia comunitaria, con la misión de proporcionar información y datos sobre los asuntos referentes a los derechos fundamentales, contribuirá al logro de ese objetivo. Además, la creación de instituciones eficaces para la protección y el fomento de los derechos humanos es un valor común de las sociedades internacional y europea, tal como se afirma en la Recomendación nº R (97) 14, de 30 de septiembre de 1997, del Comité de Ministros del Consejo de Europa.

Visto el dictamen del Parlamento Europeo,

Visto el dictamen del Comité Económico y Social Europeo ⁽¹⁾,

Visto el dictamen del Comité de las Regiones,

Considerando lo siguiente:

(1) La Unión Europea se basa en los principios de libertad, democracia, respeto de los derechos humanos y de las libertades fundamentales y el Estado de Derecho, principios que son comunes a los Estados miembros.

(5) El 13 de diciembre de 2003, los Representantes de los Estados miembros, reunidos en el Consejo Europeo, decidieron utilizar como base el actual Observatorio Europeo del Racismo y la Xenofobia, creado por el Reglamento (CE) nº 1035/97 ⁽²⁾, y ampliar su mandato a fin de convertirlo en una Agencia de Derechos Humanos. También decidieron en dicha ocasión que la sede de la Agencia permaneciera en Viena.

(2) La Carta de los Derechos Fundamentales de la Unión Europea ⁽²⁾, teniendo presente su estatuto jurídico y su ámbito de aplicación, y las explicaciones que la acompañan, enuncia los derechos que se derivan en particular de las tradiciones constitucionales y de las obligaciones internacionales comunes a los Estados miembros, el Tratado de la Unión Europea, los Tratados comunitarios, el Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales, las Cartas Sociales adoptadas por la Comunidad y por el Consejo de

(6) La Comisión se adhirió a esa decisión y comunicó su intención de presentar una propuesta para modificar, con ese propósito, el Reglamento (CE) nº 1035/97. El 25 de octubre de 2004, la Comisión publicó una Comunicación sobre la Agencia de los Derechos Fundamentales que sirvió de base para la realización de una amplia consulta pública.

⁽¹⁾ DO C 88 de 11.4.2006, p. 37.

⁽²⁾ DO C 364 de 18.12.2000, p. 1.

⁽³⁾ DO L 151 de 10.6.1997, p. 1. Reglamento modificado por el Reglamento (CE) nº 1652/2003 (DO L 245 de 29.9.2003, p. 33).

- (7) Por lo tanto, se debe crear, tomando como base el actual Observatorio Europeo del Racismo y la Xenofobia, una Agencia de los Derechos Fundamentales de la Unión Europea que proporcione a las instituciones y a las autoridades competentes de la Comunidad y de los Estados miembros, cuando apliquen el Derecho comunitario, información, ayuda y asesoramiento sobre los derechos fundamentales para ayudarles a respetarlos plenamente cuando, en sus ámbitos de competencia respectivos, adopten medidas o definan líneas de actuación.
- (8) Se reconoce que la Agencia debe actuar únicamente dentro del ámbito de aplicación del Derecho comunitario.
- (9) En el ejercicio de sus funciones, la Agencia deberá referirse a los derechos fundamentales en el sentido del artículo 6, apartado 2, del Tratado de la Unión Europea, incluido el Convenio Europeo para la Protección de los Derechos Humanos y de las Libertades Fundamentales, y como se reflejan, en particular, en la Carta de los Derechos Fundamentales, teniendo presente su estatuto jurídico y las explicaciones que la acompañan. Su estrecha vinculación con la Carta debe reflejarse en el propio nombre de la Agencia.
- (10) Dado que la Agencia debe construirse sobre la base del actual Observatorio Europeo del Racismo y la Xenofobia, el trabajo de la Agencia debe seguir cubriendo los fenómenos del racismo, la xenofobia y el antisemitismo, la protección de los derechos de las personas que pertenecen a minorías, así como la igualdad de género, como elementos esenciales para la protección de los derechos fundamentales.
- (11) Los ámbitos temáticos de actividad de la Agencia deben establecerse en un marco plurianual, de tal manera que queden definidos los límites de su labor. Dada la significación política del marco plurianual, es importante que el mismo Consejo lo adopte, previa consulta al Parlamento Europeo sobre la base de una propuesta de la Comisión.
- (12) La Agencia debe recoger información objetiva, fiable y comparable sobre la evolución de la situación de los derechos fundamentales, analizar esta información por lo que se refiere a los motivos, las consecuencias y los efectos de la violación de estos derechos y examinar ejemplos de buenas prácticas en este ámbito.
- (13) La Agencia debe tener derecho a formular dictámenes para las instituciones de la Unión y para los Estados miembros cuando apliquen el Derecho comunitario, bien por propia iniciativa o bien a petición del Parlamento Europeo, del Consejo o de la Comisión, sin interferir en los procedimientos legislativos y jurisdiccionales establecidos en el Tratado. Sin embargo, las instituciones deben poder solicitar dictámenes sobre sus propuestas legislativas o posiciones adoptadas en el curso de procedimientos legislativos, en la medida en que afecten a su compatibilidad con los derechos fundamentales.
- (14) La Agencia debe presentar un informe anual sobre cuestiones de derechos fundamentales cubiertas por las áreas de la actividad de la Agencia, destacando también los ejemplos de buenas prácticas. Además, la Agencia debe presentar informes temáticos sobre aquellos asuntos que revistan un interés particular para las políticas de la Unión.
- (15) La Agencia debe tomar medidas para concienciar en mayor medida a la ciudadanía sobre sus derechos fundamentales y sobre las posibilidades y diferentes mecanismos para hacer que dichos derechos se cumplan en general, sin que ello suponga, no obstante, tener que ocuparse de las denuncias individuales.
- (16) La Agencia debe trabajar lo más estrechamente posible con todas las instituciones pertinentes de la Unión, así como con los órganos, oficinas y agencias de la Comunidad y de la Unión, para evitar las repeticiones inútiles, en especial con el futuro Instituto Europeo de la Igualdad de Género.
- (17) Dado que la cooperación con los Estados miembros es un elemento esencial para garantizar el éxito de la realización de los cometidos de la Agencia, esta debe cooperar estrechamente con los Estados miembros a través de sus distintos órganos, para lo cual los Estados miembros deben designar funcionarios nacionales de enlace como puntos de contacto primarios para la Agencia en los Estados miembros. La Agencia debe, en especial, comunicarse con los funcionarios nacionales de enlace por lo que se refiere a los informes y otros documentos elaborados por la Agencia.
- (18) La Agencia debe colaborar estrechamente con el Consejo de Europa. Esa cooperación debe garantizar que no se produzcan colisiones entre las actividades de la Agencia y las del Consejo de Europa, en particular mediante la creación de mecanismos que aseguren la complementariedad y el valor añadido, como la celebración de un acuerdo de cooperación bilateral y la participación, con los derechos de voto adecuados, de una persona independiente, designada por el Consejo de Europa, en las estructuras de gestión de la Agencia.
- (19) Reconociendo el importante papel de la sociedad civil en la protección de los derechos fundamentales, la Agencia debe promover el diálogo con la sociedad civil y trabajar en estrecho contacto con organizaciones no gubernamentales y con instituciones de la sociedad civil que actúen en el ámbito de los derechos fundamentales. La Agencia debe establecer una red de cooperación denominada Plataforma de los derechos fundamentales con miras a instaurar un diálogo estructurado y fructífero y una estrecha colaboración con todas las partes interesadas.

- (20) Habida cuenta de las funciones especiales de la Agencia, cada Estado miembro debe designar un experto independiente para formar parte del Consejo de Administración. Teniendo en cuenta los principios relacionados con la condición y funcionamiento de las instituciones nacionales de protección y fomento de los derechos humanos (los «Principios de París»), la composición de este Consejo debe garantizar la independencia de la Agencia respecto de las instituciones comunitarias y de los gobiernos de los Estados miembros y reunir el mayor nivel de conocimientos posible sobre los derechos fundamentales.
- (21) A fin de garantizar un alto nivel de calidad científica de sus trabajos, la Agencia debe recurrir a un comité científico para que oriente su trabajo con objetividad científica.
- (22) Las autoridades que designen a los miembros del Consejo de Administración, del Consejo Ejecutivo y del Comité Científico deben aspirar a lograr una participación equilibrada de hombres y mujeres en estos órganos. También debe prestarse atención especial a una representación equilibrada de hombres y mujeres en el personal de la Agencia.
- (23) Teniendo en cuenta el importante papel desempeñado por el Parlamento Europeo en la defensa, la toma en consideración y el fomento de los derechos fundamentales, debe participar en las actividades de la Agencia, incluso en la adopción del marco plurianual para la Agencia y dado el carácter excepcional de la Agencia y de sus cometidos, en la selección de los candidatos propuestos para el cargo de Director de la Agencia sin sentar precedente respecto a otras Agencias.
- (24) La Agencia debe aplicar la normativa comunitaria pertinente sobre el acceso del público a los documentos, recogida en el Reglamento (CE) n° 1049/2001 del Parlamento Europeo y del Consejo, de 30 de mayo de 2001, relativo al acceso del público a los documentos del Parlamento Europeo, del Consejo y de la Comisión ⁽¹⁾, sobre la protección de las personas físicas en lo que respecta al tratamiento de datos personales, recogida en el Reglamento (CE) n° 45/2001 del Parlamento Europeo y del Consejo, de 18 de diciembre de 2000, relativo a la protección de las personas físicas en lo que respecta al tratamiento de datos personales por las instituciones y los organismos comunitarios y a la libre circulación de estos datos ⁽²⁾, y sobre las lenguas, recogida en el Reglamento n° 1, de 15 de abril de 1958, por el que se fija el régimen lingüístico de la Comunidad Económica Europea ⁽³⁾, y en el Reglamento (CE) n° 2965/94 del Consejo,
- de 28 de noviembre de 1994, por el que se crea un Centro de traducción de los órganos de la Unión Europea ⁽⁴⁾.
- (25) El Reglamento (CE, Euratom) n° 2343/2002 de la Comisión, de 23 de diciembre de 2002, por el que se aprueba el Reglamento financiero marco de los organismos a que se refiere el artículo 185 del Reglamento (CE, Euratom) n° 1605/2002 del Consejo, por el que se aprueba el Reglamento financiero aplicable al presupuesto general de las Comunidades Europeas ⁽⁵⁾, debe aplicarse a la Agencia, así como el Reglamento (CE) n° 1073/1999 del Parlamento Europeo y del Consejo, de 25 de mayo de 1999, relativo a las investigaciones efectuadas por la Oficina Europea de Lucha contra el Fraude (OLAF) ⁽⁶⁾.
- (26) El Estatuto de los funcionarios de las Comunidades Europeas, el Régimen aplicable a los otros agentes de las Comunidades Europeas y las reglamentaciones adoptadas de común acuerdo por las instituciones de las Comunidades Europeas a efectos de la aplicación de dicho Estatuto y de dicho Régimen deben aplicarse al personal y al Director de la Agencia, incluidas las normas relativas a la destitución del Director.
- (27) La Agencia debe gozar de personalidad jurídica y suceder al Observatorio Europeo del Racismo y la Xenofobia en todas aquellas obligaciones jurídicas, compromisos financieros u obligaciones asumidas por el Observatorio, en los acuerdos celebrados por este último, así como en los contratos de trabajo suscritos con el personal del Observatorio.
- (28) La Agencia debe estar abierta a la participación de los países candidatos. También se debe permitir participar en la Agencia a los países con los cuales se haya celebrado un acuerdo de estabilización y asociación, ya que ello permitirá a la Unión apoyarles en sus esfuerzos hacia la integración europea al facilitar una adaptación gradual de su legislación al Derecho comunitario así como la transferencia de conocimientos y de buenas prácticas, en particular en aquellos ámbitos del acervo que sirvan de referencia central para el proceso de reforma en los Balcanes occidentales.
- (29) La Agencia debe iniciar a su debido tiempo las evaluaciones necesarias de sus actividades en función de las cuales podrán revisarse su ámbito de aplicación, sus cometidos y sus métodos de trabajo.

⁽¹⁾ DO L 145 de 31.5.2001, p. 43.

⁽²⁾ DO L 8 de 12.1.2001, p. 1.

⁽³⁾ DO 17 de 6.10.1958, p. 385/58. Reglamento modificado en último lugar por el Reglamento (CE) n° 1791/2006 (DO L 363 de 20.12.2006, p. 1).

⁽⁴⁾ DO L 314 de 7.12.1994, p. 1. Reglamento modificado en último lugar por el Reglamento (CE) n° 1645/2003 (DO L 245 de 29.9.2003, p. 13).

⁽⁵⁾ DO L 357 de 31.12.2002, p. 72.

⁽⁶⁾ DO L 136 de 31.5.1999, p. 1.

- (30) Dado que los objetivos del presente Reglamento, a saber, proporcionar información y datos comparables y fiables a escala europea para ayudar a las instituciones de la Unión y a los Estados miembros a respetar los derechos fundamentales, no pueden ser alcanzados de manera suficiente por los Estados miembros y, por consiguiente, debido a la dimensión y a los efectos de la acción pretendida, pueden lograrse mejor a nivel comunitario, la Comunidad puede adoptar medidas de acuerdo con el principio de subsidiariedad consagrado en el artículo 5 del Tratado. De conformidad con el principio de proporcionalidad, enunciado en dicho artículo, el presente Reglamento no excede de lo necesario para alcanzar dichos objetivos.
- (31) Es probable que la contribución de la Agencia para garantizar el pleno respeto de los derechos fundamentales en el marco del Derecho comunitario ayude a lograr los objetivos de la Comunidad. Respecto a la aprobación del presente Reglamento, el Tratado no prevé otros poderes de acción que los del artículo 308.
- (32) Ninguna de las disposiciones del presente Reglamento debe interpretarse en el sentido de prejuzgar la cuestión de si el mandato de la Agencia puede ampliarse para cubrir los ámbitos de la cooperación policial y judicial en materia penal.
- (33) Habida cuenta de que la creación de la Agencia requeriría una modificación sustancial del Reglamento (CE) nº 1035/97, conviene, por razones de claridad, derogar dicho Reglamento.

HA ADOPTADO EL PRESENTE REGLAMENTO:

CAPÍTULO 1

OBJETO, OBJETIVO, ÁMBITO DE APLICACIÓN, COMETIDOS Y SECTORES DE ACTIVIDAD

Artículo 1

Objeto

Se crea la Agencia de los Derechos Fundamentales de la Unión Europea («la Agencia»).

Artículo 2

Objetivo

El objetivo de la Agencia será proporcionar a las instituciones, órganos, organismos y agencias competentes de la Comunidad y a sus Estados miembros cuando apliquen el Derecho comunitario, ayuda y asesoramiento en materia de derechos fundamentales con el fin de ayudarles a respetarlos plenamente cuando

adopten medidas o establezcan líneas de actuación en sus esferas de competencia respectivas.

Artículo 3

Ámbito de aplicación

1. La Agencia realizará sus cometidos, con el fin de lograr el objetivo establecido en el artículo 2, en el marco de las competencias que el Tratado constitutivo de la Comunidad Europea confiere a la Comunidad.
2. En el ejercicio de su misión, la Agencia se remitirá a los derechos fundamentales definidos en el artículo 6, apartado 2, del Tratado de la Unión Europea.
3. La Agencia se ocupará de las cuestiones relativas a los derechos fundamentales en la Unión Europea y en sus Estados miembros cuando apliquen el Derecho comunitario.

Artículo 4

Cometidos

1. Para cumplir el objetivo establecido en el artículo 2, y en los límites de sus competencias definidas en el artículo 3, la Agencia:
 - a) recopilará, registrará, analizará y difundirá datos e informaciones pertinentes, objetivos, fiables y comparables, incluidos los resultados de las actividades de investigación y supervisión que le comuniquen los Estados miembros, las instituciones de la Unión, así como los órganos, organismos y agencias de la Comunidad y de la Unión, los centros de investigación, los organismos nacionales, las organizaciones no gubernamentales, los terceros países y las organizaciones internacionales, y en particular los organismos competentes del Consejo de Europa;
 - b) desarrollará métodos y normas para mejorar la comparabilidad, la objetividad y la fiabilidad de los datos a escala europea, en cooperación con la Comisión y los Estados miembros;
 - c) realizará o fomentará investigaciones y trabajos científicos, estudios preparatorios y de viabilidad, o colaborará en ellos, incluso, cuando resulte apropiado y sea compatible con sus prioridades y su programa de trabajo anual, a petición del Parlamento Europeo, el Consejo o la Comisión;
 - d) formulará y publicará, por propia iniciativa o a petición del Parlamento Europeo, el Consejo o la Comisión, conclusiones y dictámenes sobre temas concretos para las instituciones de la Unión y los Estados miembros cuando apliquen el Derecho comunitario;

- e) publicará un informe anual sobre las cuestiones relativas a los derechos fundamentales cubiertas por los ámbitos de actividad de la Agencia, en el que también se resaltarán los ejemplos de buenas prácticas;
- f) publicará informes temáticos basados en sus análisis, investigaciones y encuestas;
- g) publicará un informe anual de sus actividades, y
- h) desarrollará una estrategia de comunicación y fomentará el diálogo con la sociedad civil, con el fin de aumentar la sensibilización de la opinión pública ante los derechos fundamentales y difundirá información activamente sobre su trabajo.

2. Las conclusiones, dictámenes e informes enunciados en el apartado 1 podrán referirse a las propuestas presentadas por la Comisión en virtud del artículo 250 del Tratado o a las posiciones tomadas por las instituciones en el curso de procedimientos legislativos, únicamente cuando las respectivas instituciones así lo soliciten de conformidad con el apartado 1, letra d). No abordarán la legalidad de los actos adoptados en el sentido del artículo 230 del Tratado, ni la cuestión de si un Estado miembro ha incumplido alguna de las obligaciones que le incumben en virtud del Tratado a los efectos de su artículo 226.

Artículo 5

Sectores de actividad

1. El Consejo, a propuesta de la Comisión y previa consulta al Parlamento Europeo, adoptará un marco plurianual para la Agencia. Al elaborar su propuesta, la Comisión consultará al Consejo de Administración.
2. El marco plurianual:
 - a) tendrá una duración de cinco años;
 - b) definirá los ámbitos temáticos de actividad de la Agencia, entre los que deberá figurar la lucha contra el racismo, la xenofobia y la intolerancia asociada a los mismos;
 - c) respetará las prioridades de la Unión teniendo debidamente en cuenta las orientaciones resultantes de las resoluciones del Parlamento Europeo y de las conclusiones del Consejo en el ámbito de los derechos fundamentales;
 - d) tendrá debidamente en cuenta los recursos financieros y humanos de la Agencia, e
 - e) incluirá disposiciones con objeto de garantizar la complementariedad con el mandato de otros órganos, organismos

y agencias de la Comunidad y de la Unión, así como con el Consejo de Europa y otras organizaciones internacionales que trabajan en el ámbito de los derechos fundamentales.

3. La Agencia llevará a cabo sus cometidos en los ámbitos temáticos establecidos en el marco plurianual. Ello se entenderá sin perjuicio de las respuestas de la Agencia a las peticiones que le formulen el Parlamento Europeo, el Consejo o la Comisión de conformidad con lo dispuesto en el artículo 4, apartado 1, letras c) y d), fuera de esos ámbitos temáticos, siempre que lo permitan sus recursos financieros y humanos.

4. La Agencia llevará a cabo sus cometidos de acuerdo con su programa de trabajo anual y teniendo debidamente en cuenta los recursos financieros y humanos disponibles.

CAPÍTULO 2

MÉTODOS DE TRABAJO Y COOPERACIÓN

Artículo 6

Métodos de trabajo

1. Con vistas a garantizar el suministro de información objetiva, fiable y comparable, basándose en los conocimientos de diversas organizaciones y órganos existentes en cada Estado miembro y teniendo en cuenta la necesidad de que las autoridades nacionales participen en la recogida de datos, la Agencia:

- a) establecerá y coordinará redes de información y utilizará las redes existentes;
- b) organizará reuniones de expertos exteriores, y
- c) cuando proceda, establecerá grupos de trabajo *ad hoc*.

2. Para lograr la complementariedad y garantizar un uso óptimo de los recursos, en el ejercicio de sus actividades la Agencia tendrá en cuenta, en su caso, las informaciones recopiladas y las actividades desempeñadas en particular por:

- a) las instituciones de la Unión, así como los órganos, organismos y agencias de la Comunidad y de la Unión y los órganos, organismos y agencias de los Estados miembros;
- b) el Consejo de Europa, remitiéndose a los resultados y actividades de sus mecanismos de seguimiento y control, así como de su Comisario de Derechos Humanos, y
- c) la Organización para la Seguridad y la Cooperación en Europa (OSCE), las Naciones Unidas y otras organizaciones internacionales.

3. La Agencia podrá establecer relaciones contractuales, en especial procedimientos de subcontratación, con otras organizaciones para que estas realicen los cometidos que la Agencia desee confiarles. La Agencia también podrá conceder subvenciones con el fin de fomentar una cooperación adecuada y actividades conjuntas, en especial a las organizaciones nacionales e internacionales a las que se hace referencia en los artículos 8 y 9.

Artículo 7

Relaciones con los órganos, organismos y agencias competentes de la Comunidad

La Agencia garantizará una coordinación adecuada con los órganos, organismos y agencias competentes de la Comunidad. Las condiciones de esta cooperación se establecerán, en su caso, en memorandos de acuerdo.

Artículo 8

Cooperación con organizaciones de los Estados miembros e internacionales

1. Con el fin de garantizar una estrecha cooperación con los Estados miembros, cada Estado miembro nombrará a un funcionario del Estado como funcionario de enlace nacional, que será el principal punto de contacto de la Agencia en el Estado miembro de que se trate. Entre otras cosas, los funcionarios de enlace nacionales podrán presentar al Director sus opiniones sobre el proyecto de programa de trabajo anual antes de que se presente al Consejo de Administración. La Agencia comunicará a los funcionarios de enlace nacionales toda la documentación elaborada con arreglo al artículo 4, apartado 1, letras a), b), c), d), e), f), g) y h).

2. En la ejecución de sus cometidos, la Agencia cooperará con:

- a) las organizaciones gubernamentales y los organismos públicos que tengan competencias en materia de derechos fundamentales en los Estados miembros, incluidas las instituciones nacionales en el ámbito de los derechos humanos, y
- b) la Organización para la Seguridad y la Cooperación en Europa (OSCE), especialmente la Oficina de Instituciones Democráticas y Derechos Humanos (OIDDH), las Naciones Unidas y otras organizaciones internacionales.

3. Las disposiciones administrativas de la cooperación en virtud del apartado 2 se atendrán a las disposiciones del Derecho comunitario y serán adoptadas por el Consejo de Administración sobre la base de un proyecto presentado por el Director, una vez que la Comisión haya emitido el correspondiente dictamen. En caso de que la Comisión manifieste su desacuerdo con dichas disposiciones, el Consejo de Administración volverá a examinarlas, adoptándolas, con las modificaciones que resulten necesarias, por una mayoría de dos tercios de sus miembros.

Artículo 9

Cooperación con el Consejo de Europa

Con el fin de evitar duplicaciones y de garantizar la complementariedad y el valor añadido, la Agencia coordinará sus actividades con las del Consejo de Europa, especialmente en lo que se refiere a su programa de trabajo anual, con arreglo a lo dispuesto en el artículo 12, apartado 6, letra a), y en colaboración con la sociedad civil de conformidad con el artículo 10. A tal fin, la Comunidad, de conformidad con el procedimiento establecido en el artículo 300 del Tratado, celebrará un acuerdo con el Consejo de Europa destinado a establecer una estrecha cooperación entre este y la Agencia. En virtud de ese acuerdo, el Consejo de Europa designará a una persona independiente para formar parte del Consejo de Administración de la Agencia y de su Consejo de Administración, tal como disponen los artículos 12 y 13.

Artículo 10

Cooperación con la sociedad civil; Plataforma de los derechos fundamentales

1. La Agencia cooperará estrechamente con organizaciones no gubernamentales y con instituciones de la sociedad civil activas en el ámbito de los derechos fundamentales, incluida la lucha contra el racismo y la xenofobia, a escala nacional, europea o internacional. A este respecto, la Agencia establecerá una red de cooperación («la Plataforma de los derechos fundamentales»), compuesta por organizaciones no gubernamentales de defensa de los derechos humanos, organizaciones sindicales y empresariales, organizaciones sociales y profesionales pertinentes, iglesias, organizaciones religiosas, filosóficas y no confesionales, universidades y otros expertos cualificados de órganos y organizaciones europeas e internacionales.

2. La Plataforma de los derechos fundamentales constituirá un mecanismo de intercambio de información y puesta en común de los conocimientos. Garantizará una estrecha cooperación entre la Agencia y las demás partes interesadas.

3. De conformidad con el apartado 1, la Plataforma de los derechos fundamentales estará abierta a todas las partes interesadas cualificadas. La Agencia podrá dirigirse a los miembros de la Plataforma de los derechos fundamentales en función de necesidades específicas en relación con los ámbitos de actividad de la Agencia considerados prioritarios.

4. En particular, la Agencia invitará a la Plataforma de los derechos fundamentales a:

- a) presentar sugerencias al Consejo de Administración en relación con el programa de trabajo anual que se adopte en virtud del artículo 12, apartado 6, letra a);
- b) transmitir información al Consejo de Administración y proponerle actividades complementarias sobre el informe anual previsto en el artículo 4, apartado 1, letra e), y

c) comunicar al Director y al Comité Científico los resultados y recomendaciones de conferencias, seminarios y reuniones pertinentes para la labor de la Agencia.

5. La coordinación de la Plataforma de los derechos fundamentales se llevará a cabo bajo la autoridad del Director.

CAPÍTULO 3

ORGANIZACIÓN

Artículo 11

Órganos de la Agencia

La Agencia constará de:

- a) un Consejo de Administración;
- b) un Consejo Ejecutivo;
- c) un Comité Científico, y
- d) un Director.

Artículo 12

Consejo de Administración

1. El Consejo de Administración estará compuesto por personas con una experiencia idónea en la gestión de organizaciones del sector público o privado y, además, con conocimientos en el ámbito de los derechos fundamentales, distribuidas de la siguiente manera:

- a) una persona independiente designada por cada Estado miembro con responsabilidades de alto nivel en una institución nacional independiente de derechos humanos o en otras organizaciones públicas o privadas;
- b) una persona independiente designada por el Consejo de Europa, y
- c) dos representantes de la Comisión.

2. Cada miembro del Consejo de Administración podrá tener un suplente, que deberá cumplir las condiciones mencionadas previamente y ser nombrado según el mismo procedimiento. La Agencia publicará y mantendrá al día en su sitio Internet la lista de los miembros y miembros suplentes del Consejo de Administración.

3. El mandato de los miembros y miembros suplentes del Consejo de Administración será de cinco años y no será renovable.

4. Salvo en caso de sustitución normal o de fallecimiento, el mandato del miembro o miembro suplente solo finalizará en caso de dimisión. Sin embargo, cuando un miembro o miembro suplente deje de cumplir los criterios de independencia, deberá informar inmediatamente de ello a la Comisión y al Director de la Agencia. La institución o el Estado miembro que lo haya nombrado designará a un nuevo miembro o un miembro suplente para el resto del mandato. La parte interesada también designará a un nuevo miembro o un miembro suplente para el resto del mandato, si el Consejo de Administración hubiera establecido, basándose en una propuesta de un tercio de sus miembros o de la Comisión, que el miembro o miembro suplente correspondiente ha dejado de cumplir los criterios de independencia. En caso de que el resto del mandato sea inferior a dos años, el mandato del nuevo miembro o del miembro suplente podrá ampliarse hasta un mandato completo de cinco años.

5. El Consejo de Administración elegirá a su Presidente y su Vicepresidente y a los otros dos miembros del Consejo Ejecutivo mencionado en el artículo 13, apartado 1, de entre los miembros designados en virtud del apartado 1, letra a), para un mandato de dos años y medio, renovable una sola vez.

6. El Consejo de Administración velará por que la Agencia ejecute los cometidos que le hayan sido confiados. El Consejo de Administración será el órgano de programación y de vigilancia de la Agencia. En particular, deberá:

- a) adoptar el programa de trabajo anual de la Agencia con arreglo al marco plurianual, a partir de un proyecto presentado por el Director, previo dictamen de la Comisión y del Comité Científico. El programa de trabajo anual estará en conformidad con los recursos financieros y humanos disponibles y tendrá en cuenta la labor de investigación y estadística de la Comunidad. El programa del trabajo anual se enviará al Parlamento Europeo, al Consejo y a la Comisión;
- b) aprobar los informes anuales mencionados en el artículo 4, apartado 1, letras e) y g), comparando en el último, en particular, los resultados alcanzados con los objetivos del programa de trabajo anual; sin perjuicio del artículo 14, apartado 5, el Comité Científico será consultado antes de la adopción del informe mencionado en el artículo 4, apartado 1, letra e); los informes se remitirán, como muy tarde el 15 de junio, al Parlamento Europeo, al Consejo, a la Comisión, al Tribunal de Cuentas, al Comité Económico y Social Europeo y al Comité de las Regiones;
- c) designar y, en caso necesario, destituir al Director de la Agencia;

- d) adoptar anualmente el proyecto de presupuesto y el presupuesto final de la Agencia;
 - e) ejercer las facultades establecidas en el artículo 24, apartado 2, con respecto al Director y la autoridad disciplinaria sobre el Director;
 - f) elaborar las previsiones anuales en materia de gastos e ingresos de la Agencia y presentarlas a la Comisión de conformidad con lo dispuesto en el artículo 20, apartado 5;
 - g) aprobar el reglamento interno de la Agencia a partir de un proyecto presentado por el Director, previo dictamen de la Comisión, del Comité Científico y de la persona mencionada en el apartado 1, letra b);
 - h) establecer la reglamentación financiera aplicable a la Agencia a partir de un proyecto presentado por el Director, previo dictamen de la Comisión, de conformidad con lo dispuesto en el artículo 21, apartado 11;
 - i) adoptar las medidas necesarias para aplicar el Estatuto de los funcionarios de las Comunidades Europeas y el Régimen aplicable a los otros agentes de estas Comunidades, de conformidad con lo dispuesto en el artículo 24, apartado 3;
 - j) adoptar las disposiciones sobre transparencia y acceso a los documentos, de conformidad con lo dispuesto en el artículo 17, apartado 2,
 - k) nombrar y destituir a los miembros del Comité Científico, de conformidad con lo dispuesto en el artículo 14, apartados 1 y 3, y
 - l) establecer que un miembro o un miembro suplente del Consejo de Administración ha dejado de cumplir los criterios de independencia, con arreglo al apartado 4.
7. El Consejo de Administración podrá delegar sus responsabilidades en el Consejo Ejecutivo, excepto cuando se trate de los asuntos mencionados en el apartado 6, letras a), b), c), d), e), g), h), k) y l).
8. El Consejo de Administración tomará sus decisiones por mayoría simple de los votos emitidos, excepto cuando se trate de las decisiones mencionadas en el apartado 5, así como en el apartado 6, letras a), b), c), d), e), g), k) y l), en cuyo caso será necesaria una mayoría de dos tercios de todos sus miembros, y por lo que se refiere a las decisiones contempladas en el artículo 25, apartado 2, en cuyo caso será necesaria la unanimidad del Consejo de Administración. Cada miembro del Consejo de Administración o, en su ausencia, su suplente, dispondrá de un voto. El Presidente tendrá voto de calidad. La persona designada por el Consejo de Europa podrá votar cuando se trate de las decisiones a que se refiere el apartado 6, letras a), b) y k).

9. El Presidente convocará el Consejo de Administración dos veces al año, sin perjuicio de que se celebren reuniones extraordinarias. El Presidente convocará esas reuniones extraordinarias por propia iniciativa o a petición de al menos un tercio de los miembros del Consejo de Administración.

10. El Presidente o el Vicepresidente del Comité Científico y el Director del Instituto Europeo de la Igualdad de Género podrán asistir como observadores a las reuniones del Consejo de Administración. Los directores de otras agencias comunitarias y órganos de la Unión competentes, así como de otros organismos internacionales mencionados en los artículos 8 y 9, también podrán asistir como observadores mediante invitación del Consejo Ejecutivo.

Artículo 13

Consejo Ejecutivo

1. El Consejo de Administración estará asistido por un Consejo Ejecutivo. El Consejo Ejecutivo estará compuesto por el Presidente y el Vicepresidente del Consejo de Administración, otros dos miembros del Consejo de Administración designados por el Consejo de Administración con arreglo al artículo 12, apartado 5, y por uno de los representantes de la Comisión en el Consejo de Administración. La persona designada por el Consejo de Europa en el Consejo de Administración podrá participar en las reuniones del Consejo Ejecutivo.

2. El Presidente convocará el Consejo Ejecutivo siempre que sea necesario para preparar las decisiones del Consejo de Administración, así como para ayudar y asesorar al Director de la Agencia. El Consejo Ejecutivo adoptará sus decisiones por mayoría simple.

3. El Director asistirá a las reuniones del Consejo de Administración sin derecho a voto.

Artículo 14

Comité Científico

1. El Comité Científico estará compuesto por once personalidades independientes especialmente cualificadas en el ámbito de los derechos fundamentales. El Consejo de Administración nombrará a los miembros del Comité Científico, tras un procedimiento transparente de convocatoria de candidaturas y selección, previa consulta a la comisión competente del Parlamento Europeo. El Consejo de Administración procurará garantizar una representación geográfica equilibrada. Los miembros del Consejo de Administración no podrán ser miembros del Comité Científico. Las condiciones para la designación de los miembros del Comité Científico estarán detalladas en el reglamento interno al que se refiere el artículo 12, apartado 6, letra g).

2. El mandato de los miembros del Comité Científico será de cinco años. No será renovable.

3. Los miembros del Comité Científico serán independientes. Solo podrán ser sustituidos a petición propia o en caso de impedimento permanente para el desempeño de sus funciones. Sin embargo, cuando un miembro deje de cumplir los criterios de independencia, deberá informar inmediatamente de ello a la Comisión y al Director de la Agencia. De forma alternativa, a propuesta de un tercio de sus miembros o de la Comisión, el Consejo de Administración podrá declarar la falta de independencia y destituir a la persona en cuestión. El Consejo de Administración designará a un nuevo miembro por lo que reste de mandato con arreglo al procedimiento establecido para los miembros ordinarios. En caso de que el resto del mandato sea inferior a dos años, el mandato del nuevo miembro podrá ampliarse hasta un mandato completo de cinco años. La Agencia publicará y mantendrá al día en su sitio Internet la lista de los miembros del Comité Científico.

4. El Comité Científico elegirá a su Presidente y a su Vicepresidente de entre sus miembros, para mandato de un año.

5. El Comité Científico será garante de la calidad científica de los trabajos de la Agencia y dirigirá los trabajos a tal efecto. Con este objetivo, el Director hará participar al Comité Científico siempre que sea conveniente en la preparación de la documentación elaborada de conformidad con el artículo 4, apartado 1, letras a), b), c), d), e), f) y h).

6. El Comité Científico se pronunciará por mayoría de dos tercios y será convocado por su Presidente cuatro veces al año. Si fuera necesario, el Presidente iniciará un procedimiento escrito o convocará reuniones extraordinarias por propia iniciativa o a petición de al menos cuatro miembros del Comité Científico.

Artículo 15

Director

1. La Agencia estará dirigida por un Director, designado por el Consejo de Administración de conformidad con el procedimiento de cooperación («concertación») establecido en el apartado 2.

Se designará al Director en función de sus méritos personales, su experiencia en el ámbito de los derechos fundamentales, y sus conocimientos en materia administrativa y de gestión.

2. El procedimiento de cooperación se desarrollará del siguiente modo:

a) sobre la base de una lista elaborada por la Comisión tras una convocatoria de candidatos y un procedimiento de selección transparente, se pedirá a los solicitantes, antes de que se proceda a una designación, que se dirijan al Consejo y a la comisión competente del Parlamento Europeo y respondan a diversas preguntas;

b) el Parlamento Europeo y el Consejo de la Unión Europea emitirán sus dictámenes y declararán sus órdenes de preferencia;

c) el Consejo de Administración nombrará al Director teniendo en cuenta dichos dictámenes.

3. El mandato del Director será de cinco años.

En el transcurso de los nueve meses que precedan al término de este período, la Comisión llevará a cabo una evaluación. En la evaluación, la Comisión valorará, en particular:

a) el rendimiento del Director, y

b) las misiones y las necesidades de la Agencia en los próximos años.

El Consejo de Administración, actuando a partir de una propuesta de la Comisión, teniendo en cuenta el informe de evaluación, y solo en aquellos casos que puedan estar justificados por las misiones y las necesidades de la Agencia, podrá prorrogar el mandato del Director una sola vez y por un período no superior a tres años.

El Consejo de Administración informará al Parlamento Europeo y al Consejo de su intención de prorrogar el mandato del Director. En un plazo de un mes antes de que el Consejo de Administración tome formalmente su decisión de prorrogar dicho mandato, podrá pedirse al Director que formule una declaración ante la comisión competente del Parlamento Europeo y que responda a las preguntas de los miembros de la misma.

En caso de que no se prorrogue su mandato, el Director permanecerá en ejercicio hasta el nombramiento de su sucesor.

4. El Director será responsable de:

a) la ejecución de los cometidos contemplados en el artículo 4, y en particular de la preparación y publicación de los documentos elaborados de conformidad con el artículo 4, apartado 1, letras a), b), c), d), e), f), g) y h), en colaboración con el Comité Científico;

b) la preparación y ejecución del programa de trabajo anual de la Agencia;

c) todas las cuestiones relacionadas con el personal y, en particular, el ejercicio, respecto del personal, de las competencias establecidas en el artículo 24, apartado 2;

d) los asuntos de administración ordinaria;

- e) la ejecución del presupuesto de la Agencia, de conformidad con el artículo 21;
- f) la aplicación de procedimientos eficaces de seguimiento y evaluación de las realizaciones de la Agencia con respecto a sus objetivos de acuerdo con normas profesionales reconocidas. El Director informará anualmente al Consejo de Administración de los resultados del sistema de seguimiento;
- g) la cooperación con los funcionarios de enlace nacionales, y
- h) la cooperación con la sociedad civil, incluida la coordinación de la Plataforma de los derechos fundamentales con arreglo a lo dispuesto en el artículo 10.
5. El Director ejercerá su tarea de forma independiente. Dará cuenta de la gestión de sus actividades al Consejo de Administración y asistirá a sus reuniones sin derecho a voto.
6. El Director podrá ser invitado en cualquier momento por el Parlamento Europeo y el Consejo a informar sobre cualquier asunto relacionado con las actividades de la Agencia.
7. A petición de un tercio de sus miembros o de la Comisión, el Consejo de Administración podrá destituir al Director antes de que expire su mandato.

CAPÍTULO 4

FUNCIONAMIENTO

Artículo 16

Independencia e interés público

1. La Agencia realizará sus cometidos con total independencia.
2. Los miembros y miembros suplentes del Consejo de Administración, los miembros del Comité Científico y el Director de la Agencia se comprometerán a actuar al servicio del interés público. Con este fin, harán una declaración de intereses en la que indicarán, o bien no tener intereses que puedan considerarse contrarios a su independencia, o bien cualquier interés directo o indirecto que pueda considerarse perjudicial para su independencia. La declaración deberá hacerse por escrito en el momento de asumir las funciones y se revisará en caso de que se produzcan cambios en relación con los intereses. Será publicada por la Agencia en su sitio Internet.

Artículo 17

Transparencia y acceso a los documentos

1. La Agencia establecerá buenas prácticas administrativas para garantizar la mayor transparencia posible sobre sus actividades.

El Reglamento (CE) n° 1049/2001 se aplicará a los documentos en poder de la Agencia.

2. En un plazo de seis meses a partir del inicio de las actividades de la Agencia, el Consejo de Administración adoptará normas específicas para la puesta en práctica del apartado 1. Tales normas incluirán, entre otras, las relativas a:

- a) la transparencia de las reuniones;
- b) la publicación de los trabajos de la Agencia, incluidos los del Comité Científico, y
- c) disposiciones para la aplicación del Reglamento (CE) n° 1049/2001.

3. Las decisiones adoptadas por la Agencia en virtud del artículo 8 del Reglamento (CE) n° 1049/2001 podrán ser objeto de una reclamación ante el Defensor del Pueblo o de un recurso ante el Tribunal de Justicia de las Comunidades Europeas, en las condiciones previstas en los artículos 195 y 230 del Tratado, respectivamente.

Artículo 18

Protección de los datos

El Reglamento (CE) n° 45/2001 se aplicará a la Agencia.

Artículo 19

Control por el Defensor del Pueblo

Las actividades de la Agencia estarán sujetas a la supervisión del Defensor del Pueblo de conformidad con lo dispuesto en el artículo 195 del Tratado.

CAPÍTULO 5

DISPOSICIONES FINANCIERAS

Artículo 20

Elaboración del presupuesto

1. Todos los ingresos y gastos de la Agencia serán objeto de una previsión para cada ejercicio presupuestario, que coincidirá con el año natural, y se consignarán en el presupuesto de la Agencia.
2. El presupuesto deberá estar equilibrado en cuanto a ingresos y gastos.
3. Sin perjuicio de otros recursos, los ingresos de la Agencia comprenderán una subvención de la Comunidad, consignada en el presupuesto general de la Unión Europea (sección «Comisión»).

Estos ingresos podrán completarse con:

- a) los pagos efectuados en remuneración de los servicios prestados en el ejercicio de los cometidos mencionados en el artículo 4, y

b) contribuciones financieras de las organizaciones o terceros países mencionados en los artículos 8, 9 y 28.

4. Los gastos de la Agencia comprenderán los gastos de retribución del personal, los gastos administrativos y de infraestructura, así como los gastos de funcionamiento.

5. Cada año, el Consejo de Administración, a partir de un proyecto preparado por el Director, elaborará una estimación de los ingresos y gastos de la Agencia para el siguiente ejercicio contable. El Consejo de Administración deberá transmitir a la Comisión dicha estimación, que deberá incluir un proyecto de plantilla de personal, como muy tarde el 31 de marzo.

6. La Comisión transmitirá la estimación al Parlamento Europeo y al Consejo (en adelante, «la Autoridad Presupuestaria») junto con el anteproyecto de presupuesto de la Unión Europea.

7. Sobre la base de esa estimación, la Comisión consignará en el anteproyecto de presupuesto general de la Unión Europea las cantidades que estime necesarias para la plantilla de personal y el importe de la subvención con cargo al presupuesto general y presentará todo ello a la Autoridad Presupuestaria con arreglo a lo dispuesto en el artículo 272 del Tratado.

8. La Autoridad Presupuestaria autorizará los créditos necesarios para la subvención de la Agencia. La Autoridad Presupuestaria aprobará la plantilla de personal de la Agencia.

9. El Consejo de Administración adoptará el presupuesto de la Agencia, que será definitivo tras la adopción definitiva del presupuesto general de la Unión Europea. Cuando sea necesario, se rectificará en consecuencia.

10. El Consejo de Administración notificará lo antes posible a la Autoridad Presupuestaria su intención de realizar cualquier proyecto que pueda tener repercusiones financieras significativas en la financiación del presupuesto de la Agencia, especialmente todos los proyectos relacionados con bienes inmuebles, como el alquiler o la adquisición de locales. También informará de ello a la Comisión.

Cuando una de las ramas de la Autoridad Presupuestaria haya notificado su intención de emitir un dictamen, transmitirá dicho dictamen al Consejo de Administración en el plazo de seis semanas a partir de la fecha de notificación del proyecto.

Artículo 21

Ejecución del presupuesto

1. El Director ejecutará el presupuesto de la Agencia.

2. Como muy tarde el 1 de marzo siguiente a cada ejercicio, el contable de la Agencia deberá presentar las cuentas provisionales al contable de la Comisión, junto con un informe sobre la gestión presupuestaria y financiera correspondiente a dicho ejercicio. El contable de la Comisión consolidará las cuentas provisionales de las instituciones y de los organismos descentralizados de conformidad con lo dispuesto en el artículo 128 del Reglamento (CE, Euratom) n° 1605/2002 del Consejo ⁽¹⁾ («el Reglamento financiero»).

3. Como muy tarde el 31 de marzo siguiente a cada ejercicio, el contable de la Comisión deberá presentar las cuentas provisionales de la Agencia al Tribunal de Cuentas, junto con un informe sobre la gestión presupuestaria y financiera correspondiente a dicho ejercicio. El informe sobre la gestión presupuestaria y financiera del ejercicio también se transmitirá al Parlamento Europeo y al Consejo.

4. Una vez recibidas las observaciones del Tribunal de Cuentas sobre las cuentas provisionales de la Agencia, con arreglo a lo dispuesto en el artículo 129 del Reglamento financiero, el Director elaborará las cuentas definitivas de la Agencia bajo su propia responsabilidad y las remitirá al Consejo de Administración para que este emita el correspondiente dictamen.

5. El Consejo de Administración deberá emitir un dictamen sobre las cuentas definitivas de la Agencia.

6. El Director de la Agencia remitirá estas cuentas definitivas, conjuntamente con el dictamen del Consejo de Administración, como muy tarde el 1 de julio siguiente a cada ejercicio, al Parlamento Europeo, al Consejo, a la Comisión y al Tribunal de Cuentas.

7. Las cuentas definitivas deberán publicarse.

8. El Director enviará al Tribunal de Cuentas la respuesta a sus observaciones como muy tarde el 30 de septiembre. Enviará asimismo esta respuesta al Consejo de Administración.

9. El Director presentará al Parlamento Europeo, a petición de este, toda la información necesaria para el correcto desarrollo del procedimiento de aprobación de la gestión del presupuesto del ejercicio de que se trate, establecido en el artículo 146, apartado 3, del Reglamento financiero.

10. El Parlamento Europeo, previa recomendación del Consejo adoptada por mayoría cualificada, aprobará, antes del 30 de abril del año N + 2, la gestión del Director con respecto a la ejecución del presupuesto del ejercicio N.

⁽¹⁾ DO L 248 de 16.9.2002, p. 1. Reglamento modificado por el Reglamento (CE, Euratom) n° 1995/2006 (DO L 390 de 30.12.2006, p. 1).

11. El Consejo de Administración aprobará la reglamentación financiera aplicable a la Agencia, tras haber consultado a la Comisión. La reglamentación financiera únicamente podrá apartarse del Reglamento (CE, Euratom) n° 2343/2002 si así lo exigen las condiciones específicas de funcionamiento de la Agencia y previo acuerdo de la Comisión.

Artículo 22

Lucha contra el fraude

1. Con el fin de combatir el fraude, la corrupción y otros actos ilegales, se aplicarán plenamente a la Agencia las disposiciones del Reglamento (CE) n° 1073/1999.

2. La Agencia suscribirá el Acuerdo Interinstitucional, de 25 de mayo de 1999, entre el Parlamento Europeo, el Consejo de la Unión Europea y la Comisión de las Comunidades Europeas, relativo a las investigaciones internas efectuadas por la Oficina Europea de Lucha contra el Fraude (OLAF) ⁽¹⁾, y adoptará inmediatamente las medidas pertinentes, que se aplicarán a todo el personal de la Agencia.

3. En las decisiones sobre financiación y en los acuerdos e instrumentos de ejecución derivados de las mismas, se establecerá de forma expresa que, en caso necesario, el Tribunal de Cuentas y la OLAF podrán efectuar controles sobre el terreno a los receptores de créditos de la Agencia y a los servicios que los distribuyan.

CAPÍTULO 6

DISPOSICIONES GENERALES

Artículo 23

Estatuto jurídico y sede

1. La Agencia tendrá personalidad jurídica.

2. En cada uno de los Estados miembros, la Agencia gozará de la capacidad jurídica más amplia reconocida a las personas jurídicas por la legislación de dichos Estados. En concreto, podrá adquirir y disponer de bienes muebles e inmuebles y podrá constituirse en parte en acciones judiciales.

3. La Agencia estará representada por su Director.

4. La Agencia sucederá jurídicamente al Observatorio Europeo del Racismo y la Xenofobia. La Agencia asumirá todos los derechos y obligaciones legales, compromisos financieros o responsabilidades del Observatorio. Se respetarán los contratos de trabajo celebrados por el Observatorio antes de la aprobación del presente Reglamento.

5. La Agencia tendrá su sede en Viena.

⁽¹⁾ DO L 136 de 31.5.1999, p. 15.

Artículo 24

Personal

1. Se aplicarán al personal de la Agencia y a su Director el Estatuto de los funcionarios de las Comunidades Europeas, el Régimen aplicable a otros agentes de las Comunidades Europeas y las normas adoptadas conjuntamente por las instituciones de las Comunidades Europeas al efecto de la aplicación de dicho Estatuto y de dicho Régimen.

2. La Agencia ejercerá, con respecto a su personal, las competencias atribuidas a la autoridad facultada para proceder a los nombramientos por el Estatuto de los funcionarios de las Comunidades Europeas y las competencias atribuidas a la autoridad facultada para celebrar contratos por el Régimen aplicable a otros agentes de las Comunidades Europeas.

3. El Consejo de Administración adoptará, de acuerdo con la Comisión, las disposiciones de aplicación necesarias con arreglo al artículo 110 del Estatuto de los funcionarios de las Comunidades Europeas y del Régimen aplicable a otros agentes de las Comunidades Europeas.

4. El Consejo de Administración podrá adoptar disposiciones que permitan la contratación de expertos nacionales destinados en comisión de servicio en la Agencia.

Artículo 25

Régimen lingüístico

1. Las disposiciones del Reglamento n° 1, de 15 de abril de 1958, se aplicarán a la Agencia.

2. El Consejo de Administración decidirá acerca del régimen lingüístico interno de la Agencia.

3. El Centro de traducción de los órganos de la Unión Europea prestará los servicios de traducción necesarios para el funcionamiento de la Agencia.

Artículo 26

Privilegios e inmunidades

Se aplicará a la Agencia el Protocolo sobre los privilegios y las inmunidades de las Comunidades Europeas.

Artículo 27

Competencia del Tribunal de Justicia

1. La responsabilidad contractual de la Agencia se regirá por la legislación aplicable al contrato de que se trate.

El Tribunal de Justicia será competente cuando un contrato celebrado por la Agencia contenga una cláusula compromisoria en tal sentido.

2. En materia de responsabilidad extracontractual, la Agencia resarcirá los daños causados por sus servicios o por sus agentes en el ejercicio de sus funciones, de conformidad con los principios generales comunes a los ordenamientos jurídicos de los Estados miembros.

El Tribunal de Justicia será competente para conocer de todos los litigios relativos a la indemnización por dichos daños.

3. El Tribunal de Justicia será competente para resolver los recursos presentados contra la Agencia en las condiciones que se contemplan en los artículos 230 y 232 del Tratado.

Artículo 28

Participación y alcance en relación con países candidatos y países con los que se haya celebrado un acuerdo de estabilización y asociación

1. La Agencia estará abierta a la participación de los países candidatos, en calidad de observadores.

2. La participación y sus modalidades respectivas se determinarán por medio de una decisión del consejo de asociación correspondiente, teniendo en cuenta el estatuto específico de cada país. La decisión indicará, en particular, la naturaleza, el grado y la manera en que estos países participarán en los trabajos de la Agencia, en el marco fijado por los artículos 4 y 5, e incluirá disposiciones relativas a su participación en las iniciativas emprendidas por la Agencia, a la contribución financiera y al personal. La decisión deberá respetar el presente Reglamento y el Estatuto de los funcionarios de las Comunidades Europeas y el Régimen aplicable a los otros agentes de las Comunidades Europeas. En dicha decisión se establecerá asimismo que el país participante podrá designar a una persona independiente, que reúna los requisitos establecidos en el artículo 12, apartado 1, letra a), para formar parte, como observador y sin derecho a voto, del Consejo de Administración. Sobre la base de una decisión del consejo de asociación, la Agencia podrá abordar cuestiones relacionadas con los derechos fundamentales en el sentido del artículo 3, apartado 1, en el país correspondiente, en la medida necesaria para una adaptación progresiva al Derecho comunitario del país de que se trate.

3. Por unanimidad y a propuesta de la Comisión, el Consejo podrá decidir invitar a un país con el que la Comunidad Europea haya celebrado un acuerdo de estabilización y asociación a participar en la Agencia como observador, en cuyo caso se aplicará el apartado 2 según corresponda.

CAPÍTULO 7

DISPOSICIONES FINALES

Artículo 29

Disposiciones transitorias

1. El mandato de los miembros del Consejo de Administración del Observatorio Europeo del Racismo y la Xenofobia («el Observatorio») finalizará el 28 de febrero de 2007.

2. En lo que se refiere a la designación del Consejo de Administración:

a) la Comisión tomará sin demora, tras la entrada en vigor del presente Reglamento, las medidas necesarias para garantizar que el Consejo de Administración que debe establecerse con arreglo a lo dispuesto en el artículo 12 pueda comenzar su trabajo a su debido tiempo;

b) en el plazo de cuatro meses a partir de la fecha de entrada en vigor del presente Reglamento, los Estados miembros notificarán a la Comisión los nombres de las personas que hayan designado para miembro y miembro suplente del Consejo de Administración, de conformidad con el artículo 12, apartados 1 y 2. Después del vencimiento de dicho plazo, la Comisión convocará al Consejo de Administración, siempre que hayan sido designados como mínimo 17 miembros. En tal caso y no obstante lo dispuesto en el artículo 12, apartado 8, las decisiones del Consejo de Administración serán adoptadas por una mayoría de los dos tercios de los votos de los miembros designados. El artículo 12, apartado 8, se aplicará cuando hayan sido designados 23 miembros del Consejo de Administración;

c) en la primera reunión del Consejo de Administración, una vez concluidos todos los nombramientos, la Comisión procederá a elegir por sorteo a 15 miembros de dicho Consejo cuyas funciones cesarán, no obstante lo dispuesto en el artículo 12, apartado 4, al final de los tres primeros años de mandato.

3. Las partes afectadas iniciarán el procedimiento para el nombramiento del Director de la Agencia previsto en el artículo 15, apartado 1, inmediatamente después de la entrada en vigor del presente Reglamento.

4. Hasta que concluya la formación del Consejo de Administración de conformidad con el apartado 2, letra b), y con el artículo 12, apartados 1 y 2, la Comisión convocará un Consejo de Administración interino constituido por las personas ya designadas por los Estados miembros, el Consejo de Europa y la Comisión para el Consejo de Administración del Observatorio sobre la base del artículo 8 del Reglamento (CE) n° 1035/97.

El Consejo de Administración interino tendrá el mandato de:

a) emitir un dictamen sobre una propuesta de la Comisión referente al texto de la convocatoria para candidatos al cargo de Director de conformidad con el artículo 15, apartado 1, a fin de empezar el procedimiento de selección;

b) a propuesta de la Comisión, nombrar un Director interino o ampliar el mandato en curso del Director del Observatorio durante el período más corto posible, hasta que finalice el procedimiento de nombramiento mencionado en el apartado 3;

c) aprobar el presupuesto de la Agencia para el año 2007 de conformidad con el artículo 20, apartado 9, y un proyecto de presupuesto para el año 2008 de conformidad con el artículo 20, apartado 5, y

d) adoptar el informe anual sobre las actividades propias del Observatorio para 2006, de conformidad con el artículo 12, apartado 6, letra b).

5. Hasta que se haya adoptado el primer marco plurianual para la Agencia de conformidad con el artículo 5, apartado 1, la Agencia ejercerá sus cometidos en los ámbitos temáticos de la lucha contra el racismo, la xenofobia y la intolerancia asociada a los mismos contemplados en el artículo 5, apartado 2, letra b), sin perjuicio del artículo 5, apartado 3, segunda frase.

Artículo 30

Evaluaciones

1. La Agencia realizará periódicamente evaluaciones *a priori* y *a posteriori* de sus actividades cuando estas supongan gastos importantes. El Director comunicará al Consejo de Administración los resultados de estas evaluaciones.

2. La Agencia remitirá todos los años a la Autoridad Presupuestaria toda aquella información que guarde relación con el resultado de los procedimientos de evaluación.

3. Como muy tarde el 31 de diciembre de 2011, la Agencia encargará una evaluación externa e independiente de sus logros durante sus cinco primeros años de funcionamiento sobre la base de las directrices que elabore el Consejo de Administración de acuerdo con la Comisión. Esta evaluación:

- a) tendrá en cuenta los cometidos de la Agencia, sus prácticas de trabajo y el impacto de la Agencia sobre la protección y promoción de los derechos fundamentales;
- b) evaluará la posibilidad de modificar los cometidos, el ámbito de aplicación, los sectores de actividad o la estructura de la Agencia;
- c) incluirá un análisis de los efectos de sinergia y de las repercusiones financieras de cualquier modificación de sus cometidos, y
- d) tendrá asimismo en cuenta las opiniones de las partes interesadas, tanto a escala comunitaria como nacional.

4. El Consejo de Administración, de acuerdo con la Comisión, determinará el calendario y el alcance de las evaluaciones externas posteriores, que se llevarán a cabo periódicamente.

Artículo 31

Revisión

1. El Consejo de Administración examinará las conclusiones de las evaluaciones a que se refiere el artículo 30, apartados 3 y 4, y dirigirá a la Comisión las recomendaciones que considere necesarias acerca de posibles cambios en la Agencia, sus prácticas de trabajo o el alcance de su misión. La Comisión transmitirá los informes de evaluación y las recomendaciones al Parlamento Europeo, al Consejo, al Comité Económico y Social Europeo y al Comité de las Regiones, y los hará públicos.

2. Tras estudiar el informe de evaluación y las recomendaciones, la Comisión podrá presentar las propuestas de modificación del presente Reglamento que considere necesarias.

Artículo 32

Inicio de las actividades de la Agencia

La Agencia será operativa a más tardar el 1 de marzo de 2007.

Artículo 33

Derogación

1. El Reglamento (CE) nº 1035/97 queda derogado con efectos a partir del 1 de marzo de 2007.
2. Las referencias al Reglamento derogado se entenderán hechas al presente Reglamento.

Artículo 34

Entrada en vigor y aplicación

El presente Reglamento entrará en vigor el día siguiente al de su publicación en el *Diario Oficial de la Unión Europea*.

El presente Reglamento será aplicable a partir del 1 de marzo de 2007.

El presente Reglamento será obligatorio en todos sus elementos y directamente aplicable en cada Estado miembro.

Hecho en Bruselas, el 15 de febrero de 2007.

Por el Consejo
El Presidente
W. SCHÄUBLE

Stefan Trömel Sturmer

STEFAN TRÖMEL

- | | |
|---------------------------------|--|
| February 2010 to now | Appointed as Executive Director of the International Disability Alliance |
| September 2008 to January 2010 | Seconded by Fundacion ONCE to the Secretariat of the International Disability Alliance (IDA) |
| November 2004 to September 2008 | International Affairs (Fundación ONCE, Spain). |
| January 2006 to December 2008 | General Manager of FEACEM, the Spanish umbrella organization of not for profit entities providing employment to persons with disabilities;

And |
| November 2004 to June 2007: | Seconded by Fundación ONCE on a part time basis as Advisor to the European Disability Forum. Involved in this capacity in the negotiation process of the Convention on the Rights of Persons with Disabilities |
| September 1999 to October 2004: | Director of the European Disability Forum |

The role of organisations of persons with disabilities (DPOs) in the implementation and monitoring of the CRPD

Getafe, December 16th 2011

Stefan Trömel

DPO impact in the negotiation of the CRPD

- The CRPD would not be the way it is without the active participation of DPOs
- «Nothing about us without us» served as a reminder that no longer the definition of policies is possible without the active involvement of persons with disabilities and their organisations
- Set an important precedent for civil society participation in the negotiation of a human rights treaty

Some examples of impact

- The most innovative elements of the CRPD were promoted by the organisations of persons with disabilities:
 - Article 12 Equal recognition before the law
 - Article 14 Liberty and security of persons
 - Article 19 Living independently and being included in the community
- No limitations, no exceptions

References in the CRPD

- The involvement of organisations of persons with disabilities in the implementation of the CRPD (article 4)
- Including children with disabilities
- Specific reference also in the article 33 on national implementation and monitoring
- Civil society in general, but recognition of special role of organisations of persons with disabilities
- Article 29 on political participation

Impact of the CRPD on DPOs

- DPOs were not considered and usually did not consider themselves as human rights organisations
- Were unfamiliar with human rights monitoring mechanisms (very few had used other human rights treaties)
- Some issues were not on the agenda of most DPOs
- Being able to effectively contribute to the implementation and monitoring of the CRPD requires building of capacities

Role in implementation at national level

- Participation in revision of specific and mainstream legislation and policies to be adapted to the CRPD
- Participation in the Government coordination mechanisms which usually need to be revised
- Influencing international cooperation to ensure it is disability inclusive
- Show the way especially in the most innovative areas
- Awareness raising and training of professionals

Role in monitoring at national and at international level

- Active involvement in the national monitoring process
- Involvement in the international monitoring process, in particular through the preparation of parallel reports
- Acquire capacity to influence the work of the UN Treaty Bodies, not just the CRPD Committee, but also CEDAW, CESCR, Human Rights Committee, CAT and CRC.
- Participation in the Universal Periodic Review process (disability on the human rights agenda)
- Work with national human rights institutions
- Build alliances with other human rights organisations

Ana Sastre Campo

Ana Sastre Campo, licenciada en Derecho por la Universidad Complutense de Madrid, y PDD (Programa de Educación Ejecutiva) 2004 de la Escuela de Negocios del IESE, viene desarrollando su carrera profesional en el ámbito de la discriminación y la inclusión social de las personas con discapacidad desde hace más de 10 años. En la actualidad es Delegada de Derechos Humanos del Comité Español de Representantes de Personas con discapacidad, CERMI, dónde además asume cargos de representación institucional como Presidenta del Comité de Seguimiento de la Convención sobre los Derechos Humanos de las personas con Discapacidad del CERMI, miembro del Foro de Justicia y Discapacidad del Consejo General del Poder Judicial y Consejera de la Confederación Empresarial Española de Economía Social y del Consejo Nacional de Transportes Terrestres.

Antes de incorporarse al CERMI, fue la Coordinadora de Empleo y Formación de la Confederación Empresarial Española de la Economía Social donde ejercía como asesora externa a los Consejeros del Grupo III del Consejo Económico y Social para los temas de discriminación e inclusión social. Desde 1999 hasta 2006 ocupó diferentes puestos en la Fundación ONCE dónde trabajó primero como técnico experto en la Dirección de Relaciones Internacionales y después como miembro de los gabinetes del Director General y del Vicepresidente. Anteriormente trabajó dos años en la Delegación en Bruselas del Consejo General de la Abogacía Española como letrada.

Como experta en temas de no discriminación ha comparecido ante la Comisión para las políticas integrales de la discapacidad y colabora e interviene frecuentemente en seminarios y jornadas, organizadas entre otras instituciones por el Real Patronato de Personas con Discapacidad, la UNED, el Consejo General del Poder Judicial, etc. Ha elaborado numerosos artículos técnicos y de opinión; es Directora de la Colección Convención ONU del CERMI, línea editorial especializada en derechos humanos de personas con discapacidad y entre otros artículos cabe destacar el *Mecanismos para la efectividad de la Convención de la ONU en España* editado en el 2009 por Aranzadi en la obra colectiva "Hacia un Derecho de la Discapacidad o *El Derecho a la inclusión en la comunidad de las personas con discapacidad en la Convención de la ONU* editado en la colección *cermi.es*..

LA PARTICIPACIÓN DEL CERMI EN EL PROCESO DE IMPLEMENTACION Y SEGUIMIENTO DE LA CDPD

Ana Sastre Campo
Delegada de Derechos Humanos del CERMI

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Comité Español de Representantes de Personas con discapacidad

- Asociación de interés general
- Creada en 1996
- Integrada por Organizaciones de Personas con Discapacidad más representativas:
 - 35 miembros
 - 6.000 asociaciones
- Misión: plataforma de encuentro y acción política.
- Ámbito de actuación: defensa y promoción de los derechos de las personas con discapacidad.

www.cermi.es;
www.convenciondiscapacidad.es

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“NADA SOBRE NOSOTROS SIN NOSOTROS”



- Art. 1 La participación como premisa de inclusión vs la discapacidad como resultado de la exclusión.
- En la **Implementación 4.3** – Diálogo Civil-, 29 – participación política- y **seguimiento art. 33.3**

3

SISTEMA DE APLICACIÓN Y SEGUIMIENTO



Características del sistema CDPD:

- Deberá adecuarse al sistema organizativo del Estado parte.
- El Estado deberá tener en cuenta en la designación las funciones a llevar a cabo :
 - Aplicación o implementación de la Convención
 - Supervisar, promover y proteger las labores de aplicación.
- Voluntariamente puede designarse un **mecanismo de coordinación** que facilite la implementación en diferentes sectores y niveles.
- **Necesariamente** se debe asegurar la **participación del movimiento asociativo de personas con discapacidad**, en todos los niveles del proceso de seguimiento.

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LA CONVENCION PARA LAS PCD



ART. 33. APLICACIÓN Y SEGUIMIENTO NACIONALES

1. *Los Estados Partes, de conformidad con su sistema organizativo, designarán uno o más organismos gubernamentales encargados de las cuestiones relativas a la aplicación de la presente Convención y considerarán detenidamente la posibilidad de establecer o designar un mecanismo de coordinación para facilitar la adopción de medidas al respecto en diferentes sectores y a diferentes niveles.*
2. *Los Estados Partes, de conformidad con sus sistemas jurídicos y administrativos , mantendrán, reforzarán, designarán o establecerán , a nivel nacional, **un MARCO que constará de uno o varios mecanismos independientes, PARA PROMOVER, PROTEGER Y SUPERVISAR**, la aplicación de la presente convención. Cuando designen o establezcan esos mecanismos, los Estados Partes tendrán en cuenta los principios relativos a la condición jurídica y el funcionamiento de las instituciones nacionales de protección y promoción de los derechos humanos .*

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LA CONVENCION PARA LAS PCD



ART. 33. APLICACIÓN Y SEGUIMIENTO NACIONALES

3. *La SOCIEDAD CIVIL, y en particular las personas con discapacidad y las organizaciones que las representan, **ESTARÁN INTEGRADAS Y PARTICIPARÁN PLENAMENTE EN TODOS LOS NIVELES DEL PROCESO DE SEGUIMIENTO.***

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MARCO ESPAÑOL DE APLICACIÓN Y SEGUIMIENTO NACIONAL



1. Organismos de aplicación:

- Dirección General de Coordinación de Políticas Sectoriales de la Discapacidad del Ministerio de Sanidad, Política Social e Igualdad.
- Oficina de Derechos Humanos del Ministerio de Asuntos Exteriores y Cooperación.
- **Método de coordinación :CONSEJO NACIONAL DE LA DISCAPACIDAD.**

2. Marco independiente de seguimiento:

Real Decreto 1276/2011 de 16 de septiembre:

- **CERMI : Participación de la sociedad civil**, y en particular de las organizaciones de personas con discapacidad
- Sin perjuicio de las funciones del **Defensor del Pueblo**. Institución Nacional de Derechos Humanos.

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Mecanismo de Coordinación



CONSEJO NACIONAL DE LA DISCAPACIDAD – R.D. 1955/2009 de 4 dicm.

Órgano consultivo del Gobierno integrado por 40 miembros

- Presidido por la Ministra de Sanidad, Política Social e Igualdad
- 3 vicepresidentes, uno representando OPD.
- 16 representantes de diferentes ministerios: (Ministry of Health and Social Policy and Equality, the Ministry of Economy and Finance, the Ministry of Interior, the Ministry for Public Works, the Ministry of Education, the Ministry of Industry, Tourism and Trade, the Ministry of the Presidency, the Ministry of Work and Immigration, the Ministry of the Environment, Rural and Marine Affairs and the Ministry for Regional Policy and Public Administration);
- 16 representantes de OPD;
- 4 expertos independientes.
- Asume las función de coordinar las políticas y la cooperación entre los distintos ministerios y las organizaciones de personas cog discapacidad.

MARCO ESPAÑOL DE APLICACIÓN Y SEGUIMIENTO NACIONAL



1. Aplicación:

- **CERMI forma parte del M.C. :CONSEJO NACIONAL DE LA DISCAPACIDAD.**
- Participación en órganos de consulta generales y específicos
- Legitimidad reconocida del CERMI como interlocutor social.

2. Marco independiente de seguimiento:

Real Decreto 1276/2011 de 16 de septiembre:

- **CERMI : Participación de la sociedad civil**, y en particular de las organizaciones de personas con discapacidad
- Sin perjuicio de las funciones del **Defensor del Pueblo**.
Institución Nacional de Derechos Humanos.

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FUNCIONES QUE ASUME EL CERMI



- Presentar opiniones, recomendaciones y propuestas en el ámbito legislativo: intervención en el proceso legislativo.
- Informes y estudios que fomenten la protección y promoción de los derechos humanos de las personas con discapacidad: Informes anuales y de impacto en diferentes ámbitos.
- Difusión y sensibilización:
 - www.convenciondiscapacidad.es
 - Formación y divulgación
- Protección y defensa de derechos:
 - Asesoría jurídica: Capacitación y orientación
 - Mediación
 - Tutela preventiva y litigación estratégica
- Coordinación institucional: administraciones públicas, operadores jurídicos, Defensor del Pueblo,

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EL CERMI Y LA CONVENCION



- **Aplicación CDPD**
- **Implementación ordenamiento jurídico español:**
 - Informe de Impacto inicial: Carlos III
 - Seguimiento iniciativas legislativas y propuestas
- **Seguimiento:**
 - **Informes DDHH anuales desde 2007**
 - **Informes temáticos: promoción autonomía, educación.**
- **Defensa de derechos: tutela preventiva y litigación estratégica**
- **Capacitación, información y difusión**

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PRIMER INFORME DE ESPAÑA ART.35 CDPD



- **Primer Informe de España sobre la CDPD enviado el 3 de mayo de 2010 OACDH.**
- CERMI presentó un “Informe Alternativo” el 2 de diciembre de 2010.
- **Examen ante el Comité de Expertos en la Sexta Sesión**
- El CERMI participo activamente como organismo independiente de seguimiento durante la Sexta Sesión exponiendo ante el Comité el Informe Alternativo.
- **El Comité de expertos de la CDPD elaboró las Observaciones Finales durante la Sexta Sesión ;: documento que contiene recomendaciones para el Gobierno para una mejor implementación de la Convención en España.**
- Las Observaciones contienen las recomendaciones que CERMI había incluido en su Informe Alternativo.
- El Comité ha elogiado en sus Observaciones Finales la aplicación del artículo 33.2. de España.

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El proceso...



- Complementar el informe del Estado: presentado después del gobierno
- Seguir la sistemática de presentación exigida al país: por artículos, numeración de párrafos, extensión limitada
- Facilitar la comprensión: traducirlos al inglés y español
- Participar en todo el proceso: informe alternativo, elaboración de preguntas, conclusiones,
- Presentación del informe ante el Comité: identificación de cuestiones puntuales y de especial interés.
- Participar activamente en la sesión de Diálogo y en la redacción de las conclusiones.
- No crear confusión y dar mensajes claros y sencillos: coordinación con otras entidades...

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El resultado



- Valoración positiva
- Las observaciones contienen propuestas o temas elevados por el CERMI ante el Comité, que deberían ser tenidas en cuenta por el Gobierno para mejorar la implementación de la CDPD.
- Próximo paso del CERMI: elaboración de un Informe de implementación política de las Observaciones.
- Seguimiento periódico de la implementación

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CERMI Composición y garantías de funcionamiento



- **Independencia:** entidad privada con independencia económica... asignación de recursos para las nuevas funciones...
- **Recursos propios:** Delegada de Derechos Humanos
- **Plural:** más de 6.000 asociaciones + Comité de Apoyo asesor
- **Colaboración institucional:**
 - Consejo Nacional de Discapacidad
 - Operadores jurídicos: Foro Justicia y Discapacidad, CGAE, Notarios, etc.
 - Con otros organismos de defensa de Derechos Humanos: Defensor del Pueblo
 - Sociedad Civil: de defensa de derechos humanos, de infancia, de mayores, etc.

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www.convenciondiscapacidad.es

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OBSERVACIONES FINALES DEL COMITÉ IV



- (Art. 11) Revisión de la legislación en materia de situaciones de emergencia.
- (Art. 19) Financiación adecuada para ejercer el derecho de autonomía respecto de su vida y decidir el lugar de residencia, con acceso garantizado a los servicios comunitarios y participación en su comunidad en igualdad de oportunidades. El Comité alienta al Estado parte a ampliar los recursos para asistentes personales a todas las personas con discapacidad, en función de sus necesidades.
- (Art. 27) Programas abiertos y avanzados que aumenten las oportunidades de empleo de las personas con discapacidad.
- (Art. 9) Fomento de la Accesibilidad a través de la Cooperación internacional.

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PRIMER INFORME DE ESPAÑA ART.35 CDPD



- **Concepto amplio de la discapacidad:** Es importante que las políticas de igualdad de oportunidades cubran a todas las personas con discapacidad de acuerdo a la Convención (certificado, ajuste razonables y accesibilidad)
- **Protección por discriminación:** impulso y promoción de los sistemas de protección no judiciales como el arbitraje (LIONDAU), y sistema de sanciones e infracciones administrativo : desarrollo y aplicación autonómica y local.
- Mayor **participación regional y local** de las pcd en los procesos de diseño y ejecución de políticas .
- Mayor **participación de los niños y niñas** en las cuestiones que les afecten.
- Discriminación por discapacidad en las leyes: El Estado debería eliminar la distinción, en cuanto al período en el que se permite abortar, cuando esta distinción se fundamenta en la existencia de una discapacidad.
- Protección de la discriminación por discapacidad por “error” o “percibida”.
- Adecuada **perspectiva de discapacidad en las políticas** y programas **contra la violencia de género.**

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PRIMER INFORME DE ESPAÑA ART.35 CDPD



- **Perspectiva de género** en las políticas para pcd sobre empleo, salud y protección social, orientadas a **fomentar la autonomía personal** y asegurar la participación de mujeres y niñas.
- Atención de menores con discapacidad mediante la coordinación de servicios y prestaciones en los ámbitos social, sanitario y educativo.
- **Información y formación de profesionales**, especialmente del poder judicial y demás operadores jurídicos, miembros del gobierno, funcionarios... de personas con discapacidad y de la sociedad en general.
- **Accesibilidad**: compromiso real con la implementación de las leyes y medidas de accesibilidad, especialmente a nivel regional y local. Asignación de recursos financieros y humanos,

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PRIMER INFORME DE ESPAÑA ART.35 CDPD



- **Modificación del sistema de modificación de la capacidad de obrar** de las personas con discapacidad, para pasar de un modelo de sustitución a un modelo de apoyos a la toma de decisiones.
- Revisión de la legislación que regula los **internamientos forzados** por razón de discapacidad.
- **Penalización de la esterilización no consentida de pcd.**
- Utilización de recursos para garantizar la autonomía de las personas con discapacidad y su inclusión en la comunidad. No limitación del recurso de asistente personal.
- **Derecho de voto de TODAS** las personas con discapacidad: modificación de la Ley Orgánica 5/1985)
- Sistematización de la recogida de datos por sexo, edad y discapacidad; desarrollo de indicadores de género.
- Próximo examen: no más tarde del 3 de diciembre de 2015.

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Miguel Ángel Ramiro Avilés

Miguel Ángel Ramiro Avilés

Miguel Angel Ramiro Avilés es profesor titular de Filosofía del Derecho en la Universidad de Alcalá desde 2011 y antes lo fue en la Universidad Carlos III de Madrid (2005). Ha sido Director del Master en Derechos Fundamentales que organiza el Instituto de Derechos Humanos "Bartolomé de las Casas", del cual ha sido Subdirector. Es miembro del Comité Ético de Investigación Clínica del Hospital Universitario de Getafe y del Comité Ético Regional de Investigación Clínica de la Comunidad de Madrid. Representa a los Institutos Universitarios de Derechos Humanos en el Plan de Derechos Humanos. Ha publicado diversos trabajos sobre la cuestión de la discapacidad, la investigación y los derechos humanos.



La Convención Internacional sobre los Derechos de las Personas con Discapacidad El caso español

Miguel Angel Ramiro Avilés
Universidad de Alcalá
Instituto de Derechos Humanos Bartolomé de las Casas
(Universidad Carlos III de Madrid)

- **Firma y ratificación en 2008 de la CDPD (BOE 21 de abril de 2008)**
 - Art. 10.2 CE: criterio interpretativo de las normas relativas a los derechos fundamentales y a las libertades que la Constitución reconoce
 - Art. 96.1 CE: los tratados internacionales, una vez publicados oficialmente en España, formarán parte del ordenamiento interno
 - Art. 49 CE: modelo médico/rehabilitador de atención a las personas con discapacidad
- **Art. 4 CDPD**
 - Los Estados se comprometen a **adoptar las medidas legislativas, administrativas y de otra índole que sean pertinentes para asegurar el pleno ejercicio de todos los derechos humanos y las libertades fundamentales de las personas con discapacidad sin discriminación alguna por motivos de discapacidad**

- **En u se inspira la CDPD**
 - Modelo de la discapacidad basado en los derechos humanos (dignidad inherente a la persona)
 - Las personas con discapacidad son sujetos de derecho (autonom a)
 - Personalidad jur dica
 - Capacidad jur dica
 - No discriminación - Igualdad de condiciones y de oportunidades con respecto al conjunto de ciudadanos
 - Generali ación de derechos
 - Especificación de derechos
 - Participación e inclusión plenas y efectivas en la sociedad
 - Respeto de la diferencia aceptación de las personas con discapacidad como manifestación de la diversidad y la condición humana

- **El caso español en perspectiva temporal**
 - Futuro la legislación que está por venir en 2012 y más
 - Presente la legislación vigente en 2011 y el Informe ante el Comité de Naciones Unidas
 - Pasado... los trabajos preparatorios
- *Una sociedad abierta e inclusiva ha de modificar el entorno solidariamente para acoger a las personas con discapacidad como elementos enriquecedores que ensanchan la humanidad y le agregan valor y debe hacerlo tomando en consideración la propia intervención de las personas con capacidades diferenciadas (Exposición de Motivos, Ley 26/2011)*

Futuro

- Ley 26/2011, 1 de agosto, Disposición adicional séptima
 - El Gobierno, en el **plazo de un año** a partir de la entrada en vigor de esta Ley, remitirá a las Cortes Generales un proyecto de ley de **adaptación normativa** del ordenamiento jurídico para dar **cumplimiento al artículo 12** de la Convención Internacional sobre los Derechos de las Personas con Discapacidad, **en lo relativo al ejercicio de la capacidad jurídica** por las personas con discapacidad, **en igualdad de condiciones** que las demás en todos los aspectos de la vida. Dicho proyecto de ley establecerá las **modificaciones necesarias en el proceso judicial de determinación de apoyos para la toma libre de decisiones de las personas con discapacidad** que los precisen .

- **Otras obligaciones a futuro** contenidas en la Ley 26/2011
 - Disp. Adic. 4 : El Gobierno remitirá a la Comisión para las Políticas Integrales de la Discapacidad un **informe bienal** sobre el balance e indicadores de evolución del grado de accesibilidad y de inclusión socio-laboral de las personas con discapacidad
 - Disp. Adic. 5 : Las memorias de **análisis de impacto normativo** incluirán el impacto de la norma en materia de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad
 - Disp. Adic. 6 : Medidas de acción positiva dirigidas a promover el **acceso al empleo** de las personas con discapacidad intelectual límite.
 - Disp. Adic. 8 : Líneas de **ayudas dirigidas a las comunidades de propietarios** para la realización de actuaciones y obras de accesibilidad
 - Disposición Final: en el plazo de un año, **asegurar el cumplimiento de la cuota de reserva** de trabajo para las personas con discapacidad **evaluar las medidas existentes**.

- Otra **obligación a futuro** contenida en las Observaciones Finales del *Comité de Naciones Unidas sobre Derechos de las Personas con Discapacidad*
 - El Comité pide al Estado parte que presente su segundo informe periódico a más tardar el 3 de diciembre de 2011 y que incluya en él información sobre la aplicación de las presentes observaciones finales

Presente

- Legislación de adaptación a la Convención
 - **Ley 26 2011**, 1 de agosto, Adaptación Normativa a la Convención Internacional de Derechos de las Personas con Discapacidad
 - **Real Decreto 12 6 2011**, 16 de septiembre, Adaptación Normativa a la Convención Internacional de Derechos de las Personas con Discapacidad

- **Ley 26 2011**

- Supera el modelo médico/rehabilitador y **asume la perspectiva social y derechos y capacidades**, que configura la discapacidad como un complejo conjunto de condiciones, muchas de las cuales están agravadas por el entorno social. **Objetivos:**
 - Favorecer la toma de decisiones en todos los aspectos de la vida, tanto personal como colectiva
 - Avanzar hacia la autonomía personal desinstitucionalizada
 - Garantizar la no discriminación en una sociedad plenamente inclusiva
- Su **precedente inmediato** es la Ley 1/2003, 2 de diciembre, de Igualdad de Oportunidades, No Discriminación y Accesibilidad Universal de las Personas con Discapacidad.

- **Normas afectadas por la Ley 26 2011**

- Ley 1/2003
 - Modifica la definición legal de igualdad de oportunidades, persona con discapacidad, diálogo civil
- Ley 27/2007
 - Garantías adicionales al uso de la lengua de signos
- Ley 49/2007
 - Régimen de infracciones y sanciones en materia de igualdad de oportunidades, no discriminación y accesibilidad universal de las personas con discapacidad

- RD /2000
 - Infracciones y sanciones en el Orden Social
- Ley 30/1979
 - Extracción y trasplante de órganos (donante vivo y receptor)
- Ley 14/1986 y Ley 16/2003
 - No discriminación por razón de discapacidad en el ámbito sanitario
 - Detección precoz de discapacidades
- Ley 41/2002
 - Medidas de apoyo pertinentes, información en formatos adecuados en el ámbito sanitario

- Ley 14/2006
 - Información y consentimiento en formatos adecuados para las técnicas de reproducción humana asistida
- Ley 16/2003
 - No discriminación por razón de discapacidad en el ámbito sanitario
- Ley 44/2003 y Ley 7/2007
 - Aumento del 7% en la reserva de plazas en las ofertas de empleo público
 - El 2% deben ser personas con discapacidad intelectual

- Ley 2/198
 - Medidas especiales de protección civil para las personas con discapacidad
- Ley 23/1988
 - Se incluye la discapacidad de modo expreso y diferenciado en el ámbito de la cooperación internacional
- Ley 13/1982
 - Acceso a la vivienda de personas con discapacidad
- Ley 0/1980
 - No discriminación por razón de discapacidad en el ámbito de los seguros - No se pueden imponer condiciones más onerosas, salvo que se encuentren fundadas en causas justificadas, proporcionadas y razonables, que se hallen documentadas previa y objetivamente

- Ley 49/1960
 - Actuaciones y obras de accesibilidad que sean necesarias para un uso adecuado de los elementos comunes
- Ley 34/2002
 - Nivel de medio de accesibilidad al contenido en las páginas de Internet que sirvan de soporte o canal a las redes sociales en línea
- Ley 39/2007
 - Reordenación carrera militar
- Ley 30/2007
 - 2 de trabajadores con discapacidad (o medidas alternativas) en empresas con contratos en sector público

- **RD 12 6 2011**

- Propone en la Exposición de Motivos una interpretación del art. 49 CE en clave del modelo social de la discapacidad mediante su interpretación conjunta con los artículos 9.2 CE (igualdad material), 14 CE (igualdad formal) y 10.1 CE (dignidad humana)

- **Normas afectadas por el RD 12 6 2011**

- RD 1 44/2007
 - Modifica las condiciones básicas de accesibilidad y no discriminación para el acceso y utilización de los modos de transporte
- RD 1494/2007
 - Regula las condiciones básicas para el acceso de las personas con discapacidad a las tecnologías, productos y servicios relacionados con la sociedad de la información y medios de comunicación social

- RD 407/1992
 - Garantía a la asistencia a las personas con discapacidad en las normas básicas de protección civil para evitar o minimizar los efectos adversos del riesgo
- RD 146/2004
 - Protocolos de actuación específicos para garantizar la asistencia a las personas con discapacidad en caso de emergencia nuclear
- RD 164/2010
 - Protocolos de actuación específicos para garantizar la asistencia a las personas con discapacidad ante riesgos radiológicos
- RD 1123/2000
 - Formación específica en materias y aspectos destinados a garantizar la seguridad y protección de las personas con discapacidad

- Reglamento de Organización y Régimen del Notariado
 - Capacidad para ser testigo
- RD 2070/1990
 - Regula la información y el consentimiento en la donación de órganos (donante vivo)
- RD 1301/2006
 - Regula la información y el consentimiento en la donación y la obtención de células y tejidos humanos
- RD 1088/2000
 - Regula la información y el consentimiento en la hemodonación
- RD 223/2004
 - Modifica la definición de consentimiento informado en el caso de los ensayos clínicos con medicamentos

- **Otras medidas del RD 12 6 2011**

- Designa el mecanismo independiente para promover, proteger y supervisar en España la CDPD
- Suministro de información por las CC.AA.

- España, cumpliendo con el art. 3 CDPD, fue el primer país que presentó el informe ante el *Comité de Naciones Unidas sobre los Derechos de las Personas con Discapacidad*

- Examen (20 septiembre 2011)
- Observaciones (Finales 23 septiembre 2011)
- CRPD/C/ESP/CO/1 disponible en <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session6.aspx>

- **Aspectos positivos**

- Aprobación Ley 26/2011 y Ley 1/2003
- Mecanismo independiente de supervisión
- III Plan de Acción para las Personas con Discapacidad (2009-2012) y Estrategia Global de Acción para el Empleo de las Personas con Discapacidad (2008-2012)
- Alto porcentaje de matriculación de niños con discapacidad en el sistema de educación tradicional
- Esfuerzos para mantener la financiación de los programas para las personas con discapacidad en tiempos de crisis económica

- **Aspectos preocupantes 1 3 (algunos de ellos)**

- Lentitud del desarrollo y falta de promoción del sistema de arbitraje incluido en la Ley 49/2007
- no participación de las personas con discapacidad y de sus representantes en los procesos de elaboración de las disposiciones legislativas, de las políticas y de la adopción de decisiones y en los procesos de evaluación de su aplicación
- despenalización de la interrupción voluntaria del embarazo o de dos casos específicos en los que se amplían los plazos para el aborto si el feto tiene una discapacidad
- los programas y políticas públicos sobre la prevención de la violencia de género no tiene suficientemente en cuenta la situación de las mujeres con discapacidad
- tasas de malos tratos de los niños con discapacidad

- **Aspectos preocupantes 2 3 (algunos de ellos)**

- discriminación que sufren los pasajeros con discapacidad en las aerolíneas
- los tutores que representan a personas con discapacidad consideradas legalmente incapacitadas pueden legalmente consentir en que se terminen o se suspendan el tratamiento médico, la nutrición u otros medios de sustentación de la vida de esas personas
- no se han tomado medidas para reemplazar la sustitución en la adopción de decisiones por la asistencia para la toma de decisiones en el ejercicio de la capacidad jurídica
- régimen jurídico que permite el internamiento de las personas con discapacidad, incluidas las personas con discapacidad intelectual y psicosocial (enfermedad mental), en establecimientos especiales solo existen salvaguardias *ex post facto* malos tratos de que son objeto las personas con discapacidad internadas en centros residenciales o en hospitales psiquiátricos
- las personas con discapacidad cuya personalidad jurídica no se reconoce pueden ser sometidas a esterilización sin su consentimiento, otorgado libremente y con conocimiento de causa
- la elección de residencia de las personas con discapacidad se vea limitada por la disponibilidad de los servicios necesarios, así como el hecho de que quienes viven en establecimientos residenciales no tienen otra alternativa que ese internamiento

- **Aspectos preocupantes 3 3 (algunos de ellos)**

- se limitan los recursos disponibles para contratar asistentes personales a solo las personas que tienen discapacidad del tercer nivel, y solo para la educación y el trabajo
- los padres que rechazan la inclusión de sus hijos con discapacidad en programas especiales de educación no tienen ninguna posibilidad de apelar, y su única alternativa es educarlos por su cuenta o pagar por la inclusión razonable de sus hijos en el sistema tradicional de educación
- baja tasa general de empleo de las personas con discapacidad.
- restricción del derecho al voto de las personas con discapacidad intelectual o psicosocial si la persona interesada ha sido privada de su capacidad jurídica o ha sido internada en una institución
- escasez de datos desglosados sobre las personas con discapacidad

Pasado

- **I Plan Nacional de Accesibilidad**, 2004-2012
- **III Plan de Acción para las Personas con Discapacidad**, 2009-2012
- **Estrategia Global de Acción para el Empleo de las Personas con Discapacidad**, 2008-2012
- **Acuerdo Consejo de Ministros**, 30 de marzo de 2010
 - Aprueba el informe sobre las medidas necesarias para la adaptación de la legislación española a la CDPD y encomendó a diversos departamentos ministeriales que, en el ámbito de sus competencias, impulsasen las reformas comprometidas.

- En dicho informe se dedica, dada su complejidad, un **apartado especial a la cuestión de la capacidad** jurídica y a los negocios jurídicos que habrá que modificar para dar sentido al art. 12 CDPD
- Se recogen en el apartado de las conclusiones, las modificaciones legales que posteriormente se verán plasmadas en la legislación actualmente vigente.

- Este informe comenzó a gestarse cuando el Consejo de Ministros aprobó el 10 de julio de 2009, a propuesta de la Ministra de Sanidad y Política Social, la creación de un **grupo de trabajo interministerial** para realizar un estudio integral de la normativa española con el objetivo de adaptarla a las previsiones de la CDPD
- Creación de este grupo de trabajo para **analizar legislación y realizar**, en su caso, **los ajustes técnicos convenientes** para adaptarla y adecuarla a las directrices de la Convención.
- Estos ajustes deberán hacerse desde un **enfoque de globalidad** para que la Convención alcance a todos los sectores del derecho positivo español

- **El grupo de trabajo se constituyó el día 13 de octubre de 2009** en el Ministerio de Sanidad y Política Social, con el objeto de analizar el estado de situación actual de la legislación española y la metodología a seguir para elaborar el estudio final comparativo de la normativa española y, en su caso, los borradores de textos legislativos para modificarla.
- Desde el primer momento se **tuvo en cuenta el estudio que había realizado por el Instituto de Derechos Humanos Bartolomé de las Casas de la Universidad Carlos III de Madrid.**

- **Informe del IDHBC**

- Publicado como libro colectivo (no incluye todos los textos del informe)
 - Patricia Cuenca (ed.), *Estudios sobre el Impacto de la Convención Internacional sobre los Derechos de las Personas con Discapacidad en el Ordenamiento Jurídico Español*, Dykinson, Madrid, 2010, 633 páginas.
- Trabajos individuales de investigación (desde tesis doctorales hasta artículos científicos), nuevas líneas de investigación (IHD y Discapacidad), redes internacionales de trabajo, clínicas jurídicas sobre discapacidad.

– El informe abarca todos los ámbitos del sistema jurídico español: multidisciplinar

- Reflexión general sobre el modelo (Rafael de Asís)
- Derechos Constitucionales (Patricia Cuenca)
- Capacidad jurídica (María José Santos)
- Definición de discapacidad (Roberto Jiménez)
- Salud, sanidad e investigación (Miguel Ángel Ramiro)
- Libertad y seguridad (Diego Blázquez)
- Laboral (Cristina Aragón)
- Acceso a la justicia (José Antonio Colmenero)
- Cultura, ocio y deporte (José María)
- Fiscalidad (Hugo López)
- Educación (Carlos Lema)
- Medio audiovisuales (María del Carmen Barranco)
- Derecho antidiscriminatorio (Silvina Ribotta)
- Mujeres (María Angeles Bengoechea)
- Inmigración (Oscar Pérez)
- Infancia (Ignacio Campoy, Agustina Palacios)
- Envejecimiento (María del Carmen Barranco)
- Recopilación de datos y estadísticas (Francisco Bariffi)

- Trabajo conjunto Universidad – Sociedad Civil
 - Ejemplo de diálogo civil: los borradores de los textos se discutían con representantes de personas con discapacidad (Foro de Vida Independiente, CERMI, Fundación ONCE)
- Financiación externa
 - Privada: Fundación ONCE, Fundación Gregorio Peces-Barba
 - Pública: Ministerio de Educación y Ciencia, Comunidad de Madrid, Ministerio de Ciencia e Innovación, Programa CONSOLIDER – Ingenio 2010

Conclusión

- Sin un buen estudio de base (informe – acuerdo) no se puede avanzar por el buen camino de las reformas legales
- Participación de actores plurales: Administración, Sociedad Civil, Universidad.
- Reforma legal de amplio espectro.
- Se debería haber profundizado más en algunos ámbitos
- Se sigue cuestionando la constitucionalidad de algunas normas (LO 2/2010)



The International Convention on the Rights of Persons with Disabilities The case of Spain

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(Carlos III University of Madrid)

- **CRPD signed and ratified in 2008** (Ga ette 21 April 2008)
 - Art. 10(2) SC: a criterion for interpreting norms relating to basic rights and liberties which are recogni ed by the Constitution
 - Art. 96(1) SC: once published officially in Spain, international treaties shall constitute part of the internal legal order
 - Art. 49 SC: the care model for people with disabilities is medical/rehabilitation-based
- Art. 4 CRPD
 - States Parties undertake to **adopt all legislative, administrative and other measures to ensure the full exercise by persons with disabilities of all human rights and fundamental freedoms, without any discrimination on grounds of disability**

- **What notions inspire the CRPD**

- Model of disability based on human rights (the inherent dignity of the individual)
- Persons with disabilities are subjects in law (autonomy)
 - Legal personality
 - Legal capacity
- Non-discrimination Equal conditions and opportunities to all other citizens
 - Generalised rights
 - Specific rights
- Full, effective participation and inclusion in society
- Respect for difference acceptance of persons with disabilities as a manifestation of diversity and the human condition

- **The case of Spain: chronology**

- Future the legislation to come in 2012 and more
- Present the legislation in force in 2011 and the Report to the United Nations Committee
- Past... the preparatory work

- *An open, inclusive society must exercise solidarity in altering the environment to welcome persons with disabilities as enriching elements that broaden humanity and contribute to its value, and it should do so by taking account of the intervention that persons with differentiated abilities themselves make (Preamble, Act no. 26/2011)*

Future

- Act no. 26/2011, of 1 August, seventh additional provision
 - The Government shall, **within one year** from the entry into force of this Act, present to Parliament a legislative Bill for **adapting the rules** of the legal order so as to **implement Article 12** of the International Convention on the Rights of Persons with Disabilities, **in relation to the exercise of legal capacity** by persons with disabilities, **under equal conditions** with all others in every aspect of life. This Bill shall establish the **amendments in legal process required to determine support for such persons with disabilities as may need it in freely taking decisions** .

- **Other future obligations** contained in Act no. 26/2011
 - Add. prov. 4: The Government shall present a **biennial report** to the Commission on Disability Integration Policies, taking stock and providing indicators of progress in the level of access and inclusion for persons with disabilities in the world of work
 - Add. prov. : **Impact assessments for new legislation** shall include the impact of the law on equality of opportunities, non-discrimination and universal access for persons with disabilities
 - Add. prov. 6: Positive action aimed at promoting **access to employment** for persons with limited intellectual ability
 - Add. prov. 8: **Aid for housing communities** to carry out measures and works facilitating access
 - Final provision: within a year, **ensure implementation of the quota** reserved for persons with disabilities **evaluate existing measures**

- Another **future obligation** contained in the Concluding Observations of the *United Nations Committee on the Rights of Persons with Disabilities*
 - The Committee requests the State party to submit its second periodic report by no later than 3 December 201 , and to include therein information on the implementation of the present concluding observations.

Present

- Legislation to comply with the Convention
 - **Act no 26 2011**, of 1 August, Adapting Legal Norms to the International Convention on the Rights of Persons with Disabilities
 - **Royal Decree 12 6 2011**, of 16 September, Adapting Legal Norms to the International Convention on the Rights of Persons with Disabilities

- **Act no 26 2011**

- Discards the medical/rehabilitation-based model and **adopts a social perspective geared to rights and abilities**, which sees disability as a complex set of conditions, many of which are aggravated by the social environment.

- **Objectives:**

- to facilitate decision-making in every aspect of life, both personal and collective
 - to move towards de-institutionalized personal autonomy
 - to guarantee non-discrimination in a fully inclusive society
- Its **immediate predecessor** is Act no. 1/2003, of 2 December, on Equality of Opportunities, Non-Discrimination and Universal Access for Persons with Disabilities.

- **Law affected by Act no 26 2011**

- Act no. 1/2003
 - Modifies the legal definition of equality of opportunities, person with a disability, civil dialogue
- Act no. 27/2007
 - Additional guarantees for the use of sign language
- Act no. 49/2007
 - Regulates offences and penalties relating to equality of opportunities, non-discrimination and universal access for persons with disabilities

- RD /2000
 - Offences and penalties in labour relations
- Act no. 30/1979
 - Organ removal and transplant (live donor and recipient)
- Act no. 14/1986 and Act no. 16/2003
 - Non-discrimination on grounds of disability in health care
 - Early detection of disabilities
- Act no. 41/2002
 - Relevant assistance, information in appropriate formats in health care

- Act no. 14/2006
 - Information and consent in appropriate formats for assisted human reproduction techniques
- Act no. 16/2003
 - Non-discrimination on grounds of disability in health care
- Act no. 44/2003 and Act no. 7/2007
 - Increase from 2 to 7 in the recruitment quota for public employment
 - 2 must be persons with mental disabilities

- Act no. 2/198
 - Special measures of civil protection for persons with disabilities
- Act no. 23/1988
 - Disability is included explicitly and in differentiated forms in the sphere of international cooperation
- Act no. 13/1982
 - Access to housing for persons with disabilities
- Act no. 0/1980
 - Non-discrimination on grounds of disability in the field of insurance Tougher conditions may not be imposed unless they are justified, proportionate and reasonable, and have been previously and objectively documented

- Act no. 49/1960
 - Measures and work to create access where necessary for the appropriate use of communal facilities
- Act no. 34/2002
 - Level of access to the content of websites serving as support or channels for online social services
- Act no. 39/2007
 - Re-regulation of careers in the armed forces
- Act no. 30/2007
 - 2 of workers with disabilities (or alternative measures) in companies contracted by the public sector

- **RD 12 6 2011**

- Sets out in its Preamble an interpretation of Art. 49 of the Spanish Constitution as key to the social model of disability by interpreting it in conjunction with Articles 9(2) SC (material equality), 14 SC (formal equality) and 10(1) SC (human dignity)

- **Law affected by RD 12 6 2011**

- RD 1 44/2007
 - Amends the basic conditions of accessibility and non-discrimination in access to and use of modes of transport
- RD 1494/2007
 - Regulates the basic conditions for the access of persons with disabilities to technologies, products and services related to the information society and social media

- RD 407/1992
 - Guarantees assistance for persons with disabilities in the basic rules of civil protection to avoid or minimize the adverse effects of the risk
- RD 146/2004
 - Specific action protocols to guarantee assistance to persons with disabilities in the event of a nuclear emergency
- RD 164/2010
 - Specific action protocols to guarantee assistance to persons with disabilities in the event of radiation risks
- RD 1123/2000
 - Specific training in matters designed to ensure the safety and protection of persons with disabilities

- Rules on the Organization and Regulation of Notary Services
 - Capacity to serve as a witness
- RD 2070/1990
 - Regulates information and consent in organ donation (live donor)
- RD 1301/2006
 - Regulates information and consent in the donation and acquisition of human cells and tissues
- RD 1088/2000
 - Regulates information and consent in the donation of blood
- RD 223/2004
 - Amends the definition of informed consent in clinical drugs tests

- **Other measures under RD 12 6 2011**

- Designates the independent mechanism for promoting, protecting and monitoring CRPD in Spain
- Supply of information to Autonomous Communities

- In compliance with Art. 3 CRPD, Spain was the first country to present a report to the *United Nations Committee on the Rights of Persons with Disabilities*

- Report examined (20 September 2011)
- Concluding Observations (23 September 2011)
- CRPD/C/ESP/CO/1 available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session6.aspx>

- **Positive aspects**

- Approval for Act no. 26/2011 and Act no. 1/2003
- Independent monitoring mechanism
- 3rd Action Plan for Persons with Disabilities (2009-2012) and Global Action Strategy for the Employment of Persons with Disabilities (2008-2012)
- High percentage of children with disabilities enrolled in the traditional education system
- Efforts to maintain funding in times of economic crisis for programmes aimed at persons with disabilities

- **Areas of concern 1 3 (selected)**

- Slow development and lack of promotion for the arbitration system provided for in Act no. 49/2007
- non-participation of persons with disabilities and their representatives in designing and evaluating the implementation of legislation, policy and decision-making processes
- decriminalisation of voluntary termination of pregnancy, and two specific cases in which the time limits for abortion are extended, if the foetus has a disability
- public programmes and policies on the prevention of gender-based violence do not sufficiently take into consideration the particular situation of women with disabilities
- rates of abuse of children with disabilities

- **Areas of concern 2 3 (selected)**

- discrimination suffered by air passengers with disabilities
- guardians representing persons with disabilities deemed legally incapacitated may validly consent to termination or withdrawal of medical treatment, nutrition or other life support of those persons
- no measures have been taken to replace substitute decision-making by supported decision-making in the exercise of legal capacity
- legal regime allowing the institutionalisation of persons with disabilities, including persons with intellectual and psychosocial disabilities (mental illness) safeguards only *ex post facto* abuse of persons with disabilities who are institutionalised in residential centres or psychiatric hospitals
- persons with disabilities whose legal capacity is not recognised may be subjected to sterilisation without their free and informed consent
- the choice of residence of persons with disabilities is limited by the availability of the necessary services, and those living in residential institutions have no alternative to institutionalisation

- **Areas of concern 3 3 (selected)**

- the law for the promotion of autonomy limits the resources to hire personal assistants only to those persons who have level 3 disabilities and only for education and work
- parents challenging the placement of their children with disabilities in special education have no possibility of appeal and their only alternative is to educate them at their own expense or pay for the reasonable accommodation of their child in the regular education system
- overall low rate of employment of persons with disabilities
- the right to vote of persons with intellectual or psychosocial disabilities can be restricted if the person concerned has been deprived of his or her legal capacity, or has been placed in an institution
- low level of disaggregated data on persons with disabilities

Past

- **1st National Accessibility Plan, 2004-2012**
- **3rd Action Plan for Persons with Disabilities, 2009-2012**
- **Global Action Strategy for the Employment of Persons with Disabilities, 2008-2012**
- **Council of Ministers Agreement, 30 March 2010**
 - Approved the report on the measures necessary for adapting Spanish legislation to the CRPD and recommended to diverse ministerial departments that, within their sphere of competence, they promote the reforms undertaken.

- Given its complexity, the report devotes a **special section to the question of legal capacity** and the legal transactions that will require modification in order to give meaning to Article 12 CRPD.
- The section containing the conclusions sets out the legal amendments that were subsequently implemented in the legislation currently in force.

- This report began to take shape on 10 July 2009, when the Council of Ministers approved a proposal from the Minister of Health and Social Policies to set up an **interministerial working group** to carry out a thorough study of Spanish legislation with a view to aligning it to the CRPD.
- This working group was put together to **analyse legislation and, where necessary, make appropriate technical adjustments** to adapt it and bring it into line with the provisions of the Convention.
- These adjustments were to be performed within a **global perspective** so that the Convention would reach into every sector of positive law in Spain.

- **The working group was constituted on 13 October 2009** at the Ministry of Health and Social Policies, and tasked with analysing the current state of Spanish legislation and the methods to be adopted for drawing up a final comparative study of national rules and, where necessary, drafting legislative amendments.
- From the outset, **the study carried out by the Bartolom de las Casas Institute of Human Rights at Carlos III University in Madrid was taken into account.**

- **BCIHR Report**

- Published as a collective work (does not include all the texts in the report)
 - Patricia Cuenca (ed.), *Estudios sobre el Impacto de la Convention Internacional sobre los Derechos de las Personas con Discapacidad en el Ordenamiento Jurídico Español*, Dykinson, Madrid, 2010, 633 pages.
- Individual research (from doctoral dissertations to academic papers), new lines of investigation (HI and Disability), international networks, law clinics on disability.

– The multidisciplinary report covers all aspects of the Spanish legal system:

- General Reflections on the Model (Rafael de Asís)
- Constitutional Rights (Patricia Cuenca)
- Legal Capacity (María José Santos)
- Definition of Disability (Roberto Jiménez)
- Health and Research (Miguel Ángel Ramiro)
- Freedom and Security (Diego Blázquez)
- Labour Relations (Cristina Aragón)
- Access to Justice (José Antonio Colmenero)
- Culture, Leisure and Sport (José María)
- Taxation (Hugo López)
- Education (Carlos Lema)
- Audiovisual Media (María del Carmen Barranco)
- Anti-Discrimination Law (Silvina Ribotta)
- Mothers (María Angeles Bengoechea)
- Immigration (Oscar Pérez)
- Childhood (Ignacio Campoy, Agustina Palacios)
- Ageing (María del Carmen Barranco)
- Collecting Statistical Data (Francisco Bariffi)

- Joint work by University – Civil Society
 - Example of civil dialogue: the draft texts were discussed with representatives of persons with disabilities (Foro de Vida Independiente, CERMI, Fundación ONCE)
- Third-party funding
 - Private: Fundación ONCE, Fundación Gregorio Peces-Barba
 - Public: Ministry of Education and Science, Community of Madrid, Ministry of Science and Innovation, Programme CONSOLIDER – Ingenio 2010

Conclusions

- Without a proper underlying study (report – agreement), the right progress will not be made towards legal reforms
- Diversity of participants: Administration, Civil Society, University
- Legal reform across the board
- Some fields should have been explored in more depth
- The constitutionality of some laws is still challenged (LO 2/2010)

Daniël Cuypers



The UN-CONVENTION and BELGIUM

Daniël Cuypers

University of Antwerp

Flemish Policy Research Centre for Equal Opportunities

Flemish Policy Research Centre for Law and Education.

(Report in 2010)

(Advisory Board for Students with Disabilities-
University of Antwerp)

16 december 2011



Some Topics

- I. Ratification and constitutional competencies
- II. Education
- III. Employment



I. Ratification and constitutional competencies

- Complicated constitution:
Moving competencies (State Reform)
- Regions and Communities
Ratification/Approval by all constitutional bodies (8x: including German speaking Community)
- Enforcement: (Inter)federal Institution for Equal Opportunities (?)
Civil society



II. EDUCATION

- 1° Legal procedures and "school basis"
 - Deaf pupils against FI.Community
 - Universities and special facilities
 - New administrative tribunals
(necessary ?)
- 2° Getting teachers involved - motivated
(This is in not my job description !)
Institutions/Trade Unions
"Disability awareness"



II. EDUCATION

- 3° what about...?
 - Learning outcomes ? (standard)
 - Curricular changes ?
 - Difference between school and professional situation ?
- 4° Special schools for disabled children
 - Separate and equal by compensation ?
 - Inclusive education: to what extent ?
(The case of autism)



III. Employment

- Antidiscrimination law (EU + national)
 - Impact
 - 1° Legal claims (legal actions)
 - Diabetes and dismissal
(Case of Antwerp Port Administration)
 - 2° Reasonable accommodation
 - Disproportionate: Can the judge decide ?
 - 3° Positive action: soft quota ?

Background Documentation

CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION 30.3.2010

Official Journal of the European Union C 83, 30.3.2010

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3 *(ex Article 2 TEU)*

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 6
(ex Article 6 TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

Official Journal of the European Union C 83, 30.3.2010

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 19 *(ex Article 13 TEC)*

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

(2000/C 364/01)

CHAPTER III

EQUALITY*Article 20***Equality before the law**

Everyone is equal before the law.

*Article 21***Non-discrimination**

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

*Article 22***Cultural, religious and linguistic diversity**

The Union shall respect cultural, religious and linguistic diversity.

*Article 23***Equality between men and women**

Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

*Article 24***The rights of the child**

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25

The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26

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.



EUROPEAN COMMISSION

Brussels, 11.11.2010
COM(2010) 636 final

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**European Disability Strategy 2010-2020:
A Renewed Commitment to a Barrier-Free Europe**

SEC(2010) 1323
SEC(2010) 1324

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**European Disability Strategy 2010-2020:
A Renewed Commitment to a Barrier-Free Europe**

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1 INTRODUCTION

One in six people in the European Union (EU) has a disability¹ that ranges from mild to severe making around 80 million who are often prevented from taking part fully in society and the economy because of environmental and attitudinal barriers. For people with disabilities the rate of poverty is 70% higher than the average² partly due to limited access to employment.

Over a third of people aged over 70 have disabilities that restrict them to some extent, and over 20% are considerably restricted³. Furthermore, these numbers are set to rise as the EU's population ages.

The EU and its Member States have a strong mandate to improve the social and economic situation of people with disabilities.

- Article 1 of the Charter of Fundamental Rights of the EU (the Charter) states that Human dignity is inviolable. It must be respected and protected. Article 26 states that the EU 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. In addition, Article 21 prohibits any discrimination on the basis of disability.
- The Treaty on the Functioning of the EU (TFEU) requires the Union to combat discrimination based on disability when defining and implementing its policies and activities (Article 10) and gives it the power to adopt legislation to address such discrimination (Article 19).
- The United Nations Convention on the Rights of Persons with Disabilities (the UN Convention), the first legally-binding international human rights instrument to which the EU and its Member States are parties, will soon apply throughout the EU⁴. The UN Convention requires States Parties to protect and safeguard all human rights and fundamental freedoms of persons with disabilities.

According to the UN Convention, people 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.

The Commission will work together with the Member States to tackle the obstacles to a barrier-free Europe, taking up recent European Parliament and Council resolutions. This

¹ EU Labour Force Survey ad hoc module on employment of disabled people (LFS AHM), 2002.

² EU Statistics on Income and Living Conditions (EU-SILC), 2004.

³ LFS AHM and EU-SILC 2007.

⁴ Agreed in 2007 and signed by all Member States and the EU ratified by October 2010 by 16 Member States (BE, C, DK, DE, ES, FR, IT, L, LT, HU, AT, PT, SI, SK, SE, UK) while the rest are in the process of doing so. The UN Convention will be binding on the EU and will form part of the EU legal order.

Council Resolutions (SOC 37 of 2 June 2010) and 2008/C 7 /01 and European Parliament Resolution B6-0194/2009, P6 TA(2009)0334.

Strategy provides a framework for action at European level, as well as with national action to address the diverse situation of men, women and children with disabilities.

Full economic and social participation of people with disabilities is essential if the EU's Europe 2020 strategy⁶ is to succeed in creating smart, sustainable and inclusive growth. Building a society that includes everyone also brings market opportunities and fosters innovation. There is a strong business case for making services and products accessible to all, given the demand from a growing number of ageing consumers. For example, the EU market for assistive devices (with an estimated annual value of over 30 billion⁷) is still fragmented, and the devices are expensive. Policy and regulatory frameworks do not reflect the needs of people with disabilities adequately, neither do product and service development. Many goods and services, as well as much of the built environment, are still not accessible enough.

The economic downturn has had an adverse impact on the situation of people with disabilities, making it all the more urgent to act. This Strategy aims to improve the lives of individuals, as well as bringing wider benefits for society and the economy without undue burden on industry and administrations.

2 OBJECTIVES AND ACTIONS

The overall aim of this Strategy is to empower people with disabilities so that they can enjoy their full rights, and benefit fully from participating in society and in the European economy, notably through the Single market. Achieving this and ensuring effective implementation of the UN Convention across the EU calls for consistency. This Strategy identifies actions at EU level to supplement national ones, and it determines the mechanisms⁸ needed to implement the UN Convention at EU level, including inside the EU institutions. It also identifies the support needed for funding, research, awareness-raising, statistics and data collection.

This Strategy focuses on eliminating barriers⁹. The Commission has identified eight main areas for action: **Accessibility, Participation, Equality, Employment, Education and training, Social protection, Health, and External Action**. For each area, key actions are identified, with the overarching EU-level objective highlighted in a box. These areas were selected on the basis of their potential to contribute to the overall objectives of the Strategy and of the UN Convention, the related policy documents from EU institutions and the Council of Europe, as well as the results of the EU Disability Action Plan 2003-2010, and a consultation of the Member States, stakeholders and the general public. The references to national actions are intended to supplement action at EU level, rather than to cover all national obligations under the UN Convention. The Commission will also tackle the situation of people with disabilities through the Europe 2020 strategy, its flagship initiatives and the relaunch of the single market.

⁶ COM(2010) 2020.

⁷ Deloitte Touche, Access to Assistive Technology in the EU, 2003, and BCC Research, 2008.

⁸ Article 33 UN Convention.

⁹ 2006 Eurobarometer: 91% find that more money should be spent on eliminating physical barriers for people with disabilities.

2 1 Areas for action

1 Accessibility

Accessibility is defined as meaning that people with disabilities have access, on an equal basis with others, to the physical environment, transportation, information and communications technologies and systems (ICT), and other facilities and services. There are still major barriers in all of these areas. For example, on average in the EU-27, only 10% of public websites comply fully with web accessibility standards, though more are partially accessible. Many television broadcasters still provide few subtitled and audio-described programmes¹⁰.

Accessibility is a precondition for participation in society and in the economy, but the EU still has a long way to go in achieving this. The Commission proposes to use legislative and other instruments, such as standardisation, to optimise the accessibility of the built environment, transport and ICT in line with the Digital Agenda and Innovation Union flagships. Based on smarter regulation principles, it will explore the merits of adopting regulatory measures to ensure accessibility of products and services, including measures to step up the use of public procurement (proven to be very effective in the US¹¹). It will encourage the incorporation of accessibility and design for all in educational curricula and training for relevant professions. It will also foster an EU-wide market for assistive technology. Following further consultations with Member States and other stakeholders, the Commission will consider whether to propose a European Accessibility Act by 2012. This could include developing specific standards for particular sectors to substantially improve the proper functioning of the internal market for accessible products and services.

EU action will support and supplement national activities for implementing accessibility and removing existing barriers, and improving the availability and choice of assistive technologies.

Ensure accessibility to goods, services including public services and assistive devices for people with disabilities.

2 Participation

There are still many obstacles preventing people with disabilities from fully exercising their fundamental rights - including their Union citizenship rights - and limiting their participation in society on an equal basis with others. Those rights include the right to free movement, to choose where and how to live, and to have full access to cultural, recreational, and sports activities. For example a person with a recognised disability moving to another EU country can lose access to national benefits, such as free or reduced-cost public transport.

The Commission will work to:

- overcome the obstacles to exercising their rights as individuals, consumers, students, economic and political actors
- tackle the problems related to intra-EU mobility and facilitate and promote the use of the European model of disability parking card

¹⁰ EC (2007), SEC(2007) 1469, p. 7.

¹¹ Section 08 of Rehabilitation Act and Architectural Barriers Act.

promote the transition from institutional to community-based care by: using Structural Funds and the Rural Development Fund to support the development of community-based services and raising awareness of the situation of people with disabilities living in residential institutions, in particular children and elderly people

improve the accessibility of sports, leisure, cultural and recreational organisations, activities, events, venues, goods and services including audiovisual ones promote participation in sports events and the organisation of disability-specific ones explore ways of facilitating the use of sign language and Braille in dealing with the EU institutions address accessibility to voting in order to facilitate the exercise of EU citizens' electoral rights foster the cross-border transfer of copyright works in accessible format promote use of the scope for exceptions provided by the Directive on copyright¹².

EU action will support national activities to:

achieve the transition from institutional to community-based care, including use of Structural Funds and the Rural Development Fund for training human resources and adapting social infrastructure, developing personal assistance funding schemes, promoting sound working conditions for professional carers and support for families and informal carers

make sports, leisure, cultural and recreational organisations and activities accessible, and use the possibilities for exceptions in the Directive on copyright.

Achieve full participation of people with disabilities in society by:

- enabling them to enjoy all the benefits of EU citizenship
- removing administrative and attitudinal barriers to full and equal participation
- providing quality community-based services, including access to personal assistance.

3 Equality

Over half of all Europeans consider discrimination on grounds of disability or age to be widespread in the EU¹³. As required by Articles 1, 21 and 26 of the EU Charter and by Articles 10 and 19 TFEU, the Commission will promote the equal treatment of people with disabilities through a two-pronged approach. This will involve using existing EU legislation to provide protection from discrimination, and implementing an active policy to combat discrimination and promote equal opportunities in EU policies. The Commission will also pay attention to the cumulative impact of discrimination that people with disabilities may experience on other grounds, such as nationality, age, race or ethnicity, sex, religion or belief, or sexual orientation.

It will also ensure that Directive 2000/78/EC¹⁴ banning discrimination in employment is fully implemented it will promote diversity and combat discrimination through awareness-raising

¹² Directive 2001/29/EC. A Stakeholder Memorandum of Understanding signed on 14.9.2009.

¹³ Special Eurobarometer 317.

¹⁴ Council Directive 2000/78/EC (OJ L 303, 2.12.2000, p. 16).

campaigns at EU and national level, and support the work of EU-level NGOs active in the area.

EU action will support and supplement national policies and programmes to promote equality, for instance by promoting the conformity of Member State legislation on legal capacity with the UN Convention.

Eradicate discrimination on grounds of disability in the EU.

4 Employment

Quality jobs ensure economic independence, foster personal achievement, and offer the best protection against poverty. However, the rate of employment for people with disabilities is only around 0¹. To achieve the EU's growth targets, more people with disabilities need to be in paid employment on the open labour market. The Commission will exploit the full potential of the Europe 2020 Strategy and its Agenda for new skills and jobs by providing Member States with analysis, political guidance, information exchange and other support. It will improve knowledge of the employment situation of women and men with disabilities, identify challenges and propose remedies. It will pay particular attention to young people with disabilities in their transition from education to employment. It will address intra-job mobility on the open labour market and in sheltered workshops, through information exchange and mutual learning. It will also address the issue of self-employment and quality jobs, including aspects such as working conditions and career advancement, with the involvement of the social partners. The Commission will step up its support for voluntary initiatives that promote diversity management at the workplace, such as diversity charters signed by employers and a Social Business Initiative.

EU action will support and supplement national efforts to: analyse the labour market situation of people with disabilities fight those disability benefit cultures and traps that discourage them from entering the labour market help their integration in the labour market making use of the European Social Fund (ESF) develop active labour market policies make workplaces more accessible develop services for job placement, support structures and on-the-job training promote use of the General Block Exemption Regulation¹⁶ which allows the granting of state aid without prior notification to the Commission.

Enable many more people with disabilities to earn their living on the open labour market.

Education and training

In the 16-19 age group the rate of non-participation in education is 37% for considerably restricted people, and 2% for those restricted to some extent, against 17% for those not restricted¹⁷. Access to mainstream education for children with severe disabilities is difficult and sometimes segregated. People with disabilities, in particular children, need to be integrated appropriately into the general education system and provided with individual support in the best interest of the child. With full respect for the responsibility of the Member

¹ LFS AHM 2002.

¹⁶ Commission Regulation (EC) No 800/2008 (OJ L 214, 9.8.2008, p. 3).

¹⁷ LFS AHM 2002.

States for the content of teaching and the organisation of education systems, the Commission will support the goal of inclusive, quality education and training under the Youth on the Move initiative. It will increase knowledge on levels of education and opportunities for people with disabilities, and increase their mobility by facilitating participation in the Lifelong Learning Programme.

EU action will support national efforts through ET 2020, the strategic framework for European cooperation in education and training¹⁸, to remove legal and organisational barriers for people with disabilities to general education and lifelong learning systems provide timely support for inclusive education and personalised learning, and early identification of special needs provide adequate training and support for professionals working at all levels of education and report on participation rates and outcomes.

Promote inclusive education and lifelong learning for pupils and students with disabilities.

6 Social protection

Lower participation in general education and in the labour market lead to income inequalities and poverty for people with disabilities, as well as to social exclusion and isolation. They need to be able to benefit from social protection systems and poverty reduction programmes, disability-related assistance, public housing programmes and other enabling services, and retirement and benefit programmes. The Commission will pay attention to these issues through the European Platform against Poverty. This will include assessing the adequacy and sustainability of social protection systems and support through the ESF. In full respect of the competence of the Member States, the EU will support national measures to ensure the quality and sustainability of social protection systems for people with disabilities, notably through policy exchange and mutual learning.

Promote decent living conditions for people with disabilities.

Health

People with disabilities may have limited access to health services, including routine medical treatments, leading to health inequalities unrelated to their disabilities. They are entitled to equal access to healthcare, including preventive healthcare, and specific affordable quality health and rehabilitation services which take their needs into account, including gender-based needs. This is mainly the task of the Member States, which are responsible for organising and delivering health services and medical care. The Commission will support policy developments for equal access to healthcare, including quality health and rehabilitation services designed for people with disabilities. It will pay specific attention to people with disabilities when implementing policies to tackle health inequalities promote action in the field of health and safety at work to reduce risks of disabilities developing during working life and to improve the reintegration of workers with disabilities¹⁹ and work to prevent those risks.

¹⁸ Council conclusions of 12 May 2009 on ET 2020 (OJ C 119, 28. .2009, p. 2).

¹⁹ EU Strategy on Health and Safety at Work 2007-2012 - COM(2007) 62.

EU action will support national measures to deliver accessible, non-discriminatory health services and facilities promote awareness of disabilities in medical schools and in curricula for healthcare professionals provide adequate rehabilitation services promote mental health services and the development of early intervention and needs assessment services.

Foster equal access to health services and related facilities for people with disabilities.

External action

The EU and the Member States should promote the rights of people with disabilities in their external action, including EU enlargement, neighbourhood and development programmes. The Commission will work where appropriate within a broader framework of non discrimination to highlight disability as a human rights issue in the EU s external action raise awareness of the UN Convention and the needs of people with disabilities, including accessibility, in the area of emergency and humanitarian aid consolidate the network of disability correspondents, increasing awareness of disability issues in EU delegations ensure that candidate and potential candidate countries make progress in promoting the rights of people with disabilities and ensure that the financial instruments for pre-accession assistance are used to improve their situation.

EU action will support and complement national initiatives to address disability issues in dialogues with non-member countries, and where appropriate include disability and the implementation of the UN Convention taking into account the Accra commitments on aid-effectiveness. It will foster agreement and commitment on disability issues in international fora (UN, Council of Europe, OECD).

Promote the rights of people with disabilities within the EU external action.

2 2 Implementation of the Strategy

This Strategy requires a joint and renewed commitment of the EU institutions and all Member States. The actions in the main areas above need to be underpinned by the following general instruments:

1 Awareness-raising

The Commission will work to ensure that people with disabilities are aware of their rights, paying special attention to accessibility of materials and information channels. It will promote awareness of design for all approaches to products, services and environments.

EU action will support and supplement national public awareness campaigns on the capabilities and contributions of people with disabilities and promote exchange of good practices in the Disability High Level Group (DHLG).

Raise society s awareness of disability issues and foster greater knowledge among people with disabilities of their rights and how to exercise them.

2 Financial support

The Commission will work to ensure that EU programmes in policy areas relevant to people with disabilities offer funding possibilities, for example in research programmes. The cost of measures to enable people with disabilities to take part in EU programmes should be eligible for reimbursement. EU funding instruments, particularly the Structural Funds, need to be implemented in an accessible and non-discriminatory way.

EU action will support and supplement national efforts to improve accessibility and combat discrimination through mainstream funding, proper application of Article 16 of the Structural Funds General Regulation²⁰, and by maximising requirements regarding accessibility in public procurement. All measures should be implemented in accordance with European competition law, in particular State aid rules.

Optimise use of EU funding instruments for accessibility and non-discrimination and increase visibility of disability-relevant funding possibilities in post-2013 programmes.

3 Statistics and data collection and monitoring

The Commission will work to streamline information on disability collected through EU social surveys (EU Statistics on Income and Living Conditions, Labour Force Survey ad hoc module, European Health Interview Survey), develop a specific survey on barriers for social integration of disabled people and present a set of indicators to monitor their situation with reference to key Europe 2020 targets (education, employment and poverty reduction). The EU Fundamental Rights Agency is requested to contribute to this task, within the framework of its mandate, by data collection, research and analysis.

The Commission will also establish a web-based tool giving an overview of the practical measures and legislation used to implement the UN Convention.

EU action will support and supplement Member States efforts to collect statistics and data that reflect the barriers preventing people with disabilities from exercising their rights.

Supplement the collection of periodic disability-related statistics with a view to monitoring the situation of persons with disabilities.

4 Mechanisms required by the UN Convention

The governance framework required under Article 33 of the UN Convention (focal points, coordination mechanism, independent mechanism and involvement of people with disabilities and their organisations) needs to be addressed on two levels: *vis-à-vis* the Member States in a wide range of EU policies, and within EU institutions. At EU level, mechanisms for coordination based on existing facilities will be established both between the Commission services and the EU institutions, and between the EU and the Member States. The implementation of this Strategy and of the UN Convention will be regularly discussed at the DHLG with representatives of the Member States and their national focal points, the Commission, disabled people and their organisations and other stakeholders. It will continue to provide progress reports for informal ministerial meetings.

²⁰ Council Regulation (EC) No 1083/2006 (OJ L 210, 31.7.2006, p. 2).

Also, a monitoring framework including one or more independent mechanisms will be established to promote, protect and monitor implementation of the UN Convention. After the UN Convention is concluded and after considering the possible role of a number of existing EU bodies and institutions, the Commission will propose a governance framework without undue administrative burden to facilitate implementation of the UN Convention in Europe.

By the end of 2013, the Commission will report on progress achieved through this Strategy, covering implementation of actions, national progress and the EU report to the UN Committee on the Rights of Persons with Disabilities²¹. The Commission will use statistics and data collection to illustrate changes in disparities between people with disabilities and the population as a whole, and to establish disability-related indicators linked to the Europe 2020 targets for education, employment and poverty reduction. This will provide an opportunity to revise the Strategy and the actions. A further report is scheduled for 2016.

3 CONCLUSION

This Strategy is intended to harness the combined potential of the EU Charter of Fundamental Rights, the Treaty on the Functioning of the European Union, and the UN Convention, and to make full use of Europe 2020 and its instruments. It sets in motion a process to empower people with disabilities, so that they can participate fully in society on an equal basis with others. As Europe's population ages, these actions will have a tangible impact on the quality of life of an increasingly large proportion of its people. The EU institutions and the Member States are called upon to work together under this Strategy to build a barrier-free Europe for all.

²¹ Articles 3 and 36 UN Convention.

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COUNCIL DECISION

of 26 November 2009

concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities

(2010/48/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 13 and 95 in conjunction with the second sentence of the first paragraph of Article 300(2) and the first subparagraph of Article 300(3) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament ⁽¹⁾,

Whereas:

- (1) In May 2004, the Council authorised the Commission to conduct negotiations on behalf of the European Community concerning the United Nations Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (hereinafter referred to as the UN Convention).
- (2) The UN Convention was adopted by the United Nations General Assembly on 13 December 2006 and entered into force on 3 May 2008.
- (3) The UN Convention was signed on behalf of the Community on 30 March 2007 subject to its possible conclusion at a later date.
- (4) The UN Convention constitutes a relevant and effective pillar for promoting and protecting the rights of persons with disabilities within the European Union, to which both the Community and its Member States attach the greatest importance.
- (5) The UN Convention should be thus approved, on behalf of the Community, as soon as possible.

(6) Such approval should, however, be accompanied by a reservation, to be entered by the European Community, with regard to Article 27(1) of the UN Convention, in order to state that the Community concludes the UN Convention without prejudice to the Community law-based right, as provided under Article 3(4) of Council Directive 2000/78/EC ⁽²⁾, of its Member States not to apply to armed forces the principle of equal treatment on the grounds of disability.

(7) Both the Community and its Member States have competence in the fields covered by the UN Convention. The Community and the Member States should therefore become Contracting Parties to it, so that together they can fulfil the obligations laid down by the UN Convention and exercise the rights invested in them, in situations of mixed competence in a coherent manner.

(8) The Community should, when depositing the instrument of formal confirmation, also deposit a declaration under Article 44.1 of the Convention specifying the matters governed by the Convention in respect of which competence has been transferred to it by its Member States,

HAS DECIDED AS FOLLOWS:

Article 1

1. The UN Convention on the Rights of Persons with Disabilities is hereby approved on behalf of the Community, subject to a reservation in respect of Article 27.1 thereof.

2. The text of the UN Convention is set out in Annex I to this Decision.

The text of the reservation is contained in Annex III to this Decision.

⁽¹⁾ Opinion delivered on 27 April 2009, not yet published in the Official Journal.

⁽²⁾ OJ L 303, 2.12.2000, p. 16.

Article 2

1. The President of the Council is hereby authorised to designate the person(s) empowered to deposit, on behalf of the European Community, the instrument of formal confirmation of the Convention with the Secretary-General of the United Nations, in accordance with Articles 41 and 43 of the UN Convention.

2. When depositing the instrument of formal confirmation, the designated person(s) shall, in accordance with Articles 44.1 of the Convention, deposit the Declaration of Competence, set out in Annex II to this Decision, as well as the Reservation, set out in Annex III to this Decision.

Article 3

With respect to matters falling within the Community's competence and without prejudice to the respective competences of the Member States, the Commission shall be a focal point for matters relating to the implementation of the UN Convention in accordance with Article 33.1 of the UN Convention. The details of the function of focal point in this regard shall be laid down in a Code of Conduct before the deposition of the instrument of formal confirmation on behalf of the Community.

Article 4

1. With respect to matters falling within the Community's exclusive competence, the Commission shall represent the Community at meetings of the bodies created by the UN Convention, in particular the Conference of Parties referred to in Article 40 thereof, and shall act on its behalf as concerns questions falling within the remit of those bodies.

2. With respect to matters falling within the shared competences of the Community and the Member States, the Commission and the Member States shall determine in advance the appropriate arrangements for representation of the Community's position at meetings of the bodies created by the UN Convention. The details of this representation shall be laid down in a Code of Conduct to be agreed before the deposition of the instrument of formal confirmation on behalf of the Community.

3. At the meetings referred to in paragraphs 1 and 2 the Commission and the Member States, when necessary in prior consultation with other institutions of the Community concerned, shall closely cooperate, in particular as far as the questions of monitoring, reporting and voting arrangements are concerned. The arrangements for ensuring close cooperation shall also be addressed in the Code of Conduct referred to in paragraph 2.

Article 5

This Decision shall be published in the *Official Journal of the European Union*.

Done at Brussels, 26 November 2009.

For the Council
The President
J. BJÖRKLUND

ANNEX I

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES**Preamble**

THE STATES PARTIES TO THE PRESENT CONVENTION,

- (a) Recalling the principles proclaimed in the Charter of the United Nations which recognise the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world,
- (b) Recognising that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,
- (c) Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination,
- (d) Recalling the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,
- (e) Recognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,
- (f) Recognising the importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities in influencing the promotion, formulation and evaluation of the policies, plans, programmes and actions at the national, regional and international levels to further equalise opportunities for persons with disabilities,
- (g) Emphasising the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development,
- (h) Recognising also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,
- (i) Recognising further the diversity of persons with disabilities,
- (j) Recognising the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,
- (k) Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,
- (l) Recognising the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries,
- (m) Recognising the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment of the full participation by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty,
- (n) Recognising the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,
- (o) Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them,
- (p) Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,

- (q) Recognising that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,
- (r) Recognising that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child,
- (s) Emphasising the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities,
- (t) Highlighting the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognising the critical need to address the negative impact of poverty on persons with disabilities,
- (u) Bearing in mind that conditions of peace and security based on full respect for the purposes and principles contained in the Charter of the United Nations and observance of applicable human rights instruments are indispensable for the full protection of persons with disabilities, in particular during armed conflicts and foreign occupation,
- (v) Recognising the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms,
- (w) Realising that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the International Bill of Human Rights,
- (x) Convinced that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities,
- (y) Convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries,

HAVE AGREED AS FOLLOWS:

Article 1

Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

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.

Article 2

Definitions

For the purposes of the present Convention:

'Communication' includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology;

'Language' includes spoken and signed languages and other forms of non-spoken languages;

'Discrimination on the basis of disability' means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of 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;

'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 specialised design. 'Universal design' shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

Article 3

General principles

The principles of the present Convention shall be:

- (a) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) non-discrimination;
- (c) full and effective participation and inclusion in society;
- (d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) equality of opportunity;
- (f) accessibility;
- (g) equality between men and women;
- (h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4

General obligations

1. States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

- (a) to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention;
- (b) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
- (c) to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
- (d) to refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;
- (e) to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise;
- (f) to undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in Article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;
- (g) to undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

(h) to provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

(i) to promote the training of professionals and staff working with persons with disabilities in the rights recognised in the present Convention so as to better provide the assistance and services guaranteed by those rights.

2. With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realisation of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.

4. Nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognised or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognise such rights or freedoms or that it recognises them to a lesser extent.

5. The provisions of the present Convention shall extend to all parts of federal States without any limitations or exceptions.

Article 5

Equality and non-discrimination

1. States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. 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.

Article 6

Women with disabilities

1. States Parties recognise that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

Article 7

Children with disabilities

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right.

*Article 8***Awareness-raising**

1. States Parties undertake to adopt immediate, effective and appropriate measures:
 - (a) to raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
 - (b) to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;
 - (c) to promote awareness of the capabilities and contributions of persons with disabilities.
2. Measures to this end include:
 - (a) initiating and maintaining effective public awareness campaigns designed:
 - (i) to nurture receptiveness to the rights of persons with disabilities;
 - (ii) to promote positive perceptions and greater social awareness towards persons with disabilities;
 - (iii) to promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;
 - (b) fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;
 - (c) encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;
 - (d) promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

*Article 9***Accessibility**

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:
 - (a) buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;
 - (b) information, communications and other services, including electronic services and emergency services.
2. States Parties shall also take appropriate measures:
 - (a) to develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
 - (b) to ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
 - (c) to provide training for stakeholders on accessibility issues facing persons with disabilities;
 - (d) to provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
 - (e) to provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;

- (f) to promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
- (g) to promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
- (h) to promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 10

Right to life

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

Article 11

Situations of risk and humanitarian emergencies

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Article 12

Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13

Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 14

Liberty and security of person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
 - (a) enjoy the right to liberty and security of person;

(b) are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Article 15

Freedom from torture or cruel, inhuman or degrading treatment or punishment

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 16

Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognise and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Article 17

Protecting the integrity of the person

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Article 18

Liberty of movement and nationality

1. States Parties shall recognise the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

- (a) have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;
- (b) are not deprived, on the basis of disability, of their ability to obtain, possess and utilise documentation of their nationality or other documentation of identification, or to utilise relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;
- (c) are free to leave any country, including their own;
- (d) are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

Article 19

Living independently and being included in the community

States Parties to the present Convention recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- (a) persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- (b) persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- (c) community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Article 20

Personal mobility

States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

- (a) facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost;
- (b) facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;
- (c) providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities;
- (d) encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.

Article 21

Freedom of expression and opinion, and access to information

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in Article 2 of the present Convention, including by:

- (a) providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
- (b) accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
- (c) urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
- (d) encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
- (e) recognising and promoting the use of sign languages.

*Article 22***Respect for privacy**

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.
2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

*Article 23***Respect for home and the family**

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:
 - (a) the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognised;
 - (b) the rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognised, and the means necessary to enable them to exercise these rights are provided;
 - (c) persons with disabilities, including children, retain their fertility on an equal basis with others.
2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.
3. States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realising these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.
4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.
5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

*Article 24***Education**

1. States Parties recognise the right of persons with disabilities to education. With a view to realising this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:
 - (a) the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
 - (b) the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
 - (c) enabling persons with disabilities to participate effectively in a free society.

2. In realising this right, States Parties shall ensure that:
- (a) persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
 - (b) persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
 - (c) reasonable accommodation of the individual's requirements is provided;
 - (d) persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
 - (e) effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.
3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:
- (a) facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;
 - (b) facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;
 - (c) ensuring that the education of persons, and in particular children, who are blind, deaf or deaf-blind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximise academic and social development.
4. In order to help ensure the realisation of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.
5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

Article 25

Health

States Parties recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

- (a) provide persons with disabilities with the same range, quality and standard of free or affordable healthcare and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;
- (b) provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimise and prevent further disabilities, including among children and older persons;
- (c) provide these health services as close as possible to people's own communities, including in rural areas;
- (d) require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private healthcare;

- (e) prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;
- (f) prevent discriminatory denial of healthcare or health services or food and fluids on the basis of disability.

Article 26

Habilitation and rehabilitation

1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organise, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:
 - (a) begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;
 - (b) support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.
2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.
3. States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

Article 27

Work and employment

1. States Parties recognise the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:
 - (a) prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
 - (b) protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
 - (c) ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
 - (d) enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
 - (e) promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
 - (f) promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
 - (g) employ persons with disabilities in the public sector;
 - (h) promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
 - (i) ensure that reasonable accommodation is provided to persons with disabilities in the workplace;
 - (j) promote the acquisition by persons with disabilities of work experience in the open labour market;
 - (k) promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

Article 28

Adequate standard of living and social protection

1. States Parties recognise the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realisation of this right without discrimination on the basis of disability.

2. States Parties recognise the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realisation of this right, including measures:

- (a) to ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;
- (b) to ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;
- (c) to ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;
- (d) to ensure access by persons with disabilities to public housing programmes;
- (e) to ensure equal access by persons with disabilities to retirement benefits and programmes.

Article 29

Participation in political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

- (a) to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:
 - (i) ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
 - (ii) protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
 - (iii) guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;
- (b) to promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:
 - (i) participation in non-governmental organisations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;
 - (ii) forming and joining organisations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

*Article 30***Participation in cultural life, recreation, leisure and sport**

1. States Parties recognise the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:
 - (a) enjoy access to cultural materials in accessible formats;
 - (b) enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;
 - (c) enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.
2. States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilise their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.
3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.
4. Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.
5. With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:
 - (a) to encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;
 - (b) to ensure that persons with disabilities have an opportunity to organise, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;
 - (c) to ensure that persons with disabilities have access to sporting, recreational and tourism venues;
 - (d) to ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;
 - (e) to ensure that persons with disabilities have access to services from those involved in the organisation of recreational, tourism, leisure and sporting activities.

*Article 31***Statistics and data collection**

1. States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:
 - (a) comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities;
 - (b) comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.
2. The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.
3. States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.

*Article 32***International cooperation**

1. States Parties recognise the importance of international cooperation and its promotion, in support of national efforts for the realisation of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organisations and civil society, in particular organisations of persons with disabilities. Such measures could include, inter alia:

- (a) ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;
- (b) facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;
- (c) facilitating cooperation in research and access to scientific and technical knowledge;
- (d) providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

2. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.

*Article 33***National implementation and monitoring**

1. States Parties, in accordance with their system of organisation, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process.

*Article 34***Committee on the Rights of Persons with Disabilities**

1. There shall be established a Committee on the Rights of Persons with Disabilities (hereafter referred to as the Committee), which shall carry out the functions hereinafter provided.

2. The Committee shall consist, at the time of entry into force of the present Convention, of 12 experts. After an additional sixty ratifications or accessions to the Convention, the membership of the Committee shall increase by six members, attaining a maximum number of 18 members.

3. The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognised competence and experience in the field covered by the present Convention. When nominating their candidates, States Parties are invited to give due consideration to the provision set out in Article 4, paragraph 3, of the present Convention.

4. The members of the Committee shall be elected by States Parties, consideration being given to equitable geographical distribution, representation of the different forms of civilisation and of the principal legal systems, balanced gender representation and participation of experts with disabilities.

5. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals at meetings of the Conference of States Parties. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The initial election shall be held no later than six months after the date of entry into force of the present Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit the nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating the State Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

7. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of six of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these six members shall be chosen by lot by the chairperson of the meeting referred to in paragraph 5 of this article.

8. The election of the six additional members of the Committee shall be held on the occasion of regular elections, in accordance with the relevant provisions of this article.

9. If a member of the Committee dies or resigns or declares that for any other cause she or he can no longer perform her or his duties, the State Party which nominated the member shall appoint another expert possessing the qualifications and meeting the requirements set out in the relevant provisions of this article, to serve for the remainder of the term.

10. The Committee shall establish its own rules of procedure.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention, and shall convene its initial meeting.

12. With the approval of the General Assembly of the United Nations, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

13. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 35

Reports by States Parties

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned.

2. Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests.

3. The Committee shall decide any guidelines applicable to the content of the reports.

4. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports, repeat information previously provided. When preparing reports to the Committee, States Parties are invited to consider doing so in an open and transparent process and to give due consideration to the provision set out in Article 4, paragraph 3, of the present Convention.

5. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 36

Consideration of reports

1. Each report shall be considered by the Committee, which shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned. The State Party may respond with any information it chooses to the Committee. The Committee may request further information from States Parties relevant to the implementation of the present Convention.

2. If a State Party is significantly overdue in the submission of a report, the Committee may notify the State Party concerned of the need to examine the implementation of the present Convention in that State Party, on the basis of reliable information available to the Committee, if the relevant report is not submitted within three months following the notification. The Committee shall invite the State Party concerned to participate in such examination. Should the State Party respond by submitting the relevant report, the provisions of paragraph 1 of this article will apply.

3. The Secretary-General of the United Nations shall make available the reports to all States Parties.
4. States Parties shall make their reports widely available to the public in their own countries and facilitate access to the suggestions and general recommendations relating to these reports.
5. The Committee shall transmit, as it may consider appropriate, to the specialised agencies, funds and programmes of the United Nations, and other competent bodies, reports from States Parties in order to address a request or indication of a need for technical advice or assistance contained therein, along with the Committee's observations and recommendations, if any, on these requests or indications.

Article 37

Cooperation between States Parties and the Committee

1. Each State Party shall cooperate with the Committee and assist its members in the fulfilment of their mandate.
2. In its relationship with States Parties, the Committee shall give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention, including through international cooperation.

Article 38

Relationship of the Committee with other bodies

In order to foster the effective implementation of the present Convention and to encourage international cooperation in the field covered by the present Convention:

- (a) the specialised agencies and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialised agencies and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite specialised agencies and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;
- (b) the Committee, as it discharges its mandate, shall consult, as appropriate, other relevant bodies instituted by international human rights treaties, with a view to ensuring the consistency of their respective reporting guidelines, suggestions and general recommendations, and avoiding duplication and overlap in the performance of their functions.

Article 39

Report of the Committee

The Committee shall report every two years to the General Assembly and to the Economic and Social Council on its activities, and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

Article 40

Conference of States Parties

1. The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the present Convention.
2. No later than six months after the entry into force of the present Convention, the Conference of States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary-General biennially or upon the decision of the Conference of States Parties.

Article 41

Depositary

The Secretary-General of the United Nations shall be the depositary of the present Convention.

Article 42

Signature

The present Convention shall be open for signature by all States and by regional integration organisations at United Nations Headquarters in New York as of 30 March 2007.

*Article 43***Consent to be bound**

The present Convention shall be subject to ratification by signatory States and to formal confirmation by signatory regional integration organisations. It shall be open for accession by any State or regional integration organisation which has not signed the Convention.

*Article 44***Regional integration organisations**

1. 'Regional integration organisation' shall mean an organisation constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention. Such organisations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

2. References to 'States Parties' in the present Convention shall apply to such organisations within the limits of their competence.

3. For the purposes of Article 45, paragraph 1, and Article 47, paragraphs 2 and 3, of the present Convention, any instrument deposited by a regional integration organisation shall not be counted.

4. Regional integration organisations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Convention. Such an organisation shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

*Article 45***Entry into force**

1. The present Convention shall enter into force on the thirtieth day after the deposit of the 20th instrument of ratification or accession.

2. For each State or regional integration organisation ratifying, formally confirming or acceding to the present Convention after the deposit of the 20th such instrument, the Convention shall enter into force on the thirtieth day after the deposit of its own such instrument.

*Article 46***Reservations**

1. Reservations incompatible with the object and purpose of the present Convention shall not be permitted.

2. Reservations may be withdrawn at any time.

*Article 47***Amendments**

1. Any State Party may propose an amendment to the present Convention and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

3. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with paragraph 1 of this article which relates exclusively to Articles 34, 38, 39 and 40 shall enter into force for all States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment.

Article 48

Denunciation

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 49

Accessible format

The text of the present Convention shall be made available in accessible formats.

Article 50

Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention shall be equally authentic.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorised thereto by their respective governments, have signed the present Convention.

ANNEX II

DECLARATION CONCERNING THE COMPETENCE OF THE EUROPEAN COMMUNITY WITH REGARD TO MATTERS GOVERNED BY THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

(Declaration made pursuant to Article 44(1) of the Convention)

Article 44(1) of the United Nations Convention on the Rights of Persons with Disabilities (hereinafter referred to as the Convention) provides that a regional integration organisation in its instrument of formal confirmation or accession is to declare the extent of its competence with respect to matters governed by the Convention.

The current members of the European Community are the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

The European Community notes that for the purpose of the Convention, the term 'State Parties' applies to regional integration organisations within the limits of their competence.

The United Nations Convention on the Rights of Persons with Disabilities shall apply, with regard to the competence of the European Community, to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty, in particular Article 299 thereof.

Pursuant to Article 299, this Declaration is not applicable to the territories of the Member States in which the said Treaty does not apply and is without prejudice to such act or positions as may be adopted under the Convention by Member States concerned on behalf and in the interests of those territories.

In accordance with Article 44(1) of the Convention, this Declaration indicates the competences transferred to the Community by the Member States under the Treaty establishing the European Community, in the areas covered by the Convention.

The scope and the exercise of Community competence are, by their nature, subject to continuous development and the Community will complete or amend this Declaration, if necessary, in accordance with Article 44(1) of the Convention.

In some matters the European Community has exclusive competence and in other matters competence is shared between the European Community and the Member States. The Member States remain competent for all matters in respect of which no competence has been transferred to the European Community.

At present:

1. The Community has exclusive competence as regards the compatibility of State aid with the common market and the Common Custom Tariff.

To the extent that provisions of Community law are affected by the provision of the Convention, the European Community has an exclusive competence to accept such obligations with respect to its own public administration. In this regard, the Community declares that it has power to deal with regulating the recruitment, conditions of service, remuneration, training etc. of non-elected officials under the Staff Regulations and the implementing rules to those Regulations⁽¹⁾.

2. The Community shares competence with Member States as regards action to combat discrimination on the ground of disability, free movement of goods, persons, services and capital agriculture, transport by rail, road, sea and air transport, taxation, internal market, equal pay for male and female workers, trans-European network policy and statistics.

⁽¹⁾ Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 laying down the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities (OJ L 56, 4.3.1968, p. 1).

The European Community has exclusive competence to enter into this Convention in respect of those matters only to the extent that provisions of the Convention or legal instruments adopted in implementation thereof affect common rules previously established by the European Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the European Community to act in this field. Otherwise competence rests with the Member States. A list of relevant acts adopted by the European Community appears in the Appendix hereto. The extent of the European Community's competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules.

3. The following EC policies may also be relevant to the UN Convention: Member States and the Community shall work towards developing a coordinated strategy for employment. The Community shall contribute to the development of quality of education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action. The Community shall implement a vocational training policy which shall support and supplement the action of the Member States. In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. The Community conducts a development cooperation policy and economic, financial and technical cooperation with third countries without prejudice to the respective competences of the Member States.

Appendix

COMMUNITY ACTS WHICH REFER TO MATTERS GOVERNED BY THE CONVENTION

The Community acts listed below illustrate the extent of the area of competence of the Community in accordance with the Treaty establishing the European Community. In particular the European Community has exclusive competence in relation to some matters and in some other matters competence is shared between the Community and the Member States. The extent of the Community's competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules that are affected by the provisions of the Convention.

— regarding accessibility

Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (OJ L 91, 7.4.1999, p. 10)

Directive 2001/85/EC of the European Parliament and of the Council of 20 November 2001 relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat, amending Directives 70/156/EEC and 97/27/EC (OJ L 42, 13.2.2002, p. 1)

Council Directive 96/48/EC of 23 July 1996 on the interoperability of the trans-European high-speed rail system (OJ L 235, 17.9.1996, p. 6), as amended by Directive 2004/50/EC of the European Parliament and of the Council (OJ L 164, 30.4.2004, p. 114)

Directive 2001/16/EC of the European Parliament and of the Council of 19 March 2001 on the interoperability of the trans-European conventional rail system (OJ L 110, 20.4.2001, p. 1), as amended by Directive 2004/50/EC of the European Parliament and of the Council (OJ L 164, 30.4.2004, p. 114)

Directive 2006/87/EC of the European Parliament and of the Council of 12 December 2006 laying down technical requirements for inland waterway vessels and repealing Council Directive 82/714/EEC (OJ L 389, 30.12.2006, p. 1)

Directive 2003/24/EC of the European Parliament and of the Council of 14 April 2003 amending Council Directive 98/18/EC on safety rules and standards for passenger ships (OJ L 123, 17.5.2003, p. 18)

Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ L 263, 9.10.2007, p. 1)

Commission Decision 2008/164/EC of 21 December 2007 concerning the technical specification of interoperability relating to 'persons with reduced mobility' in the trans-European conventional and high-speed rail system (OJ L 64, 7.3.2008, p. 72)

Directive 95/16/EC of the European Parliament and of the Council of 29 June 1995 on the approximation of the laws of the Member States relating to lifts (OJ L 213, 7.9.1995, p. 1), as amended by Directive 2006/42/EC of the European Parliament and of the Council on machinery, and amending Directive 95/16/EC (OJ L 157, 9.6.2006, p. 24)

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33)

Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108, 24.4.2002, p. 51)

Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of services (OJ L 15, 21.1.1998, p. 14), as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ L 176, 5.7.2002, p. 21), and as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ L 52, 27.2.2008, p. 3)

Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ L 210, 31.7.2006, p. 25)

Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1)

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114)

Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, p. 31)

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, p. 31)

— in the field of independent living and social inclusion, work and employment

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16)

Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation) (OJ L 214, 9.8.2008, p. 3)

Commission Regulation (EEC) No 2289/83 of 29 July 1983 laying down provisions for the implementation of Articles 70 to 78 of Council Regulation (EEC) No 918/83 establishing a Community system of duty-free arrangements (OJ L 220, 11.8.1983, p. 15)

Council Directive 83/181/EEC of 28 March 1983 determining the scope of Article 14(1)(d) of Directive 77/388/EEC as regards exemption from value added tax on the final importation of certain goods (OJ L 105, 23.4.1983, p. 38)

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, p. 23)

Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty (OJ L 105, 23.4.1983, p. 1)

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1), as amended by Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax (OJ L 116, 9.5.2009, p. 18)

Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p. 1)

Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51)

— in the field of personal mobility

Council Directive 91/439/EEC of 29 July 1991 on driving licences (OJ L 237, 24.8.1991, p. 1)

Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (OJ L 403, 30.12.2006, p. 18)

Directive 2003/59/EC of the European Parliament and of the Council of 15 July 2003 on the initial qualification and periodic training of drivers of certain road vehicles for the carriage of goods or passengers, amending Council Regulation (EEC) No 3820/85 and Council Directive 91/439/EEC and repealing Council Directive 76/914/EEC (OJ L 226, 10.9.2003, p. 4)

Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1)

Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, Text with EEA relevance (OJ L 204, 26.7.2006, p. 1)

Regulation (EC) No 1899/2006 of the European Parliament and of the Council of 12 December 2006 amending Council Regulation (EEC) No 3922/91 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation (OJ L 377, 27.12.2006, p. 1)

Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ L 315, 3.12.2007, p. 14)

Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1)

Commission Regulation (EC) No 8/2008 of 11 December 2007 amending Council Regulation (EEC) No 3922/91 as regards common technical requirements and administrative procedures applicable to commercial transportation by aeroplane (OJ L 10, 12.1.2008, p. 1)

— regarding access to information

Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ L 311, 28.11.2001, p. 67), as amended by Directive 2004/27/EC of the European Parliament and of the Council (OJ L 136, 30.4.2004, p. 34)

Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 332, 18.12.2007, p. 27)

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1)

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10)

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) (OJ L 149, 11.6.2005, p. 22)

— regarding statistics and data collection

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (OJ L 281, 23.11.1995, p. 31)

Council Regulation (EC) No 577/98 of 9 March 1998 on the organisation of the Labour Force Sample Survey in the Community (OJ L 77, 14.3.1998, p. 3) with related implementing Regulations

Regulation (EC) No 1177/2003 of the European Parliament and of the Council of 16 June 2003 concerning Community statistics on income and living conditions (EU-SILC); text with EEA relevance (OJ L 165, 3.7.2003, p. 1) with related implementing regulations

Regulation (EC) No 458/2007 of the European Parliament and of the Council of 25 April 2007 on the European system of integrated social protection statistics (ESSPROS) (OJ L 113, 30.4.2007, p. 3) with related implementing regulations

Regulation (EC) No 1338/2008 of the European Parliament and of the Council of 16 December 2008 on Community statistics on public health and health and safety at work (OJ L 354, 31.12.2008, p. 70)

— in the field of international cooperation

Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation (OJ L 378, 27.12.2006, p. 41)

Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide (OJ L 386, 29.12.2006, p. 1)

Commission Regulation (EC) No 718/2007 of 12 June 2007 implementing Council Regulation (EC) No 1085/2006 establishing an Instrument for Pre-accession Assistance (IPA) (OJ L 170, 29.6.2007, p. 1)

ANNEX III

RESERVATION BY THE EUROPEAN COMMUNITY TO ARTICLE 27(1) OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The European Community states that pursuant to Community law (notably Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation), the Member States may, if appropriate, enter their own reservations to Article 27(1) of the Disabilities Convention to the extent that Article 3(4) of the said Council Directive provides them with the right to exclude non-discrimination on the grounds of disability with respect to employment in the armed forces from the scope of the Directive. Therefore, the Community states that it concludes the Convention without prejudice to the above right, conferred on its Member States by virtue of Community law.

OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The States Parties to the present Protocol have agreed as follows:

Article 1

1. A State Party to the present Protocol (“State Party”) recognizes the competence of the Committee on the Rights of Persons with Disabilities (“the Committee”) to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.
2. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

Article 2

The Committee shall consider a communication inadmissible when:

- (a) The communication is anonymous;
- (b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention;
- (c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
- (d) All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;
- (e) It is manifestly ill-founded or not sufficiently substantiated; or when
- (f) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 3

Subject to the provisions of article 2 of the present Protocol, the Committee shall bring any communications submitted to it confidentially to the attention of the State Party. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 4

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

2. Where the Committee exercises its discretion under paragraph 1 of this article, this does not imply a determination on admissibility or on the merits of the communication.

Article 5

The Committee shall hold closed meetings when examining communications under the present Protocol. After examining a communication, the Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

Article 6

1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end submit observations with regard to the information concerned.

2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.

4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

Article 7

1. The Committee may invite the State Party concerned to include in its report under article 35 of the Convention details of any measures taken in response to an inquiry conducted under article 6 of the present Protocol.
2. The Committee may, if necessary, after the end of the period of six months referred to in article 6, paragraph 4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 8

Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 6 and 7.

Article 9

The Secretary-General of the United Nations shall be the depositary of the present Protocol.

Article 10

The present Protocol shall be open for signature by signatory States and regional integration organizations of the Convention at United Nations Headquarters in New York as of 30 March 2007.

Article 11

The present Protocol shall be subject to ratification by signatory States of the present Protocol which have ratified or acceded to the Convention. It shall be subject to formal confirmation by signatory regional integration organizations of the present Protocol which have formally confirmed or acceded to the Convention. It shall be open for accession by any State or regional integration organization which has ratified, formally confirmed or acceded to the Convention and which has not signed the Protocol.

Article 12

1. “Regional integration organization” shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the Convention and the present Protocol. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the Convention and the present Protocol.

Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

2. References to “States Parties” in the present Protocol shall apply to such organizations within the limits of their competence.

3. For the purposes of article 13, paragraph 1, and article 15, paragraph 2, of the present Protocol, any instrument deposited by a regional integration organization shall not be counted.

4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the meeting of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Protocol. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 13

1. Subject to the entry into force of the Convention, the present Protocol shall enter into force on the thirtieth day after the deposit of the tenth instrument of ratification or accession.

2. For each State or regional integration organization ratifying, formally confirming or acceding to the present Protocol after the deposit of the tenth such instrument, the Protocol shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 14

1. Reservations incompatible with the object and purpose of the present Protocol shall not be permitted.

2. Reservations may be withdrawn at any time.

Article 15

1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be

submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

Article 16

A State Party may denounce the present Protocol by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 17

The text of the present Protocol shall be made available in accessible formats.

Article 18

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Protocol shall be equally authentic.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Protocol.

Brussels, 5 January 2011

EU ratifies UN Convention on disability rights

Following formal ratification, it is the first time in history the EU has become a party to an international human rights treaty – the United Nation's (UN) Convention on the Rights of People with Disabilities. The Convention aims to ensure that people with disabilities can enjoy their rights on an equal basis with all other citizens. It is the first comprehensive human rights treaty to be ratified by the EU as a whole. It has also been signed by all 27 EU Member States and ratified by 16 of these (see Annex). The EU becomes the 97th party to this treaty. The Convention sets out minimum standards for protecting and safeguarding a full range of civil, political, social, and economic rights for people with disabilities. It reflects the EU's broader commitment to building a barrier-free Europe for the estimated 80 million people with disabilities in the EU by 2020, as set out in the European Commission's disability strategy ([IP/10/1505](#)).

"Good news for the new year and a milestone in the history of human rights as it is the first time ever that the EU becomes a party to an international human rights treaty. I would like to thank the Belgian Presidency for their excellent cooperation, which allowed the swift and successful conclusion of the ratification process," said European Commission Vice-President Viviane Reding, the EU's Justice Commissioner. "The UN Convention promotes and protects the human rights and fundamental freedoms of persons with disabilities. In November, the Commission presented an EU disability strategy for the next ten years: concrete measures with a concrete timeline to implement the UN Convention. I now call on all remaining Member States that have not yet ratified the Convention to do so swiftly. It is our collective responsibility to ensure that people with disabilities do not face additional obstacles in their everyday lives."

The EU signed the UN Convention on the Rights of People with Disabilities on its opening day for signature on 30 March 2007 ([IP/07/446](#)). It has since been signed by all 27 EU countries and a further 120 states worldwide. Following completion of the ratification procedure, the EU as a whole is now the first international organisation which has become a formal party to the Convention (as are 16 EU Member States too).

The Convention commits parties to making sure that people with disabilities fully can enjoy their rights on an equal basis with all other citizens ([MEMO/10/198](#)). For the EU, this means ensuring that all legislation, policies and programmes at EU level comply with the Convention's provisions on disability rights, within the limits of EU responsibilities. Ratifying countries, such as the EU Member States, should take action in the following areas: access to education, employment, transport, infrastructures and buildings open to the public, granting the right to vote, improving political participation and ensuring full legal capacity of all people with disabilities.

Parties that have ratified the Convention will need to periodically inform the UN Committee on the Rights of Persons with Disabilities about the measures taken to implement the Convention. The Committee, composed of independent experts, will highlight any shortcomings in the Convention's implementation and make recommendations.

The [EU's disability strategy for 2010-2020](#) focuses on empowering people with disabilities to enjoy their rights on an equal basis with others and on removing obstacles in everyday life. It also aims to help implement the provisions of the Convention in practice, both at EU and national level. The strategy complements and supports action by the Member States which have the main responsibility in disability policies.

Background

One in six people in the European Union – around 80 million – have a disability that ranges from mild to severe. Over one third of people aged over 75 have disabilities that restrict them to some extent. These numbers are set to rise as the EU population grows progressively older. Most of these people are all too often prevented from fully participating in society and the economy because of physical or other barriers, as well as discrimination.

Further information

- UN Convention on the Rights of Persons with Disabilities:
<http://www.un.org/disabilities>
- Justice Directorate-General Newsroom:
http://ec.europa.eu/justice/news/intro/news_intro_en.htm
- Homepage of Viviane Reding, Commission Vice-President responsible for Justice, Fundamental Rights and Citizenship:
http://ec.europa.eu/commission_2010-2014/reding/index_en.htm

ANNEX

State of play UN Convention on the Rights of Persons with Disabilities

Dates of signatures and ratification				
Country	Signature		Ratification*/Formal confirmation	
	UN Convention	Optional Protocol	UN Convention	Optional Protocol
AT	30 March 2007	30 March 2007	26 September 2008	26 September 2008
BE	30 March 2007	30 March 2007	2 July 2009	2 July 2009
BG	27 September 2007	18 December 2008		
CY	30 March 2007	30 March 2007		
CZ	30 March 2007	30 March 2007	28 September 2010	
DE	30 March 2007	30 March 2007	24 February 2009	24 February 2009
DK	30 March 2007		24 July 2009	
EE	25 September 2007			
EL	30 March 2007	27 September 2010		
ES	30 March 2007	30 March 2007	3 December 2007	3 December 2007
FI	30 March 2007	30 March 2007		
FR	30 March 2007	23 September 2008	18 February 2010	18 February 2010
HU	30 March 2007	30 March 2007	20 July 2007	20 July 2007
IE	30 March 2007			
IT	30 March 2007	30 March 2007	15 May 2009	15 May 2009
LT	30 March 2007	30 March 2007	18 August 2010	18 August 2010
LU	30 March 2007	30 March 2007		
LV	18 July 2008	22 January 2010	1 March 2010	31 August 2010
MT	30 March 2007	30 March 2007		
NL	30 March 2007			
PL	30 March 2007			
PT	30 March 2007	30 March 2007	23 September 2009	23 September 2009
RO	26 September 2007	25 September 2008		
SE	30 March 2007	30 March 2007	15 December 2008	15 December 2008
SI	30 March 2007	30 March 2007	24 April 2008	24 April 2008
SK	26 September 2007	26 September 2007	26 May 2010	26 May 2010
UK	30 March 2007	26 February 2009	8 June 2009	7 August 2009
EU	30 March 2007		23 December 2010	

* Ratification means the deposit of the instrument of ratification with the Secretary-General of the United Nations

** Internal procedures achieved, however the instrument of formal confirmation not yet deposited with the Secretary-General of the United Nations



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 7 June 2011

11125/11

**SOC 460
COHOM 156**

NOTE

from: The Commission
to: COUNCIL (Employment, Social Policy, Health and Consumer Affairs)
Subject: Ratification and implementation of the UN Convention on the Rights of People
with Disabilities
- Information from the Commission
(Any other business item)

Delegations will find attached a note from the Commission in preparation for the EPSCO Council meeting on 17 June.

**Information Note from the European Commission
on progress in implementing the UN Convention
on the Rights of Persons with Disabilities to the EPSCO Council**

1. Introduction

This note is based on the 4th Disability High Level Group Report¹ and reports on progress in ratifying and implementing the UN Convention on the Rights of Persons with Disabilities. It provides an update of developments in the national implementation of the Convention, with a more detailed reference to the governance structures required by Article 33 of the UNCRPD. The report of this year also examines the interface between implementation of the UNCRPD and the headline targets set in the context of the Europe 2020 Strategy for education, employment and poverty.

The annual progress reporting by the Disability High-Level Group was triggered by the Council Conclusions adopted under the German Presidency in 2007. The first joint Report was discussed by the ministers responsible for disability issues on 22 May 2008 under the Slovenian Presidency. The second Report responded to the Council's request in the Resolution adopted under the Slovenian Presidency for an assessment as to how national actions reflect the commitments entered into by the European Union and the Member States with a view to implementing the UNCRPD. The Report identified seven priority areas where collaboration at EU level could be useful and highlighted progress in the nine priorities for joint action that were identified in the first report. The second Report also highlighted the importance of four key matters for the implementation of the UNCRPD that were presented at the EPSCO Council in June 2009. The third Report was presented on 19 May 2010 at the third informal ministerial meeting on disability issues organised under the Spanish Presidency in Zaragoza. It complemented the two previous Reports but also had a stronger focus on procedural matters and governance aspects.

¹ Available online at: <http://ec.europa.eu/social/BlobServlet?docId=6851&langId=en>

2. Ratification/formal confirmation/accession

Since the previous Report from the Disability High Level Group (March 2010), further progress has been achieved, three additional Member States having ratified the Convention,² and three Member States having ratified the Optional Protocol.³ In addition, one Member State has finished the internal ratification procedure for the Convention and the Optional Protocol and is awaiting deposit with the UN.⁴ One Member State⁵ signed the Optional Protocol. Moreover, in 2010, the EU formally confirmed the Convention.

The current situation is as follows:

All Member States and the EU have signed the Convention,
22 Member States have signed the Optional Protocol,
17 Member States have ratified the Convention, (Austria, Belgium, Czech Republic, Denmark, Germany, France, Hungary, Italy, Latvia, Lithuania, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK),
1 Member State has finished the internal ratification procedure for the Optional Protocol and the Convention and is in the process of depositing the ratification instruments at the UN Headquarters (Cyprus),
14 Member States have ratified the Optional Protocol (Austria, Belgium, France, Germany, Hungary, Italy, Latvia, Lithuania, Portugal, Slovakia, Slovenia, Spain, Sweden, UK), and
The EU has formally confirmed the Convention.

On 26 November 2009 the Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities was adopted (Decision 2010/48/EC). Before final confirmation of the Convention on behalf of the EU, the Commission, Council and Member States needed to agree on a Code of Conduct (see Article 3 and 4 of the Council Decision) setting out the framework for implementation of the Convention within the EU and, *inter alia*, the applicable coordination, representation, voting and speaking arrangements in the UN.

² Lithuania, Slovakia, Romania.

³ Latvia, Lithuania, Slovakia.

⁴ Cyprus.

⁵ Greece.

The Code of Conduct was agreed on the 2 December 2010,⁶ enabling the EU to complete the procedure of conclusion of the Convention by depositing its instruments of formal confirmation with the UN Secretary General in New York on 23 December 2010.

The Convention entered into force with respect to the EU on 22 January 2011. The EU is bound by the Convention to the extent of its competences as these are listed in an Annex to the Decision 2010/48/EC. The EU will have to submit its first Report to the UN Committee in Geneva by 22 January 2013.

With respect to the Representation of the EU *vis-à-vis* the UN in UNCPRD matters within EU competence, the Member States and the EU are bound by the principle of loyal cooperation and the principle of unity of external representation and these principles should permeate their cooperation. It is essential to build up good cooperation practices in line with the provisions of the Code of Conduct.

The proposal for EU accession to the Optional Protocol, adopted by the Commission on 29 August 2008⁷ and transmitted to the European Parliament and the Council is still with the Council. Before pursuing the discussion on the Optional Protocol, it was decided to give priority to the procedure of formal confirmation of the Convention and to the adoption of a Code of Conduct. Now that these two procedures have been completed, the Commission considers that the process of accession of the EU to the Optional Protocol should be continued.

The process of ratification of the Convention is ongoing in 9 Member States. As the UN Convention came into force on 3 May 2008 the Commission encourages its swift ratification by the remaining Member States.

⁶ Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the EU relating to the UNCPRD, Council of the European Union, 16243/10.

⁷ COM (2008) 530 final. The proposal was endorsed by the European Parliament on 24 April 2009.

3. Progress on implementation and monitoring of the UNCRPD

The effective implementation of the UNCRPD requires a proper *governance structure*. To that end, Article 33.1 UNCRPD directly obliges the State Parties, to designate one or more focal points within government for matters relating to the implementation of the UNCRPD, and to give due consideration to the establishment of a coordination mechanism to facilitate related action in different sectors and at different levels. The efforts to put effective governance structures in place in the Member States are ongoing and advancing. Some Member States have very recently established structures and processes, while others are at the beginning or in the midst of the implementation process.

It was therefore very timely that the first Work Forum, organised in November 2010, focused on the implementation of Article 33 of the UNCRPD, and on the involvement of persons with disabilities in those structures. The Work Forum provided examples of good practices such as: effective methods of involvement and consultation with people with disabilities, action plans which work across Ministries, consultative structures, legislative instruments and multi annual funding programs.

Most Member States have designated the Focal Point within their Ministry of Welfare, Labour or Social Affairs while it is interesting to note that in a recent report of the UN-OHCHR there was a recommendation to nominate the Focal Point in the Ministry of Justice.

The establishment of a *Coordination Mechanism* is optional, but a majority of the Member States has chosen to establish such a mechanism.⁸ Many Member States combine the lead for the Coordination Mechanism and Focal Point into one body.

⁸ AT, BE, CY, CZ, DK, DE, ES, FR, HU, IT, IE, LU, LV, NL, PT, RO, SE, UK.

For the EU the European Commission is the Focal Point⁹. Certain aspects of the coordination between the Council, the Member States and the Commission in the implementation of the Convention are covered by the Code of Conduct, adopted on 2 December 2010. The Code contains provisions on representation of the EU *vis-à-vis* the UN in UNCRPD matters, how to coordinate the establishment of positions (point 6), speaking arrangements (points 7 and 9), voting arrangements (point 8), nominations (point 10) reporting and monitoring (point 12).

Article 33.2 of the UNCRPD obliges State Parties to maintain, strengthen, designate or establish a framework, including one or more independent mechanism, to promote, protect and monitor the implementation of the Convention in accordance with their legal and administrative systems.

A majority of the Member States having ratified report that they have established an independent mechanism. While all Member States recognise the importance of involving civil society in developing and implementing laws relating to persons with disabilities, only some of them have arrangements for involving civil society in the monitoring process.

At the EU level, the Commission has announced that it will present during 2011 its proposal on a framework for the purposes of Article 33 UNCRPD.

4. The interface between implementation of the UNCRPD and Europe 2020

The fourth Disability High Level Group Report highlights the link between the implementation of the UNCRPD and the goals of the Europe 2020 Strategy for education, employment and poverty reduction. The three relevant headline targets are: raising to 75% the **employment rate** for women and men aged 20-64; **improving education levels**, in particular by aiming to reduce school drop-out rates to less than 10% and by increasing the share of 30-34 years old having completed tertiary or equivalent education to at least 40%; and promoting **social inclusion**, in particular through the reduction of poverty, by aiming to lift at least 20 million people out of the risk of poverty and exclusion.

⁹ Article 3, Decision 2010/48/EC, point 11, Code of Conduct.

On the basis of the EU Statistics on Income and Living Conditions (SILC) from 2008, it is estimated that the percentage of persons with disabilities having completed tertiary education or equivalent in the age group 30-34 is around 19%, while for those without disabilities the figure is around 31%. The employment rate (from the same source) among those between 20-64 years old with disabilities is 45 % compared to 73% for persons without disabilities. The poverty risk for persons with disabilities older than sixteen years is 21% while for those without disabilities it is about 15%. The situation of persons with disabilities therefore has to improve in order to contribute to reaching the headline targets. This means that the Member States should include measures addressing the situation of persons with disabilities when they prepare their programmes aiming to reach the Europe 2020 headline targets.

In this respect, the Disability High Level Group Report shows some interesting examples and practices, for example involving the Member State's UNCRPD focal point in the preparation of the National Reform Programmes (NRP), and setting specific targets for persons with disabilities in the NRP. The overall picture so far, however, is that few NRPs contain specific measures for persons with disabilities. Moreover, the existing measures and national plans do not appear to address disability mainstreaming objectives in the actions designed to reach the three headline targets. Member States are therefore encouraged to mainstream disability concerns in their general measures but also to consider the inclusion of specific measures in their NRPs to improve the situation of persons with disabilities. This process could be underpinned by the setting of national disability targets in these three areas, in order to strengthen the disability-relevant contribution to the policies aimed at reaching the headline targets.

In order to be able to monitor progress as regards the position of persons with disabilities in the context of these three headline targets, it is of great importance that the Member States and the EU improve their relevant data and statistics. While some efforts are being made, the Member States' answers to the questionnaire reveal that there are insufficient statistics and data on disability-related issues with regard to the three above-mentioned headline targets.

While there is a need for more and better disability related data from the Member States, the European Commission will use annual SILC data to report regularly on the situation of persons with disabilities in education, employment and poverty, compared to the figures for the rest of the population.

At the same time, the Member States are encouraged to improve their data collection, statistics and the development of disability related indicators.

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

THE COUNCIL OF THE EUROPEAN UNION,

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

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

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

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

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

Whereas:

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

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

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

⁽¹⁾ OJ C 177 E, 27.6.2000, p. 42.

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

⁽³⁾ OJ C 204, 18.7.2000, p. 82.

⁽⁴⁾ OJ C 226, 8.8.2000, p. 1.

⁽⁵⁾ OJ L 39, 14.2.1976, p. 40.

⁽⁶⁾ OJ L 180, 19.7.2000, p. 22.

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

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

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

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

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

Article 2

Concept of discrimination

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

⁽¹⁾ OJ L 225, 12.8.1986, p. 43.

⁽²⁾ OJ C 186, 2.7.1999, p. 3.

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

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

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

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

Article 3

Scope

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

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

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

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

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

Article 4

Occupational requirements

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

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

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

Article 5

Reasonable accommodation for disabled persons

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

Article 6

Justification of differences of treatment on grounds of age

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

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

Such differences of treatment may include, among others:

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

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

Article 7

Positive action

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

Article 8

Minimum requirements

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

CHAPTER II

REMEDIES AND ENFORCEMENT

Article 9

Defence of rights

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

Article 10

Burden of proof

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

Article 11

Victimisation

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

*Article 12***Dissemination of information**

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

*Article 13***Social dialogue**

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

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

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

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

CHAPTER III

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

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

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

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

CHAPTER IV

FINAL PROVISIONS*Article 16***Compliance**

Member States shall take the necessary measures to ensure that:

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

*Article 17***Sanctions**

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

*Article 18***Implementation**

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

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

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

Article 19

Report

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

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

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

Article 20

Entry into force

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

Article 21

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 27 November 2000.

For the Council

The President

É. GUIGOU

JUDGMENT OF THE COURT (Grand Chamber)

11 July 2006 (*)

(Directive 2000/78/EC – Equal treatment in employment and occupation – Concept of disability)

In Case C-13/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Juzgado de lo Social No 33 de Madrid (Spain), made by decision of 7 January 2005, received at the Court on 19 January 2005, in the proceedings

Sonia Chacón Navas

v

Eurest Colectividades SA,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Schiemann and J. Makarczyk, Presidents of Chambers, J.-P. Puissechet, N. Colneric (Rapporteur), K. Lenaerts, P. Kūris, E. Juhász, E. Levits and A. Ó Caoimh, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Eurest Colectividades SA, by R. Sanz García-Muro, abogada,
- the Spanish Government, by E. Braquehais Conesa, acting as Agent,
- the Czech Government, by T. Boček, acting as Agent,
- the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents,
- the Netherlands Government, by H. G. Sevenster, acting as Agent,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the United Kingdom Government, by C. White, acting as Agent, and T. Ward, Barrister,
- the Commission of the European Communities, by I. Martínez del Peral Cagigal and D. Martín, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 March 2006,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation, as regards discrimination on grounds of disability, of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16) and, in the alternative, possible prohibition of discrimination on grounds of sickness.
- 2 The reference was made in the course of proceedings between Ms Chacón Navas and Eurest Colectividades SA ('Eurest') regarding her dismissal whilst she was on leave of absence from her employment on grounds of sickness.

Legal and regulatory context

Community law

- 3 The first paragraph of Article 136 EC reads:

'The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.'

- 4 Article 137(1) and (2) EC confers on the Community the power to support and complement the activities of the Member States with a view to achieving the objectives of Article 136 EC, inter alia in the fields of integrating persons excluded from the labour market and combating social exclusion.

- 5 Directive 2000/78 was adopted on the basis of Article 13 EC in the version prior to the Treaty of Nice, which provides:

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

- 6 Article 1 of Directive 2000/78 provides:

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

- 7 That directive states in its recitals:

'(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. ...

...

(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

...

(27) In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community [OJ 1986 L 225, p. 43], the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities, affirmed the importance of giving specific attention inter alia to recruitment, retention, training and lifelong learning with regard to disabled persons.'

8 Article 2(1) and (2) of Directive 2000/78 provides:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

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

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

9 Under Article 3 of that directive:

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

...

(c) employment and working conditions, including dismissals and pay;

...'

10 Article 5 of that directive reads:

'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.'

- 11 The Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989, to which Article 136(1) EC refers, states in point 26:

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

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

National legislation

- 12 Under Article 14 of the Spanish Constitution:

'Spanish people are equal before the law; there may be no discrimination on grounds of birth, race, sex, religion, opinion or any other condition or personal or social circumstance.'

- 13 Legislative Royal Decree No 1/1995 of 24 March 1995 approving the amended text of the Workers' Statute (Estatuto de los Trabajadores, BOE No 75 of 29 March 1995, p. 9654; 'the Workers' Statute') distinguishes between unlawful dismissal and void dismissal.

- 14 Article 55(5) and (6) of the Workers' Statute provides:

'5. Any dismissal on one of the grounds of discrimination prohibited by the Constitution or by law or occurring in breach of the fundamental rights and public freedoms of workers shall be void.

...

6. Any dismissal which is void shall entail the immediate reinstatement of the worker, with payment of unpaid wages or salary.'

- 15 It follows from Article 56(1) and (2) of the Workers' Statute that, in the event of unlawful dismissal, save where the employer decides to reinstate the worker, he loses his job but receives compensation.

- 16 As regards the prohibition of discrimination in employment relationships, Article 17 of the Workers' Statute, as amended by Law 62/2003 of 30 December 2003 laying down fiscal, administrative and social measures (BOE No 313 of 31 December 2003, p. 46874), which is intended to transpose Directive 2000/78 into Spanish law, provides:

'1. Regulatory provisions, clauses in collective agreements, individual agreements, and unilateral decisions by an employer, which involve direct or indirect unfavourable discrimination on grounds of age or disability, or positive or unfavourable discrimination in employment, or with regard to remuneration, working hours, and other conditions of employment based on sex, race, or ethnic origin, civil status, social status, religion or beliefs, political opinions, sexual orientation, membership or lack of membership of trade unions or compliance with their agreements, the fact of being related to other workers in the undertaking, or language within the Spanish State, shall be deemed void and ineffective.

...'

The main proceedings and the questions referred for a preliminary ruling

- 17 Ms Chacón Navas was employed by Eurest, an undertaking specialising in catering. On 14 October 2003 she was certified as unfit to work on grounds of sickness and, according to the

public health service which was treating her, she was not in a position to return to work in the short term. The referring court provides no information about Ms Chacón Navas' illness.

- 18 On 28 May 2004 Eurest gave Ms Chacón Navas written notice of her dismissal, without stating any reasons, whilst acknowledging that the dismissal was unlawful and offering her compensation.
- 19 On 29 June 2004 Ms Chacón Navas brought an action against Eurest, maintaining that her dismissal was void on account of the unequal treatment and discrimination to which she had been subject, stemming from the fact that she had been on leave of absence from her employment for eight months. She sought an order that Eurest reinstate her in her post.
- 20 The referring court points out that, in the absence of any other claim or evidence in the file, it follows from the reversal of the burden of proof that Ms Chacón Navas must be regarded as having been dismissed solely on account of the fact that she was absent from work because of sickness.
- 21 The referring court observes that, according to Spanish case-law, there are precedents to the effect that this type of dismissal is classified as unlawful rather than void, since, in Spanish law, sickness is not expressly referred to as one of the grounds of discrimination prohibited in relationships between private individuals.
- 22 Nevertheless, the referring court observes that there is a causal link between sickness and disability. In order to define the term 'disability', it is necessary to turn to the International Classification of Functioning, Disability and Health (ICF) drawn up by the World Health Organisation. It is apparent from this that 'disability' is a generic term which includes defects, limitation of activity and restriction of participation in social life. Sickness is capable of causing defects which disable individuals.
- 23 Given that sickness is often capable of causing an irreversible disability, the referring court takes the view that workers must be protected in a timely manner under the prohibition of discrimination on grounds of disability. Otherwise, the protection intended by the legislature would, in large measure, be nullified, because it would thus be possible to implement uncontrolled discriminatory practices.
- 24 Should it be concluded that disability and sickness are two separate concepts and that Community law does not apply directly to sickness, the referring court suggests that it should be held that sickness constitutes an identifying attribute that is not specifically cited which should be added to the ones in relation to which Directive 2000/78 prohibits discrimination. This follows from a joint reading of Articles 13 EC, 136 EC and 137 EC, and Article II-21 of the draft Treaty establishing a Constitution for Europe.
- 25 It was in those circumstances that the Juzgado de lo Social No 33 de Madrid decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
 - (1) Does Directive 2000/78, in so far as Article 1 thereof lays down a general framework for combating discrimination on the grounds of disability, include within its protective scope a ... [worker] who has been dismissed by her employer solely because she is sick?
 - (2) In the alternative, if it should be concluded that sickness does not fall within the protective framework which Directive 2000/78 lays down against discrimination on grounds of disability and the first question is answered in the negative, can sickness be regarded as an identifying attribute in addition to the ones in relation to which Directive 2000/78 prohibits discrimination?'

The admissibility of the reference for a preliminary ruling

- 26 The Commission casts doubt on the admissibility of the questions referred on the ground that the facts described in the order for reference lack precision.

- 27 In this respect, it must be observed that despite the absence of any indication of the nature and possible course of Ms Chacón Navas' sickness, the Court has enough information to enable it to give a useful answer to the questions referred.
- 28 It is apparent from the order for reference that Ms Chacón Navas, who was certified as unfit for work on grounds of sickness and was not in a position to return to work in the short term, was, according to the referring court, dismissed solely on account of the fact that she was absent from work because of sickness. It is also apparent from that order that the referring court takes the view that there is a causal link between sickness and disability and that a worker in the situation of Ms Chacón Navas must be protected under the prohibition of discrimination on grounds of disability.
- 29 The question principally referred concerns in particular the interpretation of the concept of 'disability' for the purpose of Directive 2000/78. The Court's interpretation of that concept is intended to enable the referring court to decide whether Ms Chacón Navas was, at the time of her dismissal, on account of her sickness, a person with a disability for the purpose of that directive who enjoyed the protection provided for in Article 3(1)(c) thereof.
- 30 The question referred in the alternative relates to sickness as an 'identifying attribute' and therefore concerns any type of sickness.
- 31 Euresc maintains that the reference for a preliminary ruling is inadmissible since the Spanish courts, in particular the Tribunal Supremo, have already ruled, in the light of Community legislation, that the dismissal of a worker who has been certified as unfit to work on grounds of sickness does not as such amount to discrimination. However, the fact that a national court has already interpreted Community legislation cannot render inadmissible a reference for a preliminary ruling.
- 32 As regards Euresc's argument that it dismissed Ms Chacón Navas without reference to the fact that she was absent from work on grounds of sickness because, at that time, her services were no longer necessary, it must be recalled that, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, *inter alia*, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27, and Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33).
- 33 Nevertheless, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39, and Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 25).
- 34 Since none of those conditions have been satisfied in this case, the reference for a preliminary ruling is admissible.

The questions

The first question

- 35 By its first question, the referring court is asking, in essence, whether the general framework laid down by Directive 2000/78 for combating discrimination on the grounds of disability confers protection on a person who has been dismissed by his employer solely on account of sickness.
- 36 As is clear from Article 3(1)(c) of Directive 2000/78, that directive applies, within the limits of the areas of competence conferred on the Community, to all persons, as regards inter alia dismissals.
- 37 Within those limits, the general framework laid down by Directive 2000/78 for combating discrimination on grounds of disability therefore applies to dismissals.
- 38 In order to reply to the question referred, it is necessary, first, to interpret the concept of 'disability' for the purpose of Directive 2000/78 and, second, to consider to what extent disabled persons are protected by that directive as regards dismissal.
- Concept of 'disability'
- 39 The concept of 'disability' is not defined by Directive 2000/78 itself. Nor does the directive refer to the laws of the Member States for the definition of that concept.
- 40 It follows from the need for uniform application of Community law and the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question (see, inter alia, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11, and Case C-323/03 *Commission v Spain* [2006] ECR I-0000, paragraph 32).
- 41 As is apparent from Article 1, the purpose of Directive 2000/78 is to lay down a general framework for combating discrimination based on any of the grounds referred to in that article, which include disability, as regards employment and occupation.
- 42 In the light of that objective, the concept of 'disability' for the purpose of Directive 2000/78 must, in accordance with the rule set out in paragraph 40 of this judgment, be given an autonomous and uniform interpretation.
- 43 Directive 2000/78 aims to combat certain types of discrimination as regards employment and occupation. In that context, the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.
- 44 However, by using the concept of 'disability' in Article 1 of that directive, the legislature deliberately chose a term which differs from 'sickness'. The two concepts cannot therefore simply be treated as being the same.
- 45 Recital 16 in the preamble to Directive 2000/78 states that 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'. The importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. In order for the limitation to fall within the concept of 'disability', it must therefore be probable that it will last for a long time.
- 46 There is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness.
- 47 It follows from the above considerations that a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78.

Protection of disabled persons as regards dismissal

- 48 Unfavourable treatment on grounds of disability undermines the protection provided for by Directive 2000/78 only in so far as it constitutes discrimination within the meaning of Article 2(1) of that directive.
- 49 According to Recital 17 in the preamble to Directive 2000/78, that directive does not require the recruitment, promotion or maintenance in employment of an individual who is not competent, capable and available to perform the essential functions of the post concerned, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.
- 50 In accordance with Article 5 of Directive 2000/78, reasonable accommodation is to be provided in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities. That provision states that this means 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, unless such measures would impose a disproportionate burden on the employer.
- 51 The prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.
- 52 It follows from all the above considerations that the answer to the first question must be that:
- a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78;
 - the prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.

The second question

- 53 By its second question, the referring court is asking whether sickness can be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination.
- 54 In this connection, it must be stated that no provision of the EC Treaty prohibits discrimination on grounds of sickness as such.
- 55 Article 13 EC and Article 137 EC, read in conjunction with Article 136 EC, contain only the rules governing the competencies of the Community. Moreover, Article 13 EC does not refer to discrimination on grounds of sickness as such in addition to discrimination on grounds of disability, and cannot therefore even constitute a legal basis for Council measures to combat such discrimination.
- 56 It is true that fundamental rights which form an integral part of the general principles of Community law include the general principle of non-discrimination. That principle is therefore binding on Member States where the national situation at issue in the main proceedings falls within the scope of Community law (see, to that effect, Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraphs 30 and 32, and Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 75, and the case-law cited). However, it does not follow from this that the scope of Directive 2000/78 should be extended by analogy beyond the discrimination based on the grounds listed exhaustively in Article 1 thereof.

- 57 The answer to the second question must therefore be that sickness cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination.

Costs

- 58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

- 1. A person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.**
- 2. The prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.**
- 3. Sickness cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination.**

[Signatures]

* Language of the case: Spanish.

JUDGMENT OF THE COURT (Grand Chamber)

17 July 2008 (*)

(Social policy – Directive 2000/78/EC – Equal treatment in employment and occupation – Articles 1, 2(1), (2)(a) and (3) and 3(1)(c) – Direct discrimination on grounds of disability – Harassment related to disability – Dismissal of an employee who is not himself disabled but whose child is disabled – Included – Burden of proof)

In Case C-303/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Employment Tribunal, London South (United Kingdom), made by decision of 6 July 2006, received at the Court on 10 July 2006, in the proceedings

S. Coleman

v

Attridge Law

and

Steve Law,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Tizzano, Presidents of Chambers, M. Ilešič, J. Klučka, A. Ó Caoimh (Rapporteur), T. von Danwitz and A. Arabadjiev, Judges,

Advocate General: M. Poiares Maduro,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 October 2007,

after considering the observations submitted on behalf of:

- Ms Coleman, by R. Allen QC and P. Michell, Barrister,
- the United Kingdom Government, by V. Jackson, acting as Agent, and N. Paines QC,
- the Greek Government, by K. Georgiadis and Z. Chatzipavlou, acting as Agents,
- Ireland, by N. Travers, BL,
- the Italian Government, by I.M. Braguglia, acting as Agent, and W. Ferrante, avvocato dello Stato,
- the Lithuanian Government, by D. Kriaučiūnas, acting as Agent,
- the Netherlands Government, by H.G. Sevenster and C. ten Dam, acting as Agents,
- the Swedish Government, by A. Falk, acting as Agent,

- the Commission of the European Communities, by J. Enegren and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2008,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).
- 2 The reference was made in the course of proceedings between Ms Coleman, the claimant in the main proceedings, and Attridge Law, a firm of solicitors, and Mr Law, a partner in that firm (together, the 'former employer'), concerning Ms Coleman's claim of constructive dismissal.

Legal context

Community legislation

- 3 Directive 2000/78 was adopted on the basis of Article 13 EC. Recitals 6, 11, 16, 17, 20, 27, 31 and 37 in the preamble to the directive are worded as follows:
 - '(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.
 - ...
 - (11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.
 - ...
 - (16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.
 - (17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.
 - ...
 - (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.
 - ...
 - (27) In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community [OJ 1986 L 225, p. 43], the Council established a guideline

framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities [OJ 1999 C 186, p. 3], affirmed the importance of giving specific attention inter alia to recruitment, retention, training and lifelong learning with regard to disabled persons.

...

- (31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.

...

- (37) In accordance with the principle of subsidiarity set out in Article 5 of the EC Treaty, the objective of this Directive, namely the creation within the Community of a level playing field as regards equality in employment and occupation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the action, be better achieved at Community level. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.'

- 4 Article 1 of Directive 2000/78 states that '[t]he purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

- 5 Article 2(1) to (3) of the directive, headed 'Concept of discrimination', states:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

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

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

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

...'

- 6 Article 3(1) of Directive 2000/78 provides:

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

...

(c) employment and working conditions, including dismissals and pay;

...'

- 7 Article 5 of Directive 2000/78, headed 'Reasonable accommodation for disabled persons', provides:

'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. ...'

- 8 Article 7 of Directive 2000/78, headed 'Positive action', is worded as follows:

'1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.'

- 9 Article 10 of Directive 2000/78, headed 'Burden of proof', provides:

'1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.'

- 10 In accordance with the first paragraph of Article 18 of Directive 2000/78, Member States were required to adopt the laws, regulations and administrative provisions necessary to comply with that directive by 2 December 2003 at the latest. Nevertheless, the second paragraph of Article 18 states:

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

- 11 As the United Kingdom of Great Britain and Northern Ireland requested such an additional period for the implementation of the directive, that period did not expire until 2 December 2006 as regards that Member State.

National legislation

- 12 The Disability Discrimination Act 1995 ('the DDA') essentially aims to make it unlawful to discriminate against disabled persons in connection, inter alia, with employment.
- 13 Part 2 of the DDA, which regulates the employment field, was amended, on the transposition of Directive 2000/78 into United Kingdom law, by the Disability Discrimination Act 1995 (Amendment) Regulations 2003, which came into force on 1 October 2004.
- 14 According to section 3A(1) of the DDA, as amended by those 2003 Regulations ('the DDA as amended in 2003'):
- '... a person discriminates against a disabled person if –
- (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and
- (b) he cannot show that the treatment in question is justified.'
- 15 Section 3A(4) of the DDA as amended in 2003 none the less specifies that the treatment of a disabled person cannot be justified if it amounts to direct discrimination falling within section 3A(5), according to which:
- 'A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.'
- 16 Harassment is defined in section 3B of the DDA as amended in 2003 as follows:
- '(1) ... a person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of –
- (a) violating the disabled person's dignity, or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.
- (2) Conduct shall be regarded as having the effect referred to in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should reasonably be considered as having that effect.'
- 17 Under section 4(2)(d) of the DDA as amended in 2003, it is unlawful for an employer to discriminate against a disabled person whom he employs by dismissing him or by subjecting him to any other detriment.
- 18 Section 4(3)(a) and (b) of the DDA as amended in 2003 provides that it is also unlawful for an employer, in relation to employment by him, to subject to harassment a disabled person whom he employs or a disabled person who has applied to him for employment.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 19 Ms Coleman worked for her former employer as a legal secretary from January 2001.
- 20 In 2002, she gave birth to a son who suffers from apnoeic attacks and congenital laryngomalacia and bronchomalacia. Her son's condition requires specialised and particular care. The claimant in the main proceedings is his primary carer.

- 21 On 4 March 2005, Ms Coleman accepted voluntary redundancy, which brought her contract of employment with her former employer to an end.
- 22 On 30 August 2005, she lodged a claim with the Employment Tribunal, London South, alleging that she had been subject to unfair constructive dismissal and had been treated less favourably than other employees because she was the primary carer of a disabled child. She claims that that treatment caused her to stop working for her former employer.
- 23 The order for reference states that the material facts of the case in the main proceedings have not yet been fully established, since the questions referred for a preliminary ruling arose only as a preliminary issue. The referring tribunal stayed that part of the action concerning Ms Coleman's dismissal, but held a preliminary hearing on 17 February 2006 to consider the discrimination plea.
- 24 The preliminary issue raised before that tribunal is whether the claimant in the main proceedings can base her application on national law, in particular those provisions designed to transpose Directive 2000/78, in order to plead discrimination against her former employer on the ground that she was subjected to less favourable treatment connected with her son's disability.
- 25 It is apparent from the order for reference that, should the Court's interpretation of Directive 2000/78 contradict that put forward by Ms Coleman, her application to the referring tribunal could not succeed under national law.
- 26 It is also apparent from the order for reference that, under United Kingdom law, where there is a preliminary hearing on a point of law, the court or tribunal hearing the case assumes that the facts are as related by the claimant. In the main proceedings, the facts of the dispute are assumed to be as follows:
- On Ms Coleman's return from maternity leave, her former employer refused to allow her to return to her existing job, in circumstances where the parents of non-disabled children would have been allowed to take up their former posts;
 - her former employer also refused to allow her the same flexibility as regards her working hours and the same working conditions as those of her colleagues who are parents of non-disabled children;
 - Ms Coleman was described as 'lazy' when she requested time off to care for her child, whereas parents of non-disabled children were allowed time off;
 - the formal grievance which she lodged against her ill treatment was not dealt with properly and she felt constrained to withdraw it;
 - abusive and insulting comments were made about both her and her child. No such comments were made when other employees had to ask for time off or a degree of flexibility in order to look after non-disabled children; and
 - having occasionally arrived late at the office because of problems related to her son's condition, she was told that she would be dismissed if she came to work late again. No such threat was made in the case of other employees with non-disabled children who were late for similar reasons.
- 27 Since the Employment Tribunal, London South, considered that the case before it raised questions of interpretation of Community law, it decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
- (1) In the context of the prohibition of discrimination on grounds of disability, does [Directive 2000/78] only protect from direct discrimination and harassment persons who are themselves disabled?
- (2) If the answer to Question (1) above is in the negative, does [Directive 2000/78] protect employees who, though they are not themselves disabled, are treated less

favourably or harassed on the ground of their association with a person who is disabled?

- (3) Where an employer treats an employee less favourably than he treats or would treat other employees, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that treatment direct discrimination in breach of the principle of equal treatment established by [Directive 2000/78]?
- (4) Where an employer harasses an employee, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that harassment a breach of the principle of equal treatment established by [Directive 2000/78]?’

Admissibility

- 28 While accepting that the questions put by the referring tribunal are based on an actual dispute, the Netherlands Government called into question the admissibility of the reference for a preliminary ruling on the basis that, given that these are preliminary questions raised at a preliminary hearing, all the facts at issue have not yet been established. It points out that, for the purposes of such a preliminary hearing, the national court or tribunal presumes that the facts are as related by the claimant.
- 29 It must be borne in mind that Article 234 EC establishes the framework for a relationship of close cooperation between the national courts or tribunals and the Court of Justice based on the assignment to each of different functions. It is clear from the second paragraph of that article that it is for the national court or tribunal to decide at what stage in the proceedings it is appropriate for that court or tribunal to refer a question to the Court of Justice for a preliminary ruling (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 5, and Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 30).
- 30 In the case in the main proceedings, the referring tribunal found that, if the Court of Justice should decide not to interpret Directive 2000/78 in accordance with Ms Coleman’s submissions, her case would fail in the material respects. The referring tribunal therefore decided, as permitted under United Kingdom legislation, to consider whether that directive must be interpreted as being applicable to the dismissal of an employee in Ms Coleman’s situation, before establishing whether, in fact, Ms Coleman did suffer less favourable treatment or harassment. It is for that reason that the questions referred for a preliminary ruling were based on the presumption that the facts of the dispute in the main proceedings are as summarised in paragraph 26 of this judgment.
- 31 Where, as here, the Court receives a request for interpretation of Community law which is not manifestly unrelated to the reality or the subject-matter of the main proceedings and it has the necessary information in order to give appropriate answers to the questions put to it in relation to the applicability of Directive 2000/78 to those proceedings, it must reply to that request and is not required to consider the facts as presumed by the referring court or tribunal, a presumption which it is for the referring court or tribunal to verify subsequently if that should prove to be necessary (see, to that effect, Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 12).
- 32 In those circumstances, the request for a preliminary ruling must be held to be admissible.

The questions referred for a preliminary ruling

The first part of Question 1, and Questions 2 and 3

- 33 By these questions, which should be examined together, the referring tribunal asks, in essence, whether Directive 2000/78, and, in particular, Articles 1 and 2(1) and (2)(a), must be interpreted as prohibiting direct discrimination on grounds of disability only in respect of an employee who is himself disabled, or whether the principle of equal treatment and the prohibition of direct discrimination apply equally to an employee who is not himself disabled

but who, as in the present case, is treated less favourably by reason of the disability of his child, for whom he is the primary provider of the care required by virtue of the child's condition.

- 34 Article 1 of Directive 2000/78 identifies its purpose as being to lay down, as regards employment and occupation, a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation.
- 35 Article 2(1) of Directive 2000/78 defines the principle of equal treatment as meaning that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1, including, therefore, disability.
- 36 According to Article 2(2)(a), direct discrimination is to be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds, *inter alia*, of disability.
- 37 Article 3(1)(c) of Directive 2000/78 provides that the directive is to apply, within the limits of the areas of competence conferred on the Community, to all persons, as regards both the public and private sectors, including public bodies, in relation to employment and working conditions, including dismissals and pay.
- 38 Consequently, it does not follow from those provisions of Directive 2000/78 that the principle of equal treatment which it is designed to safeguard is limited to people who themselves have a disability within the meaning of the directive. On the contrary, the purpose of the directive, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1. That interpretation is supported by the wording of Article 13 EC, which constitutes the legal basis of Directive 2000/78, and which confers on the Community the competence to take appropriate action to combat discrimination based, *inter alia*, on disability.
- 39 It is true that Directive 2000/78 includes a number of provisions which, as is apparent from their very wording, apply only to disabled people. Thus, Article 5 provides that, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation is to be provided. This means that employers must 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.
- 40 Article 7(2) of Directive 2000/78 also provides that, with regard to disabled persons, the principle of equal treatment is to be without prejudice either to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting the integration of such persons into the working environment.
- 41 The United Kingdom, Greek, Italian and Netherlands Governments contend, in the light of the provisions referred to in the two preceding paragraphs and also of recitals 16, 17 and 27 in the preamble to Directive 2000/78, that the prohibition of direct discrimination laid down by the directive cannot be interpreted as covering a situation such as that of the claimant in the main proceedings, since the claimant herself is not disabled. Only persons who, in a comparable situation to that of others, are treated less favourably or are placed in a disadvantageous situation because of characteristics which are particular to them can rely on that directive.
- 42 Nevertheless, it must be noted in that regard that the provisions referred to in paragraphs 39 and 40 of this judgment relate specifically to disabled persons either because they are provisions concerning positive discrimination measures in favour of disabled persons themselves or because they are specific measures which would be rendered meaningless or could prove to be disproportionate if they were not limited to disabled persons only. Thus, as recitals 16 and 20 in the preamble to Directive 2000/78 indicate, the measures in question are intended to accommodate the needs of disabled people at the workplace and to adapt the workplace to their disability. Such measures are therefore designed specifically to facilitate and promote the integration of disabled people into the working environment and,

for that reason, can only relate to disabled people and to the obligations incumbent on their employers and, where appropriate, on the Member States with regard to disabled people.

- 43 Therefore, the fact that Directive 2000/78 includes provisions designed to accommodate specifically the needs of disabled people does not lead to the conclusion that the principle of equal treatment enshrined in that directive must be interpreted strictly, that is, as prohibiting only direct discrimination on grounds of disability and relating exclusively to disabled people. Furthermore, recital 6 in the preamble to the directive, concerning the Community Charter of the Fundamental Social Rights of Workers, refers both to the general combating of every form of discrimination and to the need to take appropriate action for the social and economic integration of disabled people.
- 44 The United Kingdom, Italian and Netherlands Governments also contend that it follows from the judgment in Case C-13/05 *Chacón Navas* [2006] ECR I-6467 that the scope *ratione personae* of Directive 2000/78 must be interpreted strictly. According to the Italian Government, in *Chacón Navas*, the Court opted for a strict interpretation of the concept of disability and its implications in an employment relationship.
- 45 The Court defined the concept of 'disability' in its judgment in *Chacón Navas* and, in paragraphs 51 and 52 of that judgment, it found that the prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post. However, it does not follow from this interpretation that the principle of equal treatment defined in Article 2(1) of that directive and the prohibition of direct discrimination laid down by Article 2(2)(a) cannot apply to a situation such as that in the present case, where the less favourable treatment which an employee claims to have suffered is on grounds of the disability of his child, for whom he is the primary provider of the care required by virtue of the child's condition.
- 46 Although the Court explained in paragraph 56 of the judgment in *Chacón Navas* that, in view of the wording of Article 13 EC, the scope of Directive 2000/78 cannot be extended beyond the discrimination based on the grounds listed exhaustively in Article 1 of the directive, with the result that a person who has been dismissed by his employer solely on account of sickness cannot fall within the scope of the general framework established by Directive 2000/78, it nevertheless did not hold that the principle of equal treatment and the scope *ratione personae* of that directive must be interpreted strictly with regard to those grounds.
- 47 So far as the objectives of Directive 2000/78 are concerned, as is apparent from paragraphs 34 and 38 of the present judgment, the directive seeks to lay down, as regards employment and occupation, a general framework for combating discrimination on one of the grounds referred to in Article 1 – including, in particular, disability – with a view to putting into effect in the Member States the principle of equal treatment. It follows from recital 37 in the preamble to the directive that it also has the objective of creating within the Community a level playing field as regards equality in employment and occupation.
- 48 As Ms Coleman, the Lithuanian and Swedish Governments and the Commission maintain, those objectives, and the effectiveness of Directive 2000/78, would be undermined if an employee in the claimant's situation cannot rely on the prohibition of direct discrimination laid down by Article 2(2)(a) of that directive where it has been established that he has been treated less favourably than another employee is, has been or would be treated in a comparable situation, on the grounds of his child's disability, and this is the case even though that employee is not himself disabled.
- 49 In that regard, it follows from recital 11 in the preamble to the directive that the Community legislature also took the view that discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the Treaty, in particular, as regards employment.
- 50 Although, in a situation such as that in the present case, the person who is subject to direct discrimination on grounds of disability is not herself disabled, the fact remains that it is the disability which, according to Ms Coleman, is the ground for the less favourable treatment

which she claims to have suffered. As is apparent from paragraph 38 of this judgment, Directive 2000/78, which seeks to combat all forms of discrimination on grounds of disability in the field of employment and occupation, applies not to a particular category of person but by reference to the grounds mentioned in Article 1.

- 51 Where it is established that an employee in a situation such as that in the present case suffers direct discrimination on grounds of disability, an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.
- 52 As to the burden of proof which applies in a situation such as that in the present case, it should be observed that, under Article 10(1) of Directive 2000/78, Member States are required to take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of that principle. According to Article 10(2), Article 10(1) does not prevent Member States from introducing rules on the burden of proof which are more favourable to plaintiffs.
- 53 In the case before the referring tribunal, it is therefore for Ms Coleman, in accordance with Article 10(1) of Directive 2000/78, to establish, before that tribunal, facts from which it may be presumed that there has been direct discrimination on grounds of disability contrary to the directive.
- 54 In accordance with Article 10(1) of Directive 2000/78 and recital 31 in the preamble thereto, the rules on the burden of proof must be adapted when there is a prima facie case of discrimination. In the event that Ms Coleman establishes facts from which it may be presumed that there has been direct discrimination, the effective application of the principle of equal treatment then requires that the burden of proof should fall on the respondents, who must prove that there has been no breach of that principle.
- 55 In that context, the respondents could contest the existence of such a breach by establishing by any legally permissible means, in particular, that the employee's treatment was justified by objective factors unrelated to any discrimination on grounds of disability and to any association which that employee has with a disabled person.
- 56 In the light of the foregoing considerations, the answer to the first part of Question 1 and to Questions 2 and 3 must be that Directive 2000/78, and, in particular, Articles 1 and 2(1) and (2)(a) thereof, must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).

The second part of Question 1, and Question 4

- 57 By these questions, which should be examined together, the referring tribunal asks, in essence, whether Directive 2000/78, and, in particular, Articles 1 and 2(1) and (3) thereof, must be interpreted as prohibiting harassment related to disability only in respect of an employee who is himself disabled, or whether the prohibition of harassment applies equally to an employee who is not himself disabled but who, as in the present case, is the victim of unwanted conduct amounting to harassment related to the disability of his child, for whom he is the primary provider of the care required by virtue of the child's condition.
- 58 Since, under Article 2(3) of Directive 2000/78, harassment is deemed to be a form of discrimination within the meaning of Article 2(1), it must be held that, for the same reasons as those set out in paragraphs 34 to 51 of this judgment, that directive, and, in particular, Articles 1 and 2(1) and (3) thereof, must be interpreted as not being limited to the prohibition of harassment of people who are themselves disabled.

- 59 Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the principle of equal treatment enshrined in Directive 2000/78 and, in particular, to the prohibition of harassment laid down by Article 2(3) thereof.
- 60 In that regard, it must nevertheless be borne in mind that, according to the actual wording of Article 2(3) of the directive, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
- 61 With regard to the burden of proof which applies in situations such as that in the main proceedings, it must be observed that, since harassment is deemed to be a form of discrimination within the meaning of Article 2(1) of Directive 2000/78, the same rules apply to harassment as those set out in paragraphs 52 to 55 of this judgment.
- 62 Consequently, as is apparent from paragraph 54 of this judgment, in accordance with Article 10(1) of Directive 2000/78 and recital 31 in the preamble thereto, the rules on the burden of proof must be adapted when there is a prima facie case of discrimination. In the event that Ms Coleman establishes facts from which it may be presumed that there has been harassment, the effective application of the principle of equal treatment then requires that the burden of proof should fall on the respondents, who must prove that there has been no harassment in the circumstances of the present case.
- 63 In the light of the foregoing considerations, the answer to the second part of Question 1 and to Question 4 must be that Directive 2000/78, and, in particular, Articles 1 and 2(1) and (3) thereof, must be interpreted as meaning that the prohibition of harassment laid down by those provisions is not limited only to people who are themselves disabled. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment laid down by Article 2(3).

Costs

- 64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

- 1. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, and, in particular, Articles 1 and 2(1) and (2)(a) thereof, must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).**
- 2. Directive 2000/78, and, in particular, Articles 1 and 2(1) and (3) thereof, must be interpreted as meaning that the prohibition of harassment laid down by those provisions is not limited only to people who are themselves disabled. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment laid down by Article 2(3).**

[Signatures]

* Language of the case: English.

**Action brought on 20 June 2011 — European Commission
v Italian Republic****(Case C-312/11)**

(2011/C 226/36)

*Language of the case: Italian***Parties***Applicant:* European Commission (represented by: J. Enegren and C. Cattabriga, acting as Agents)*Defendant:* Italian Republic**Form of order sought**

The applicant claims that the Court should:

- declare that, by not placing all employers under an obligation to make reasonable accommodation for all disabled persons, the Italian Republic has failed to fulfil its obligation to implement, fully and correctly, Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation;
- order the Italian Republic to pay the costs.

Pleas in law and main arguments

1. By not placing all employers under an obligation to make reasonable accommodation for all disabled persons, the Italian Republic has failed to fulfil its obligation to implement, fully and correctly, Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
2. Article 5 of Directive 2000/78 places Member States under an obligation of general application to make reasonable accommodation to enable persons with a disability to have access to, to participate in, or to advance in employment, or to undergo training. Those measures must apply — consistently with the principle of proportionality and depending upon the specific circumstances — to all disabled persons and must concern all aspects of the employment relationship and all employers.
3. There is no trace in the Italian legislation of measures implementing that general obligation. Admittedly, there are the provisions of Law No 68/1999, which, in a number of areas, offer a level of assurance and facilitation which is higher even than that required under Article 5 of Directive 2000/78. However, those provisions do not concern all disabled persons; they are not enforceable against all employers; they do not concern all the various aspects of the employment relationship; or they merely indicate an objective which requires subsequent implementing measures if it is to be achieved.

Reference for a preliminary ruling from the Hof van Cassatie van België (Belgium) lodged on 30 June 2011 — Prorail NV v Xpedys NV and Others

(Case C-332/11)

(2011/C 269/59)

Language of the case: Dutch

Referring court

Hof van Cassatie van België

Parties to the main proceedings

Appellant: Prorail NV

Respondents: Xpedys NV

FAG Kugelfischer GmbH

D B Schenker Rail Nederland NV

Nationale Maatschappij der Belgische Spoorwegen NV

Question referred

Must Articles 1 and 17 of Council Regulation (EC) No 1206/2001⁽¹⁾ of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, in the light, inter alia, of European legislation concerning the recognition and enforcement of judgments in civil or commercial matters, and of the principle expressed in Article 33(1)⁽²⁾ that a judgment given in a Member State is to be recognised in the other Member States without any special procedure being required, be interpreted as meaning that the court which orders an investigation by a judicial expert whose task is to be carried out partly in the territory of the Member State to which the court belongs, but partly also in another Member State, must, for the direct performance of the latter part of the task, make use only and therefore exclusively of the method created by Regulation No 1206/2001 as referred to in Article 17 thereof, or as meaning that the judicial expert assigned by that country may also be charged with an investigation which is to be partly carried out in another Member State of the European Union, outside the provisions of Regulation No 1206/2001?

⁽¹⁾ OJ 2001 L 174, p. 1.

⁽²⁾ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

Reference for a preliminary ruling from the Hof van Cassatie van België (Belgium) lodged on 30 June 2011 — Koninklijke Federatie van Belgische Transporteurs en Logistieke Dienstverleners (Febetra) v Belgische Staat

(Case C-333/11)

(2011/C 269/60)

Language of the case: Dutch

Referring court

Hof van Cassatie van België

Parties to the main proceedings

Appellant: Koninklijke Federatie van Belgische Transporteurs en Logistieke Dienstverleners (Febetra)

Respondent: Belgische Staat

Questions referred

1. Must Article 37 of the TIR Convention and the second subparagraph of Article 454(3) of Commission Regulation (EEC) No 2454/93⁽¹⁾ of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code be interpreted as meaning that, in the absence of an official finding as to the place where the offence or irregularity was committed, and of any proof to the contrary furnished within the specified period by the guarantor, the Member State where the existence of the offence or irregularity is detected is deemed to be the Member State where the offence or irregularity was committed, even if it is possible, on the basis of the place where the TIR carnet was accepted and where the goods were sealed, without further investigation, to ascertain via which Member State situated at the external border of the Community the goods were unlawfully introduced into the Community?
2. If the first question is answered in the negative, must the same Articles, in conjunction with Articles 6(1) and 7(1) of Council Directive 92/12/EEC⁽²⁾ of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, be interpreted as meaning that the Member State situated at the external border of the Community where the goods were unlawfully introduced is also competent to collect the excise duty when the goods have in the meantime been taken to another Member State, where they were discovered, confiscated and forfeited?

⁽¹⁾ OJ 1993 L 253, p. 1.

⁽²⁾ OJ 1992 L 76, p. 1.

Reference for a preliminary ruling from the Sø- og Handelsret (Denmark) lodged on 1 July 2011 — HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab DAB

(Case C-335/11)

(2011/C 269/61)

Language of the case: Danish

Referring court

Sø- og Handelsret

Parties to the main proceedings

Applicant: HK Danmark, acting on behalf of Jette Ring

Defendant: Dansk almennyttigt Boligselskab DAB

Questions referred

1. (a) Is any person who, because of physical, mental or psychological injuries, cannot or can only to a limited extent carry out his work in a period that satisfies the requirement as to duration specified in paragraph 45 of the judgment of the Court of Justice in Case C-13/05 *Navas* ⁽¹⁾ covered by the concept of disability within the meaning of the directive?
 - (b) Can a condition caused by a medically diagnosed incurable illness be covered by the concept of disability within the meaning of the directive?
 - (c) Can a condition caused by a medically diagnosed temporary illness be covered by the concept of disability within the meaning of the directive?
2. Should a permanent reduction in functional capacity which does not entail a need for special aids or the like but means only that the person concerned is not capable of working full-time be regarded as a disability in the sense in which that term is used in Council Directive 2000/78/EC ⁽²⁾?
3. Is a reduction in working hours among the measures covered by Article 5 of Directive 2000/78/EC?
4. Does Council Directive 2000/78/EC preclude the application of a provision of national law under which an employer is entitled to dismiss an employee with a shortened notice period where the employee has received his salary during periods of illness for a total of 120 days during a period of 12 consecutive months, in the case of an employee who must be regarded as disabled within the meaning of the directive, where
 - (a) the absence was caused by the disability

or
 - (b) the absence was due to the fact that the employer did not implement the measures appropriate in the specific situation to enable a person with a disability to perform his work?

⁽¹⁾ [2006] ECR I-6467.

⁽²⁾ OJ 2000 L 303, p. 16.

Reference for a preliminary ruling from the Cour d'appel de Lyon (France), lodged on 1 July 2011 — Receveur principal des douanes de Roissy Sud, Receveur principal de la recette des douanes de Lyon Aéroport, Direction régionale des douanes et droits indirects de Lyon, Administration des douanes et droits indirects v Société Rohm & Haas Electronic Materials CMP Europe GmbH, Rohm & Haas Europe s. à r.l., Société Rohm & Haas Europe Trading APS-UK Branch

(Case C-336/11)

(2011/C 269/62)

Language of the case: French

Referring court

Cour d'appel de Lyon

Parties to the main proceedings

Appellants: Receveur principal des douanes de Roissy Sud, Receveur principal de la recette des douanes de Lyon Aéroport, Direction régionale des douanes et droits indirects de Lyon, Administration des douanes et droits indirects

Respondents: Société Rohm & Haas Electronic Materials CMP Europe GmbH, Rohm & Haas Europe s. à r.l., Société Rohm & Haas Europe Trading APS-UK Branch

Question referred

Should the combined nomenclature [set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, ⁽¹⁾ as amended by Commission Regulation (EC) No 1549/2006 of 17 October 2006 ⁽²⁾ and Commission Regulation (EC) No 1214/2007 of 20 September 2007 ⁽³⁾] be interpreted as meaning that polishing pads, intended for a polishing machine for working semiconductor materials — as such coming under tariff heading 8460 — imported separately from the machine, in the form of discs perforated in the centre, made up of a hard polyurethane layer, a layer of polyurethane foam, an adhesive layer and a protective plastic film, which do not contain any metal part or any abrasive substance and are used to polish 'wafers', in association with an abrasive liquid, and must be replaced at a frequency determined by their level of wear, come under tariff heading 8466 [...], as parts or accessories suitable for use solely or principally with the machines classified under headings 8456 to 8465, or, on the basis of their constituent material, under tariff heading [3919], as self-adhesive flat shapes made of plastic?

⁽¹⁾ OJ 1987 L 256, p. 1.

⁽²⁾ OJ 2006 L 301, p. 1.

⁽³⁾ OJ 2007 L 286, p. 1.

Reference for a preliminary ruling from the Sø- og Handelsret (Denmark) lodged on 1 July 2011 — HK Danmark, acting on behalf of Lone Skouboe Werge v Pro Display A/S in liquidation

(Case C-337/11)

(2011/C 269/63)

Language of the case: Danish

Referring court

Sø- og Handelsret

Parties to the main proceedings

Applicant: HK Danmark, acting on behalf of Lone Skouboe Werge

Defendant: Pro Display A/S in liquidation



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 2.7.2008
COM(2008) 426 final

2008/0140 (CNS)

Proposal for a

COUNCIL DIRECTIVE

on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

(presented by the Commission)

SEC(2008) 2180

SEC(2008) 2181

1 CONTENT OF THE PROPOSAL

Grounds for and objectives of the proposal

The aim of this proposal is to implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market. It sets out a framework for the prohibition of discrimination on these grounds and establishes a uniform minimum level of protection within the European Union for people who have suffered such discrimination.

This proposal supplements the existing EC legal framework under which the prohibition of discrimination on grounds of religion or belief, disability, age or sexual orientation applies only to employment, occupation and vocational training¹.

General context

The Commission announced in its legislative and work programme adopted on 23 October 2007² that it would propose new initiatives to complete the EU anti-discrimination legal framework.

The current proposal is presented as part of the Renewed Social Agenda: Opportunities, access and solidarity in 21st century Europe³, and accompanies the Communication Non-Discrimination and Equal Opportunities: A Renewed Commitment⁴.

The UN Convention on the Rights of Persons with Disabilities has been signed by the Member States and the European Community. It is based on the principles of non-discrimination, participation and inclusion in society, equal opportunities and accessibility. A proposal for the conclusion of the Convention by the European Community has been presented to the Council.

Existing provisions in the area of the proposal

This proposal builds upon Directives 2000/43/EC, 2000/78/EC and 2004/113/EC⁶ which prohibit discrimination on grounds of sex, racial or ethnic origin, age, disability, sexual orientation, religion or belief⁷. Discrimination based on race or ethnic origin is prohibited in employment, occupation and vocational training, as well as in non-employment areas such as

¹ Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000, p.22 and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000, p. 16

² COM (2007) 640

³ COM (2008) 412

⁴ COM (2008) 420

COM (2008)

⁶ Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373 of 21.12.2004, p.37

⁷ Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19.7.2000), Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2.12.2000)

social protection, health care, education and access to goods and services, including housing, which are available to the public. Discrimination based on sex is prohibited in the same range of areas, with the exception of education and media and advertising. However, discrimination based on age, religion and belief, sexual orientation and disability is prohibited only in employment, occupation and vocational training.

Directives 2000/43/EC and 2000/78/EC had to be transposed into national law by 2003, with the exception of those provisions dealing with age and disability discrimination, for which an extra three years was available. A report on the implementation of Directive 2000/43/EC was adopted by the Commission in 2006⁸ and a report on the implementation of Directive 2000/78/EC was adopted on 19 June 2008⁹. All except one Member State have transposed these directives. Directive 2004/113/EC had to be transposed by the end of 2007.

As far as possible, the concepts and rules provided for in this proposal build on those used in the existing Directives based on Article 13 EC.

Consistency with other policies and objectives of the Union

This proposal builds upon the strategy developed since the Amsterdam Treaty to combat discrimination and is consistent with the horizontal objectives of the European Union, and in particular with the Lisbon Strategy for Growth and Jobs and the objectives of the EU Social Protection and Social Inclusion Process. It will help to further the fundamental rights of citizens, in line with the EU Charter of Fundamental Rights.

2 CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

Consultation

In preparing this initiative, the Commission sought to associate all stakeholders with a potential interest and care was taken to ensure that those who might want to comment would have the opportunity and time to respond. The European Year of Equal Opportunities for All provided a unique opportunity to highlight the issues and encourage participation in the debate.

Particular mention should be made of the public on-line consultation¹⁰, a survey of the business sector¹¹, and a written consultation of, and meetings with, the social partners and European level NGOs active in the non-discrimination field¹². The results of the public consultation and that of the NGOs were a call for legislation at EU level to increase the level of protection against discrimination although some argued for ground-specific directives in the area of disability and of sex. The European Business Test Panel consultation indicated that businesses believe it would be helpful to have the same level of protection from discrimination across the EU. The social partners representing business were against new legislation in principle, which they saw as increasing red tape and costs, while the trade unions were in favour.

⁸ COM (2006) 643 final

⁹ COM (2008) 22

¹⁰ The full results of the consultation can be accessed at:

http://ec.europa.eu/employment_social/fundamental_rights/news/news_en.htm_rpc

¹¹ http://ec.europa.eu/yourvoice/ebtp/consultations/index_en.htm

¹² http://ec.europa.eu/employment_social/fundamental_rights/org/imass_en.htm_ar

The responses to the consultation highlighted concerns about how a new Directive would deal with a number of sensitive areas and also revealed misunderstandings about the limits or extent of Community competence. The proposed Directive addresses these concerns and makes explicit the limits of Community competence. Within these limits the Community has the power to act (Article 13 EC Treaty) and believes that action at EU level is the best way forward.

The responses also emphasised the specific nature of disability-related discrimination and the measures needed to address it. These are addressed in a specific Article.

Concerns have been expressed that a new Directive would bring costs for business but it should be emphasised that this proposal builds largely on concepts used in the existing directives with which economic operators are familiar. As to measures to deal with disability discrimination, the concept of reasonable accommodation is familiar to businesses since it was established in Directive 2000/78/EC. The Commission proposal specifies the factors to be taken into account when assessing what is reasonable.

It was pointed out that, unlike the other two Directives, Directive 2000/78/EC does not require Member States to establish equality bodies. Attention was also drawn to the need to tackle multiple discrimination, for example by defining it as discrimination and by providing effective remedies. These issues go beyond the scope of this Directive but nothing prevents Member States taking action in these areas.

Finally, it was pointed out that the scope of protection from sex discrimination under Directive 2004/113/EC is not as extensive as in Directive 2000/43/EC and that this should be addressed in new legislation. The Commission does not take up this suggestion now since the date for transposition of Directive 2004/113/EC has only just passed. However the Commission will report in 2010 on the Directive's implementation and can propose modifications then, if appropriate.

Collection and use of expertise

A study¹³ in 2006 showed that, on the one hand, most countries provide legal protection in some form that goes beyond the current EC requirements in most of the areas examined, and on the other hand, there was a good deal of variety between countries as to the degree and nature of the protection. It also showed that very few countries carried out ex-ante impact assessments on non-discrimination legislation. A further study¹⁴ looked at the nature and extent of discrimination outside employment in the EU, and the potential (direct and indirect) costs this may have for individuals and society.

In addition, the Commission has used the reports from the European Network of Independent Experts in the non-discrimination field, notably their overview *Developing Anti-Discrimination Law in Europe*¹ as well as a study on *Tackling Multiple Discrimination: practices, policies and laws*¹⁶.

¹³ http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mapstrand1_en.pdf

¹⁴ Will be available on: http://ec.europa.eu/employment_social/fundamental_rights/org/imass_en.htm

¹ http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm_leg

¹⁶ http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/multidis_en.pdf

Also relevant are the results of a special Eurobarometer survey¹⁷ and a Eurobarometer flash survey in February 2008¹⁸.

Impact assessment

The impact assessment report¹⁹ looked at evidence of discrimination outside the labour market. It found that, while non-discrimination is recognised to be one of the fundamental values of the EU, in practice the level of legal protection to secure these values differs between Member States and between discrimination grounds. As result, those at risk of discrimination often find themselves less able to participate fully in society and the economy, with negative effects both for the individual and for broader society.

The report defined three objectives which any initiative should meet:

- to increase protection from discrimination
- to ensure legal certainty for economic operators and potential victims across the Member States
- to enhance social inclusion and promote the full participation of all groups in society and the economy.

Of the various measures identified that could help reach the objectives, six options were selected for further analysis, notably no new action at EU level self-regulation recommendations and one or more directives prohibiting discrimination outside the employment sphere .

In any event, Member States will have to implement the UN Convention on the Rights of Persons with Disabilities which defines the denial of reasonable accommodation as discrimination. A legally binding measure which prohibits discrimination on grounds of disability entails financial costs because of the adaptations needed but there are also benefits from the fuller economic and social inclusion of groups currently facing discrimination.

The report concludes that a multi-ground directive would be the appropriate response, designed so as to respect the principles of subsidiarity and proportionality. A small number of Member States already have rather complete legislative protection while most others have some, but less comprehensive, protection. The legislative adaptation arising from new EC rules would therefore vary.

The Commission received many complaints about discrimination in the insurance and banking sector. The use of age or disability by insurers and banks to assess the risk profile of customers does not necessarily represent discrimination: it depends on the product. The Commission will initiate a dialogue with the insurance and banking industry together with other relevant stakeholders to achieve a better common understanding of the areas where age or disability are relevant factors for the design and pricing of the products offered in these sectors.

¹⁷ Special Eurobarometer Survey 296 on discrimination in the EU:
http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm and
http://ec.europa.eu/public_opinion/archives/eb_special_en.htm

¹⁸ Flash Eurobarometer 232 http://ec.europa.eu/public_opinion/flash/fl_232_en.pdf

¹⁹ Will be available on:http://ec.europa.eu/employment_social/fundamental_rights/org/imass_en.htm

3 LEGAL ASPECTS

Legal base

The proposal is based on Article 13(1) EC Treaty.

Subsidiarity and proportionality

The principle of subsidiarity applies insofar as the proposal does not fall under the exclusive competence of the Community. The objectives of the proposal cannot be sufficiently achieved by the Member States acting alone because only a Community wide measure can ensure that there is a minimum standard level of protection against discrimination based on religion or belief, disability, age or sexual orientation in all the Member States. A Community legal act provides legal certainty as to the rights and obligations of economic operators and citizens, including for those moving between the Member States. Experience with the previous directives adopted under Article 13(1) EC is that they had a positive effect in achieving a better protection against discrimination. In accordance with the principle of proportionality, the proposed directive does not go beyond what is necessary to achieve the objectives set.

Moreover, national traditions and approaches in areas such as healthcare, social protection and education tend to be more diverse than in employment-related areas. These areas are characterised by legitimate societal choices in areas which fall within national competence.

The diversity of European societies is one of Europe's strengths, and is to be respected in line with the principle of subsidiarity. Issues such as the organisation and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions are best decided at national level. The Directive does not therefore require any Member State to amend its present laws and practices in relation to these issues. Nor does it affect national rules governing the activities of churches and other religious organisations or their relationship with the state. So, for example, it will remain for Member States alone to take decisions on questions such as whether to allow selective admission to schools, or prohibit or allow the wearing or display of religious symbols in schools, whether to recognise same-sex marriages, and the nature of any relationship between organised religion and the state.

Choice of instrument

A directive is the instrument that best ensures a coherent minimum level of protection against discrimination across the EU, whilst allowing individual Member States that want to go beyond the minimum standards to do so. It also allows them to choose the most appropriate means of enforcement and sanctions. Past experience in the non-discrimination field is that a directive was the most appropriate instrument.

Correlation table

Member States are required to communicate to the Commission the text of national provisions transposing the directive as well as a correlation table between those provisions and the directive.

European Economic Area

This is a text of relevance to the European Economic Area and the Directive will be applicable to the non-EU Member States of the European Economic Area following a decision of the EEA Joint Committee

4 BUDGETARY IMPLICATIONS

The proposal has no implications for the Community budget.

DETAILED EXPLANATION OF THE SPECIFIC PROVISIONS

Article 1: Purpose

The main objective of the directive is to combat discrimination based on religion or belief, disability, age or sexual orientation and to put into effect the principle of equal treatment, outside the field of employment. The directive does not prohibit differences of treatment based on sex which are covered by Articles 13 and 141 of the EC Treaty and related secondary legislation.

Article 2: Concept of discrimination

The definition of the principle of equal treatment is based on that contained in the previous directives adopted under Article 13(1) EC as well as relevant case law of the European Court of Justice .

Direct discrimination consists of treating someone differently solely because of his or her age, disability, religion or belief and sexual orientation. Indirect discrimination is more complex in that a rule or practice which seems neutral in fact has a particularly disadvantageous impact upon a person or a group of persons having a specific characteristic. The author of the rule or practice may have no idea of the practical consequences, and intention to discriminate is therefore not relevant. As in Directives 2000/43/EC, 2000/78/EC and 2002/73/EC²⁰, it is possible to justify indirect discrimination (if that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary).

Harassment is a form of discrimination. The unwanted conduct can take different forms, from verbal or written comments, gestures or behaviour, but it has to be serious enough to create an intimidating, humiliating or offensive environment. This definition is identical to the definitions contained in the other Article 13 directives.

A denial of reasonable accommodation is considered a form of discrimination. This is in line with the UN Convention on the rights of people with disabilities and coherent with Directive 2000/78/EC. Certain differences of treatment based on age may be lawful, if they are justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (proportionality test).

²⁰ OJ L269 of .10.2002

In the existing Article 13 EC directives exceptions to the prohibition of direct discrimination were allowed for genuine and determining occupational requirements, for differences of treatment based on age, and in the context of sex discrimination, in access to goods and services. Although the current proposal does not cover employment, there will be differences of treatment in the areas mentioned in Article 3 that should be allowed. However, as exceptions to the general principle of equality should be narrowly drawn, the double test of a justified aim and proportionate way of reaching it (i.e. in the least discriminatory way possible) is required.

A special rule is added for insurance and banking services, in recognition of the fact that age and disability can be an essential element of the assessment of risk for certain products, and therefore of price. If insurers are not allowed to take age and disability into account at all, the additional costs will have to be entirely borne by the rest of the pool of those insured, which would result in higher overall costs and lower availability of cover for consumers. The use of age and disability in the assessment of risk must be based on accurate data and statistics.

The directive does not affect national measures based on public security, public order, the prevention of criminal offences, the protection of health and the rights and freedoms of others.

Article 3: Scope

Discrimination based on religion or belief, disability, age or sexual orientation is prohibited by both the public and private sector in:

- social protection, including social security and health care
- social advantages
- education
- access to and supply of goods and services which are available to the public, including housing.

In terms of access to goods and services, only professional or commercial activities are covered. In other words, transactions between private individuals acting in a private capacity will not be covered: letting a room in a private house does not need to be treated in the same way as letting rooms in a hotel. The areas are covered only to the extent that the subject matter falls within the competences of the Community. Thus, for example, the organisation of the school system, activities and the content of education courses, including how to organise education for persons with disabilities, is a matter for the Member States, and they may provide for differences in treatment in access to religious educational institutions. For example, a school could arrange a special presentation just for children of a certain age, while a faith based school would be allowed to arrange school trips with a religious theme.

The text makes it clear that matters related to marital and family status, which includes adoption, are outside the scope of the directive. This includes reproductive rights. Member States remain free to decide whether or not to institute and recognise *legally* registered partnerships. However once national law recognises such relationships as comparable to that of spouses then the principle of equal treatment applies²¹.

²¹ Judgment of the ECJ of 1.4.2008 in case C-267/06 Tadao Maruko

Article 3 specifies that the directive does not cover national laws relating to the secular nature of the State and its institutions, nor to the status of religious organisations. Member States may thus allow or prohibit the wearing of religious symbols in schools. Differences in treatment based on nationality are also not covered.

Article 4: Equal treatment of persons with disabilities

Effective access for disabled people to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing, shall be provided by anticipation. This obligation is limited by the defence that if this would impose a disproportionate burden or would require major changes to the product or service, it does not need to be done.

In some cases individual measures of reasonable accommodation may be necessary to ensure effective access for a particular disabled person. As above, this is only the case if it would not impose a disproportionate burden. A non-exhaustive list is given of factors that could be taken into account in assessing whether the burden is disproportionate, thus allowing the specific situation of small and medium sized, and micro enterprises, to be taken into account.

The concept of reasonable accommodation already exists in the employment sphere under Directive 2000/78/EC, and Member States and businesses therefore have experience in applying it. What might be appropriate for a large corporation or public body may not be for a small or medium-sized company. The requirement to make reasonable accommodation does not only imply making physical changes but may entail an alternative means of providing a service.

Article 5: Positive action

This provision is common to all Article 13 directives. It is clear that in many cases, formal equality does not lead to equality in practice. It may be necessary to put in place specific measures to prevent and correct situations of inequality. The Member States have different traditions and practices regarding positive action, and this article lets Member States provide for positive action but does not make this an obligation.

Article 6: Minimum requirements

This provision is common to all Article 13 directives. It allows Member States to provide a higher level of protection than that guaranteed by the Directive, and confirms that there should be no lowering of the level of protection against discrimination already afforded by Member States when implementing the Directive.

Article 7: Defence of rights

This provision is common to all Article 13 directives. People should be able to enforce their right to non-discrimination. This article therefore provides that people who believe that they have been the victim of discrimination should be able to use administrative or judicial procedures, even after the relationship in which the discrimination is alleged to have taken place has ended, in accordance with the ruling of the European Court of Justice in the Coote²² case.

²² Case C-18 /97 1998 ECR I- 199

The right to effective legal protection is strengthened by allowing organisations, which have a legitimate interest in the fight against discrimination, to help victims of discrimination in judicial or administrative procedures. National rules on time limits for initiating actions are unaffected by this provision.

Article 8: Burden of proof

This provision is common to all Article 13 directives. In judicial procedures, the general rule is that a person who alleges something must prove it. However, in discrimination cases, it is often extremely difficult to obtain the evidence necessary to prove the case, as it is often in the hands of the respondent. This problem was recognised by the European Court of Justice²³ and the Community legislator in Directive 97/80/EC²⁴.

The shift of the burden of proof applies to all cases alleging breach of the principle of equal treatment, including those involving associations and organisations under Article 7(2). As in the earlier directives, this shift in the burden of proof does not apply to situations where the criminal law is used to prosecute allegations of discrimination.

Article 9: Victimisation

This provision is common to all Article 13 directives. Effective legal protection must include protection against retaliation. Victims may be deterred from exercising their rights due to the risk of retaliation, and it is therefore necessary to protect individuals against any adverse treatment due to the exercise of the rights conferred by the Directive. This article is the same as in Directives 2000/43/EC and 2000/78/EC.

Article 10: Dissemination of information

This provision is common to all Article 13 directives. Experience and polls show that individuals are badly or insufficiently informed of their rights. The more effective the system of public information and prevention is, the less need there will be for individual remedies. This replicates equivalent provisions in Directives 2000/43/EC, 2000/78/EC and 2002/113/EC.

Article 11: Dialogue with relevant stakeholders

This provision is common to all Article 13 directives. It aims to promote dialogue between relevant public authorities and bodies such as non-governmental organisations which have a legitimate interest in contributing to the fight against discrimination on grounds of religion or belief, disability, age or sexual orientation. A similar provision is contained in the previous anti-discrimination directives.

Article 12: Bodies for the promotion of equal treatment

This provision is common to two Article 13 directives. This article requires the Member States to have a body or bodies (Equality Body) at national level to promote equal treatment of all persons without discrimination on the grounds of religion or belief, disability, age or sexual orientation.

²³ Danfoss, Case 109/88 1989 ECR 03199

²⁴ OJ L.14, 20.1.1998

It replicates the provisions of Directive 2000/43/EC in as far as they deal with access to and supply of goods and services, and builds on equivalent provisions in Directives 2002/73/EC² and 2004/113/EC. It sets out minimum competences applicable to bodies at national level which should act independently to promote the principle of equal treatment. Member States may decide that these bodies be the same as those already established under the previous directives.

It is both difficult and expensive for individuals to mount a legal challenge if they think they have been discriminated against. A key role of the Equality Bodies is to give independent help to victims of discrimination. They must also be able to conduct independent surveys on discrimination and to publish reports and recommendations on issues relating to discrimination.

Article 13: Compliance

This provision is common to all Article 13 directives. Equal treatment involves the elimination of discrimination arising from any laws, regulations or administrative provision and the directive therefore requires the Member States to abolish any such provisions. As with earlier legislation, the directive also requires that any provisions contrary to the principle of equal treatment must be rendered null and void or amended, or must be capable of being so rendered if they are challenged.

Article 14: Sanctions

This provision is common to all Article 13 directives. In accordance with the case law of the Court of Justice²⁶, the text provides that there should be no upper limit on the compensation payable in cases of breach of the principle of equal treatment. This provision does not require criminal sanctions to be introduced.

Article 15: Implementation

This provision is common to all Article 13 directives. It gives the Member States a period of two years to transpose the directive into national law and to communicate to the Commission the texts of the national law. Member States may provide that the obligation to ensure effective access for disabled persons only applies four years after the adoption of the Directive.

Article 16: Report

This provision is common to all Article 13 directives. It requires the Commission to report to the European Parliament and the Council on the application of the Directive, on the basis of information from Member States. The report will take account of the views of the social partners, relevant NGOs and the EU Fundamental Rights Agency.

Article 17: Entry into force

This provision is common to all Article 13 directives. The Directive will enter into force on the day it is published in the Official Journal.

² Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269 of .10.2002, p.1

²⁶ Cases C-180/9 Draehmpaehl, ECR 1997 I p.219 and C-271/91 Marshall ECR 1993 I P.4367

Article 18: Addressees

This provision is common to all Article 13 directives, making it clear that the Directive is addressed to the Member States.

Proposal for a

COUNCIL DIRECTIVE

on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 13(1) thereof,

Having regard to the proposal from the Commission²⁷,

Having regard to the opinion of the European Parliament²⁸,

Having regard to the opinion of the European Economic and Social Committee²⁹,

Having regard to the opinion of the Committee of the Regions³⁰,

Whereas:

- (1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
- (2) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the UN Convention on the Rights of Persons with Disabilities, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, to which all Member States are signatories. In particular, the UN Convention on the Rights of Persons with Disabilities includes the denial of reasonable accommodation in its definition of discrimination.

²⁷ OJ C , , p. .

²⁸ OJ C , , p. .

²⁹ OJ C , , p. .

³⁰ OJ C , , p. .

- (3) This Directive respects the fundamental rights and observes the fundamental principles recognised in particular by the Charter of Fundamental Rights of the European Union. Article 10 of the Charter recognises the right to freedom of thought, conscience and religion. Article 21 prohibits discrimination, including on grounds of religion or belief, disability, age or sexual orientation and Article 26 acknowledges the right of persons with disabilities to benefit from measures designed to ensure their independence.
- (4) The European Years of Persons with Disabilities in 2003, of Equal Opportunities for All in 2007, and of Intercultural Dialogue in 2008 have highlighted the persistence of discrimination but also the benefits of diversity.
- (5) The European Council, in Brussels on 14 December 2007, invited Member States to strengthen efforts to prevent and combat discrimination inside and outside the labour market³¹.
- (6) The European Parliament has called for the extension of the protection of discrimination in European Union law³².
- (7) The European Commission has affirmed in its Communication *Renewed social agenda: Opportunities, access and solidarity in 21st century Europe*³³ that, in societies where each individual is regarded as being of equal worth, no artificial barriers or discrimination of any kind should hold people back in exploiting these opportunities.
- (8) The Community has adopted three legal instruments³⁴ on the basis of article 13(1) of the EC Treaty to prevent and combat discrimination on grounds of sex, racial and ethnic origin, religion or belief, disability, age and sexual orientation. These instruments have demonstrated the value of legislation in the fight against discrimination. In particular, Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation on the grounds of religion or belief, disability, age and sexual orientation. However, variations remain between Member States on the degree and the form of protection from discrimination on these grounds beyond the areas of employment.
- (9) Therefore, legislation should prohibit discrimination based on religion or belief, disability, age or sexual orientation in a range of areas outside the labour market, including social protection, education and access to and supply of goods and services, including housing. It should provide for measures to ensure the equal access of persons with disabilities to the areas covered.
- (10) Directive 2000/78/EC prohibits discrimination in access to vocational training. It is necessary to complete this protection by extending the prohibition of discrimination to education which is not considered vocational training.
- (11) This Directive should be without prejudice to the competences of the Member States in the areas of education, social security and health care. It should also be without

³¹ Presidency conclusions of the Brussels European Council of 14 December 2007, point 10.

³² Resolution of 20 May 2008 P6 TA-PRO (2008)0212

³³ COM(2008) 412

³⁴ Directive 2000/43/EC, Directive 2000/78/EC and Directive 2004/113/EC

prejudice to the essential role and wide discretion of the Member States in providing, commissioning and organising services of general economic interest.

- (12) Discrimination is understood to include direct and indirect discrimination, harassment, instructions to discriminate and denial of reasonable accommodation.
- (13) In implementing the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.
- (14) The appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination should remain a matter for the national judicial or other competent bodies in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.
- (15) Actuarial and risk factors related to disability and to age are used in the provision of insurance, banking and other financial services. These should not be regarded as constituting discrimination where the factors are shown to be key factors for the assessment of risk.
- (16) All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. This Directive should not apply to economic transactions undertaken by individuals for whom these transactions do not constitute their professional or commercial activity.
- (17) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context, the freedom of religion, and the freedom of association. This Directive is without prejudice to national laws on marital or family status, including on reproductive rights. It is also without prejudice to the secular nature of the State, state institutions or bodies, or education.
- (18) Member States are responsible for the organisation and content of education. The Commission Communication on Competences for the 21st Century: An Agenda for European Cooperation on Schools draws attention to the need for special attention to be paid to disadvantaged children and those with special educational needs. In particular national law may provide for differences in access to educational institutions based on religion or belief. Member States may also allow or prohibit the wearing or display of religious symbols at school.
- (19) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. Measures to enable persons with disabilities to have effective non-discriminatory access to the areas covered by this Directive play an important part in ensuring full equality in practice. Furthermore, individual measures of reasonable accommodation may be required in some cases to ensure such access. In neither case are measures

required that would impose a disproportionate burden. In assessing whether the burden is disproportionate, account should be taken of a number of factors including the size, resources and nature of the organisation. The principle of reasonable accommodation and disproportionate burden are established in Directive 2000/78/EC and the UN Convention on Rights of Persons with Disabilities.

- (20) Legal requirements³ and standards on accessibility have been established at European level in some areas while Article 16 of Council Regulation 1083/2006 of 11 July 2006 on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999³⁶ requires that accessibility for disabled persons is one of the criteria to be observed in defining operations co-financed by the Funds. The Council has also emphasised the need for measures to secure the accessibility of cultural infrastructure and cultural activities for people with disabilities³⁷.
- (21) The prohibition of discrimination should be without prejudice to the maintenance or adoption by Member States of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation. Such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons.
- (22) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.
- (23) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations, organisations and other legal entities should be empowered to engage in proceedings, including on behalf of or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.
- (24) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.
- (25) The effective implementation of the principle of equal treatment requires adequate judicial protection against victimisation.
- (26) In its resolution on the Follow-up of the European Year of Equal Opportunities for All (2007), the Council called for the full association of civil society, including

³ Regulation (EC) No. 1107/2006 and Regulation (EC) No 1371/2007

³⁶ OJ L 210, 31.7.2006, p.2 . Regulation as last amended by Regulation (EC) No 1989/2006 (OJ L 411, 30.12.2006, p.6)

³⁷ OJ C 134, 7.6.2003, p.7

organisations representing people at risk of discrimination, the social partners and stakeholders in the design of policies and programmes aimed at preventing discrimination and promoting equality and equal opportunities, both at European and national levels.

- (27) Experience in applying Directives 2000/43/EC and 2004/113/EC show that protection from discrimination on the grounds covered by this Directive would be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims.
- (28) In exercising their powers and fulfilling their responsibilities under this Directive, these bodies should operate in a manner consistent with the United Nations Paris Principles relating to the status and functioning of national institutions for the protection and promotion of human rights.
- (29) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.
- (30) In accordance with the principles of subsidiarity and proportionality as set out in Article of the EC Treaty, the objective of this Directive, namely ensuring a common level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved by the Community. This Directive does not go beyond what is necessary in order to achieve those objectives.
- (31) In accordance with paragraph 34 of the interinstitutional agreement on better law-making, Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, which will, as far as possible, illustrate the correlation between the Directive and the transposition measures and to make them public.

HAS ADOPTED THIS DIRECTIVE:

Chapter 1

GENERAL PROVISIONS

Article 1 *Purpose*

This Directive lays down a framework for combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation.

Article 2 *Concept of discrimination*

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

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

. Denial of reasonable accommodation in a particular case as provided for by Article 4 (1)(b) of the present Directive as regards persons with disabilities shall be deemed to be discrimination within the meaning of paragraph 1.

6. Notwithstanding paragraph 2, Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In particular, this Directive shall not preclude the fixing of a specific age for access to social benefits, education and certain goods or services.

7. Notwithstanding paragraph 2, in the provision of financial services Member States may permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data.

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

Article 3 *Scope*

1. Within the limits of the powers conferred upon the Community, the prohibition of discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) Social protection, including social security and healthcare
- (b) Social advantages
- (c) Education

(d) Access to and supply of goods and other services which are available to the public, including housing.

Subparagraph (d) shall apply to individuals only insofar as they are performing a professional or commercial activity.

2. This Directive is without prejudice to national laws on marital or family status and reproductive rights.

3. This Directive is without prejudice to the responsibilities of Member States for the content of teaching, activities and the organisation of their educational systems, including the provision of special needs education. Member States may provide for differences in treatment in access to educational institutions based on religion or belief.

4. This Directive is without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status and activities of churches and other organisations based on religion or belief. It is equally without prejudice to national legislation promoting equality between men and women.

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

Article 4

Equal treatment of persons with disabilities

1. In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities:

a) The measures necessary to enable persons with disabilities to have effective non-discriminatory access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing and transport, shall be provided by anticipation, including through appropriate modifications or adjustments. Such measures should not impose a disproportionate burden, nor require fundamental alteration of the social protection, social advantages, health care, education, or goods and services in question or require the provision of alternatives thereto.

b) Notwithstanding the obligation to ensure effective non-discriminatory access and where needed in a particular case, reasonable accommodation shall be provided unless this would impose a disproportionate burden.

2. For the purposes of assessing whether measures necessary to comply with paragraph 1 would impose a disproportionate burden, account shall be taken, in particular, of the size and resources of the organisation, its nature, the estimated cost, the life cycle of the goods and services, and the possible benefits of increased access for persons with disabilities. The burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the equal treatment policy of the Member State concerned.

3. This Directive shall be without prejudice to the provisions of Community law or national rules covering the accessibility of particular goods or services.

Article 5
Positive action

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to religion or belief, disability, age, or sexual orientation.

Article 6
Minimum requirements

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

CHAPTER II **REMEDIES AND ENFORCEMENT**

Article 7
Defence of rights

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

Article 8
Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the prohibition of discrimination.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Member States need not apply paragraph 1 to proceedings in which the court or competent body investigates the facts of the case.

. Paragraphs 1, 2, 3 and 4 shall also apply to any legal proceedings commenced in accordance with Article 7(2).

Article 9
Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 10
Dissemination of information

Member States shall ensure that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by appropriate means throughout their territory.

Article 11
Dialogue with relevant stakeholders

With a view to promoting the principle of equal treatment, Member States shall encourage dialogue with relevant stakeholders, in particular non-governmental organisations, which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on the grounds and in the areas covered by this Directive.

Article 12
Bodies for the Promotion of Equal treatment

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons irrespective of their religion or belief, disability, age, or sexual orientation. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals rights, including rights under other Community acts including Directives 2000/43/EC and 2004/113/EC.

2. Member States shall ensure that the competences of these bodies include:

without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,

conducting independent surveys concerning discrimination,

publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER III FINAL PROVISIONS

Article 13 Compliance

Member States shall take the necessary measures to ensure that the principle of equal treatment is respected and in particular that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished
- (b) any contractual provisions, internal rules of undertakings, and rules governing profit-making or non-profit-making associations contrary to the principle of equal treatment are, or may be, declared null and void or are amended.

Article 14 Sanctions

Member States shall lay down the rules on sanctions applicable to breaches of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. Sanctions may comprise the payment of compensation, which may not be restricted by the fixing of a prior upper limit, and must be effective, proportionate and dissuasive.

Article 15 Implementation

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by . at the latest two years after adoption . They shall forthwith inform the Commission thereof and shall communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

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

2. In order to take account of particular conditions, Member States may, if necessary, establish that the obligation to provide effective access as set out in Article 4 has to be complied with by at the latest four years after adoption .

Member States wishing to use this additional period shall inform the Commission at the latest by the date set down in paragraph 1 giving reasons.

Article 16 Report

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

2. The Commission's report shall take into account, as appropriate, the viewpoints of the social partners and relevant non-governmental organisations, as well as the EU Fundamental Rights Agency. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 17
Entry into force

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

Article 18
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

In this list, the items in blue are still proposals, the ones marked with a "+" are instruments implementing the main legislation.

Dans cette liste, les entrées en bleu sont encore à l'état de proposition, celles marquées avec un "+" sont des instruments qui mettent en œuvre la législation principale.

Bei den blau markierten Einträgen dieser Liste handelt es sich noch um Vorschläge. Die Instrumente zur Politikumsetzung sind mit einem "+" gekennzeichnet.

List of secondary legislation relevant to disability

- 1) Council Directive 2000 EC of 2 November 2000 establishing a general framework for equal treatment in employment and occupation
- 2) Directive 2001 EC (relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat)
- 3) Directive 1999 EC (on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity)
- 4) Directive 94/46 EC on the protection of individuals with regard to the processing of personal data and the free movement of such data
- 5) Directive 90/16 EC of the European Parliament and of the Council of 29 June 1990 on the approximation of the laws of the Member States relating to lifts (OJ L 312, 9 1990, p 1)
- 6) Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 107 and 108 of the EC Treaty to State aid for employment
- 7) Regulation (EC) No 110/2006 of the European Parliament and of the Council of 17 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air Text with EEA relevance OJ L 204, 26 2006 p 1-9
- 8) Regulation of the European Parliament and of the Council on rail passengers' rights and obligations
- 9) Directive 2002/22 EC of the European Parliament and of the Council of 11 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)
- 10) Regulation (EC) No 1177/2003 of the EP and Council of 16 June 2003 concerning Community statistics on income and living conditions (EU-SILC)

Commission Regulation (EC) No 1981/2003 of 21 October 2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards definitions and updated definitions.

Commission Regulation (EC) N 1982/2003 of 21 October 2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards the sampling and tracing rules.

Commission Regulation (EC) N 1983/2003 of 7 November 2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards the list of target primary variables.

Commission regulation (EC) N 28/2004 of January 2004 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards the detailed content of intermediate and final quality reports.

Regulation (EC) N 13/2000 of the EP and Council of 7 September 2000 amending Regulation (EC) N 1177/2003 of the EP and Council of 16 June 2003 concerning Community statistics on income and living conditions (EU-SILC).

Commission Regulation (EC) N 698/2006 of May 2006 amending Commission Regulation (EC) N 1981/2003 implementing Regulation (EC) 1177/2003 of the EP and Council concerning Community statistics on income and living conditions (EU-SILC) as regards definitions and updated definitions.

11) Council Regulation (EC) N 9 of 9 March on the organisation of the Labour Force Sample Survey in the Community (LFS):

Commission Regulation (EC) N 119 of 20 July 1999 implementing Council Regulation (EC) N 9 on the organisation of a labour force sample survey in the Community (O J L 20, 22 July 1999, p 40)

Commission Regulation (EC) N 1924/1999 of 8 September 1999 implementing Council Regulation (EC) 77/98 as regards the 2000 to 2002 programme of ad hoc modules to the LFS

Commission Regulation (EC) N 166 of 12 July 2001 implementing Council Regulation (EC) N 9 on the organisation of a labour force sample survey in the Community concerning the specification of the 2002 ad hoc module on employment of disabled people

Commission Regulation (EC) N 11 of 19 July 2000 implementing Council Regulation (EC) N 9 on the organisation of a labour force sample survey in the Community concerning the codification to be used for data transmission from 2001 onwards (O J L 11, 20 July 2000, p 16)

Commission Regulation (EC) N 1626/2000 of 24 July 2000 implementing Council Regulation (EC) N 77/98 on the organisation of a labour force sample survey in the Community as regards the 2001 to 2004 program of ad hoc modules to the labour force survey.

Regulation (EC) N 1991/2002 of the EP and of the Council of 8 October 2002 amending Council Regulation (EC) N 77/98 on the organisation of a labour force sample survey in the Community.

Regulation (EC) N 22 7/2003 of the EP and of the Council of 2 November 2003 amending Council Regulation (EC) N 77/98 on the organisation of a labour force sample survey in the Community to adapt the list of survey characteristics.

Commission Regulation (EC) N 430 200 of 1 March 2006 implementing Council Regulation (EC) N 9 on the organisation of a labour force sample survey in the Community concerning the codification to be used for data transmission from 2006 onwards and the use of a sub-sample for collection of data on structural variables (O L 1, 13 2006, p 36)

12) Regulation (EC) No 4 200 of the European Parliament and of the Council of 2 April 2000 on the European system of integrated social protection statistics (ESSPROS)

13) Proposal for a Regulation of the European Parliament and of the Council on Community statistics on public health and health and safety at work CO (200) 46 final

14) Council Directive 2006 112 EC of 2 November 2006 on the common system of value added tax

1) Council Regulation (EEC) No 91 3 of 2 March 19 3 setting up a Community system of reliefs from customs duty

16) Council Directive 6 3 EEC of 24 July 19 6 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (as amended by Council Directive 96 9 EC of 20 December 1996 amending Directive 6 3 EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes)

1) Directive 2006 4 EC of the European Parliament and of the Council of July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

1) Directive 2004 1 EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

19) Directive 2004 1 EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

20) Directive 2001 3 EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, as amended by Directive 2004 2 EC of the European Parliament and of the Council of 31 March 2004 (O L 136, 30 4 2004, p 34)

21) Directive 200 29 EC of the European Parliament and of the Council of 11 May 2000 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 4 4 0 EEC, Directives 9 EC, 9 2 EC and 2002 6 EC of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (O L 149, 11 6 200 , p 22)

- 22) Directive 2003/24/EC of the European Parliament and of the Council of 14 April 2003 amending Council Directive 90/269/EEC on safety rules and standards for passenger ships - O L 123, 1 2003, p 1 -21)
- 23) Directive 96/44/EC on the interoperability of the trans-European high-speed rail system (O L 23, 1 09 1996, p 6-24) as amended by Directive 2004/40/EC of the European Parliament and of the Council of 29 April 2004 (O L 164, 30 4 2004, p 114-163)
- 24) Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans European conventional rail system (O L 110, 20 04 2001, p 1-2) -as amended by Directive 2004/40/EC of the European Parliament and of the Council of 29 April 2004 (O L 164, 30 4 2004, p 114-163)
- 2) Directive 2000/46/EC of the European Parliament and of the Council of September 2000 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (Text with EEA relevance)(O L 263, 9 10 2000 , p 1)
- 26) Directive 2000/6/EC of the European Parliament and of the Council of 11 December 2000 amending Council Directive 90/269/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Text with EEA relevance) (O L 332, 1 12 2000 , p 2)
- 2) Council Regulation (EC) No 1033/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999
- 2) Decision 120/2006/EC of the European Parliament and of the Council of 1 November 2000 establishing an action programme in the field of lifelong learning
- 29) Council Regulation (EC) No 1699/2000 of 20 September 2000 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)
- 30) Directive 2002/21/EC of the European Parliament and of the Council of March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)
- 31) Council Decision 2006/600/EC of 12 July 2006 on guidelines for the employment policies of the Member States
- Council Decision 2006/44/EC of 18 July 2006 on guidelines for the employment policies of the Member States
- 32) Regulation (EC) No 1920/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide
- 33) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

- 34) **Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use**
- 35) **Proposal for a Regulation of the European Parliament and of the Council concerning the production and development of statistics on education and lifelong learning COM(2000)62 final**
- 36) **Directive 96/6/EC of the European Parliament and of the Council of 1 December on common rules for the development of the internal market of Community postal services and the improvement of quality of services (OJ L1 of 21.01.1998), page 14) as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ, L176 of 07.07.2002, page 21).**
- 37) **Decision No 192006/EC of the European Parliament and of the Council of 1 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013)**
- 38) **Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin**
- 39) **Decision 2119/99 of the European Parliament and of the Council of 24 September 1999 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community**
- 40) **Directive 2004/23/EC of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissue and cells**
- 41) **Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood components and amending Directive 2001/83/EC**

Notes

